

Reconstitutionalizing Politics in the Hong Kong Special Administrative Region of China

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Abstract

The question of whether constitutional law can protect, consolidate, and advance democracy has been considered extensively in multiple jurisdictions. The issue has not yet been considered in the context of one of the most problematic contemporary democratic transitions: Hong Kong's, from an externally governed colonial outpost to a self-governed suffrage-based special administrative region of the People's Republic of China. The Basic Law of Hong Kong proposes the eventual election of the Legislative Council and Chief Executive of Hong Kong by some form of universal suffrage. These provisions are at the core of the 'democratic constitution' of Hong Kong. Achieving this goal requires consensus between the executive in Hong Kong, members of the Legislative Council in Hong Kong, and the legislative body of the People's Republic of China. Although not a formal constitutional requirement, any democratization efforts will also require popular buy-in from Hong Kong residents in order to function effectively. However, it is increasingly clear that the views of all concerned do not converge on how and when these constitutional aspirations should be realized. In addition, all parties have started moving outside of this constitutional framework when deliberating issues of political reform. This article looks at the problems in the constitutional design of the Hong Kong Special Administrative Region that have resulted in this political deadlock. The article will then look at one solution to mitigate the effect of these design issues and to move forward again on the issue of reform: 'litigating' the democratic constitution in the courts. The article discusses the advantages of the courts in the process: primarily the capacity of the courts to *reconstitutionalize* political debate on electoral issues. This article evaluates the largely unsuccessful use of the courts thus far by Hong Kong residents to correct and advance political reform. It considers possible reasons for the high failure rate in courts and proposes alternative litigation strategies that can better utilize the position of the courts to re-orient all parties to the Basic Law.

The constitutional document of the Hong Kong Special Administrative Region (HKSAR), the *Basic Law of Hong Kong* (Basic Law), proposes the gradual realization of universal suffrage for Hong Kong residents. The development of a system of direct

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elections was a significant focus during the Sino-British negotiations of the transition of Hong Kong from British to Chinese rule.¹ The provisions of the Basic Law set out the parameters for reforming the mode of electing the Chief Executive and the members of the Legislative Council (LEGCO) respectively. Several principles can be discerned from these provisions. First, reform should be ‘gradual and orderly’.² Second, it should be based on a temporal appraisal of the ‘actual situation’³ in Hong Kong. Third, the ultimate aim is the election of LEGCO by universal suffrage, and the Chief Executive by universal suffrage ‘upon nomination by a broadly representative nominating committee in accordance with democratic procedures’.⁴ The process for reform (in terms of the requisite majority in LEGCO, the consent of the Chief Executive, and the role of the legislative body of the People’s Republic of China (the Standing Committee of the National People’s Congress (NPCSC))) is also clear in the text. Annexes I and II of the Basic Law state that any changes should ‘be reported to the [NPCSC] for the record’ (in the case of the election of members of LEGCO) or ‘for approval’ (in the case of the election of the Chief Executive).⁵ However, the position is complicated by the fact that the NPCSC has issued various ‘interpretations’ and ‘decisions’⁶ on the meaning and implementation of these provisions of the Basic Law that arguably augment and amend the provisions outside the proper constitutional amendment procedures set out in the Basic Law.

It is also clear that the views of the executive in Hong Kong, the NPCSC, members of LEGCO, and Hong Kong residents do not converge on how and when these constitutional aspirations should be realized. Hong Kong residents do not have an explicit role in constitutional reform under the Basic Law. However, increasing dissatisfaction with reform has motivated residents to try and alter the course of reform. The most visible strategy has been the organization of mass social movements such as the ‘Umbrella Movement’ in 2014.⁷ The focus of this paper is on another strategy: taking the reform debate to court. Residents have sought to challenge the ‘constitutionality’ of systemic and structural issues with the political system.

Thus far, discussions on the protection of the democratic constitution in Hong Kong have focused on ‘downstream’ issues relating to the protection and consolidation of democratic conditions in Hong Kong. This includes primarily analyzing case law on the protection of rights necessary for effective democratic participation.⁸ This article

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1. See Michael C. Davis, *Constitutional Confrontation in Hong Kong: Issues and Implications of the Basic Law* (St Martin’s Press, 1990), especially 27–29.
 2. Basic Law, arts 45 and 68.
 3. Ibid.
 4. Ibid.
 5. Annex II, Part III and Annex I, para 7, Basic Law.
 6. Section I (A) discusses the problematic distinction between ‘decisions’ and ‘interpretations’ by the NPCSC.
 7. See Albert HY Chen, ‘The Law and Politics of the Struggle for Universal Suffrage in Hong Kong 2013–15’ (2016) 3 *Asian Journal of Law and Society* 189; and Michael C Davis, ‘Promises to Keep: The Basic Law, the “Umbrella Movement,” and Democratic Reform in Hong Kong’ in Mahmood Monshipouri (ed), *Information Politics, Protests, and Human Rights in the Digital Age* (CUP 2016) 239–266.
 8. See generally J J Chan and CL Lim (eds), *The Law of the Constitution of Hong Kong* (Sweet & Maxwell 2011) for a discussion of these cases.

takes the democratic constitution conversation further ‘upstream’ to the courts’ role in implementing democracy, in the first instance, under the Basic Law.⁹

This article focuses on a consideration of two main causes that have led to the current stalemate. The first concerns the flaws in the constitutional design of the Basic Law and, in particular, a lack of clarity on the scope and nature of the role of the various parties, which precipitate such an impasse. Second, the article considers the advantages of introducing a new party to the conversation: the courts. It looks at the role of the courts in reconstitutionalizing the political reform debate by refocusing the parties’ attention to the relevant provisions of the Basic Law. The article evaluates the largely unsuccessful use of the courts thus far by Hong Kong residents to correct and advance political reform. This analysis is done with a view to designing optimal litigation strategies. The litigation strategies proposed in Section III push the courts to play a stronger role in two discrete respects: (1) re-orienting the parties to the Basic Law by clarifying the application of the Basic Law to the issues occupying the political reform agenda; and (2) rectifying discrete constitutionally problematic aspects of the current system pending broader reform.

I. CONSTITUTIONAL DESIGN ISSUES

The Basic Law contains three types of provisions that govern political reform. First, Articles 45 and 68 constitutionalize the ultimate aim of universal suffrage. Second, Annexes I and II set out the process for reform. These provisions include a role for the Chief Executive (in consenting to any reform), LEGCO (in approving a reform proposal), and the NPCSC (in receiving and recording or approving any changes to the system). Although not explicitly required, in practice the executive has initiated each reform cycle through a public consultation: it is only here that Hong Kong residents have been given a role to play in political reform. Third, Chapter III of the Basic Law sets out the political and civil rights of residents necessary for effective democratic participation (for example, Article 26 sets out the right to vote and participate in public affairs).¹⁰ While this appears to be a constitutionally robust framework, the position has been complicated by two key design flaws. The first is the division of power between the NPCSC and the local political arms of government (the Chief Executive and LEGCO) to conduct and dictate the terms

9. See Tom Ginsburg, ‘Courts and New Democracies: Recent Works’ (2012) 37 *Law and Social Inquiry* 720 for a discussion of ‘downstream’ and ‘upstream’ roles for the courts. See also Samuel Issacharoff, ‘The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections’ (2003) 81 *Texas Law Review* 1985, 1985–6 and Po Jen Yap, *Courts and Democracies in Asia* (CUP 2017).

10. This is mirrored in Article 21 of the Bill of Rights Ordinance (c 383) 1991 (BORO) as incorporated in the Basic Law via Article 39. The government continues to rely on a 1976 reservation by the British Government to the International Covenant on Civil and Political Rights (ICCPR) (which BORO incorporates) – ‘the right not to apply article 25(b) in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong.’ Article 39 of the Basic Law states that ‘[t]he provisions of [the ICCPR] as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.’ (emphasis added) Some read this to indicate that this includes the pre-1997 reservations. For a discussion of these issues see Yash Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press 1999) 406–409.

of any reform exercise. The second is the lack of clarity in the scope of the NPCSC's interpretive power in relation to these provisions of the Basic Law.

A. Problematic Role of the NPCSC under Annexes I and II

While Annexes I and II make clear that the NPCSC has a role to play in political reform, this is only at the end of the reform process once any reform package has been voted on by LEGCO and approved by the Chief Executive. Paragraph 7 of Annex I states that any amendments to the method for selecting the Chief Executive 'shall be reported to the [NPCSC] for approval' (emphasis added). Paragraph (III) of Annex II states that any amendments to the method for selecting LEGCO 'shall be reported to the [NPCSC] for the record' (emphasis added). The political reform process was therefore envisaged as a process that would be primarily locally-initiated, driven, and led. However, through various interpretations and decisions relating to the relevant provisions of the Basic Law, the NPCSC has created a new role for themselves at the inception of the reform exercise and have then exercised this role in problematic ways. This section looks at these interpretations and decisions.

As a preliminary matter, the distinction between a 'decision' and an 'interpretation' by the NPCSC is unclear. The NPCSC has provided no indicators or guidance on when it will issue one over the other on a particular issue, but the purported effect of both instruments appears to be the same from the text of the instruments: they are promulgated as authoritative positions on the particular provision of the Basic Law. Concerns with the proposed authority of these instruments are the subject of discussion in this section.

A starting point for understanding the string of decisions and interpretations is the NPCSC's interpretation of Annex I and II of the Basic Law in 2004.¹¹ In that interpretation, the NPCSC stated that the Chief Executive will first need to report to the NPCSC on the need to amend electoral methods and the NPCSC will then 'decide' whether there is such a need. This 'interpretation' is extra-textual, not borne out in the wording of the Annexes. This significantly amplifies the role of the NPCSC under both Annexes by giving the NPCSC an additional role in *kick-starting* any reform process.¹² The significance of this role can be felt in subsequent decisions and interpretations where the NPCSC prescribed the scope and pace of reform in each reform cycle that the Chief Executive sought to initiate, as well as specific conditions for universal suffrage (for example, the criteria for the candidacy of the Chief Executive).

11. Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Eighth Session of the Standing Committee of the Tenth National People's Congress, 6 April 2004), <www.blis.gov.hk/blis_ind.nsf/CurAllEngDoc/E6EBECD7F6384417482575EE000E1080?OpenDocument> accessed 4 September 2017.

12. It has been argued that such augmentation is legitimate in the context of China's civil law system, where legislative interpretation by the NPCSC of domestic statutes can include clarification or supplementation of laws and that the Basic Law is indeed 'legislation' under art 67 of the Constitution of the People's Republic of China amenable to such 'interpretation': *Director of Immigration v Chong Fung Yuen* [2001] 4 HKCFAR 211, 222J–223A. On this, see Simon Marsden, 'Constitutional Interpretation in Hong Kong: Do Common Law Approaches Apply When the National People's Congress Standing Committee Interprets the Basic Law?' (2006) LAWASIA Journal 99.

The interpretation in 2004 was followed shortly by a decision from the NPCSC¹³ on the back of a report by the Chief Executive on the need for reform.¹⁴ Despite the Chief Executive indicating that there was a need for reform, the NPCSC disagreed. The NPCSC elaborated that:

[A]ny change...shall conform to principles such as being compatible with the social, economic, political development of Hong Kong, being conducive to the balanced participation of all sectors and groups of the society, being conducive to the effective operation of the executive-led system, being conducive to the maintenance of the long-term prosperity and stability of Hong Kong.¹⁵

These principles are in addition to those embedded in the text of Articles 45 and 68.¹⁶ The NPCSC sought to reassure the electorate that there will be gradual progress towards universal suffrage – an assurance which ultimately proved problematic in later reform cycles as elaborated on below.

Subsequently, in 2007,¹⁷ the NPCSC, in its new role at the inception of the reform exercise, ‘approved’ the Chief Executive’s ‘request’ for making ‘appropriate amendments’ to the mode of electing the Chief Executive and LEGCO.¹⁸ The NPCSC

13. Standing Committee of the National People’s Congress (NPCSC), ‘Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in 2007 and for Forming the Legislating Council of the Hong Kong Special Administrative Region in 2008’ (Adopted at the Tenth Session of the Twelfth National People’s Congress, 26 April 2004), <www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383886.htm> accessed 4 September 2017.

14. Chief Executive of the HKSAR, ‘Report on Whether There is a Need to Amend the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in 2008’ (Report to the Standing Committee of the National People’s Congress, 15 April 2004), <www.basiclaw.gov.hk/en/materials/doc/2004_04_15_e.pdf> accessed 5 September 2017. Interestingly, the report from the Chief Executive stated:

In examining the direction and pace of its constitutional development, [we] must pay heed to the views of the Central Authorities... Amendments to the design and principle of the political structure...must not be lightly contemplated... [and] must aim at consolidating the executive-led system...and must not deviate from this principle of design... when considering the actual situation, public opinions, as well as other factors, including the legal status of the HKSAR, the present stage of constitutional development, economic development, social conditions, the understanding on the part of the public of “One Country, Two Systems” and the Basic Law, public awareness on political participation, the maturity of political talent and political groups, as well as the relationship between the executive authorities and the legislature, must be taken into account... any proposed amendments must enable different sectors of society to be represented in the political structure, and to participate in politics through various channels... any proposed amendments must not bring about any adverse effect to the systems of economy, monetary affairs, public finance.

15. NPCSC (n 13).

16. Namely that reform be based on the ‘actual’ situation in Hong Kong and be ‘gradual and orderly’. See also Benny Tai, ‘One Principle...Two Principles...3, 4, 5, 6, 7, 8, 9 Factors for Constitutional Reform’ in Johannes Chan and Lison Harris (eds), *Hong Kong’s Constitutional Debates* (Hong Kong Law Journal 2005) 15–27.

17. Standing Committee of the National People’s Congress (NPCSC), ‘Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage’ (Promulgated by the Standing Committee of the National People’s Congress on 29 December 2007), <www.legco.gov.hk/yr07-08/english/panels/ca/papers/ca0121-ppro71229-e.pdf> accessed 4 September 2017.

18. *ibid.*

further stated that the election of the Chief Executive in 2017 ‘may’ be by universal suffrage, and the election of LEGCO by universal suffrage thereafter.¹⁹ This was in response to the Chief Executive’s report in which it had been communicated that residents wanted a timetable. The Chief Executive thus started a public consultation exercise. Ultimately, it was determined that the Election Committee that elected the Chief Executive be enlarged from 800 to 1,200 members. There would also be an increase in the number of seats in LEGCO (from sixty to seventy seats) with five new seats in the ‘functional constituencies’.²⁰ These constituencies are a unique and problematic aspect of Hong Kong’s electoral system and discussed further in Section II below. The new functional constituency seats proposed in this reform cycle would not be filled by members elected by and from industry-specific sectors as is typically the case for functional constituencies, but by district council candidates who were elected to local government by popular vote. These proposals followed two rounds of public consultation and one round of voting in LEGCO.²¹

This was followed in 2014 by a decision from the NPCSC where it imposed strict conditions for universal suffrage in 2017.²² This was on the basis of a report by the Chief Executive on (apparently) divergent views of the public on universal suffrage.²³ The NPCSC took the view that ‘the Chief Executive has to be a person who loves the country and loves Hong Kong... The method for selecting the Chief Executive by universal suffrage must provide corresponding institutional safeguards for this purpose.’²⁴ It set out that the nominating committee for the Chief Executive must be based on the Election Committee that will nominate only two to three candidates. It further stated that as there had already been significant changes made to the process for electing members of LEGCO in previous reform cycles, there was no further need for reform at this stage. This decision provoked the strongest reaction from members of the

19. *ibid.*

20. The existence of ‘functional’ constituencies (industry versus geographical sectors) is one of the most problematic aspects of the Hong Kong political system and is discussed in Section II(C)(2).

21. See Albert HY Chen, ‘An Unexpected Breakthrough in Hong Kong’s Constitutional Reform’ (2010) 40 *Hong Kong Law Journal* 259 for a discussion of this reform exercise.

22. Standing Committee of the National People’s Congress (NPCSC), ‘Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016’ (Adopted at the Tenth Session of the Standing Committee of the Twelfth National People’s Congress, 31 August 2014), <www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc23.pdf> accessed 4 September 2017. For a discussion of the issues surrounding the proposals coming out of the 2014 decision, see Simon NM Young, ‘Realising Universal Suffrage in Hong Kong after the Standing Committee’s Decision’ (2014) 44 *Hong Kong Law Journal* 689.

23. This Report was done at a volatile time and the NPCSC thus commented on the report itself:

The Session is of the view that the report complies with the requirements of the Hong Kong Basic Law, the Interpretation by the Standing Committee of the National People’s Congress of Article 7 of Annex I and Article III of Annex II to the Hong Kong Basic Law and the relevant Decisions of the Standing Committee of the National People’s Congress, and reflects comprehensively and objectively the views collected during the public consultation; and is thus a positive, responsible and pragmatic report. (NPCSC, *ibid.*)

The legitimacy of the content of the report was the subject of a challenge in judicial review proceedings (as further discussed in Section II(A) below).

24. NPCSC, *ibid.*

public (and was a trigger for the Umbrella Movement). This reaction prompted an ‘explanation’ of the decision from the NPCSC, where it reiterated the ‘divergent views’ on universal suffrage in Hong Kong as the foundation for its decision.²⁵ Ultimately, proposals made by the Government in this reform cycle were rejected by LEGCO.²⁶

The above discussion highlights the gradual increase in input from the NPCSC, which now dictates the parameters, pace, and scope of reform.²⁷ The NPCSC’s decisions are made following consultations with various political representatives from Hong Kong and the local government bureaus, which, it is argued, helps apprise them of the real concerns of the Hong Kong electorate, and in particular, their desire for universal suffrage. However, this does not help to appease the Hong Kong residents who increasingly express their frustration at their decreasing impact on the actual design and outcome of any reform exercise. The frustration is compounded by the fact that their role is being eclipsed by the NPCSC instead of a local institution such as LEGCO, which arguably and relatively speaking, has some democratic credentials and representativeness.

These unilateral actions by the NPCSC to augment its role are made possible by another major design flaw in the Basic Law: the lack of clarity over the division of interpretive power and, in particular, the scope of the plenary powers of interpretation of the NPCSC under Article 158. The following section considers this issue.

B. Authority over Interpretation of the Basic Law

This article proposes a stronger role for the local courts. This involves resolving some problematic issues relating to the interpretation of the Basic Law. Under Article 158(1) of the Basic Law, plenary powers of interpretation are vested in the NPCSC. Under Article 158(2), the NPCSC authorizes the Hong Kong courts to interpret ‘on their own... the provisions of the Basic Law’ in adjudicating cases. However, in respect of certain provisions (described in Article 158(3)), where the courts are unclear about the meaning of those provisions, they must consult the NPCSC for an interpretation before making a decision, and then must do so in accordance with the interpretation so provided.

There are two design issues that are unclear from the text of Article 158. First, it is unclear when and how the NPCSC can exercise their plenary powers. Second, it is unclear which provisions trigger an ‘obligation’ on the part of the Hong Kong courts to

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25. Standing Committee of the National People’s Congress (NPCSC), ‘Explanations on the Draft Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016’ (Adopted at the Tenth Session of the Standing Committee of the Twelfth National People’s Congress, 27 August 2014), <www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc24.pdf> accessed 4 September 2017.
26. This was possible because a large group of ‘pro-China’ legislators were absent during the vote – the reasons for their last minute walk out and absence remain unclear (see Jeffie Lam, ‘Inside the Legco walkout: how pro-establishment lawmakers used opponents’ own tactics to turn the tables’ *South China Morning Post* (Hong Kong, 19 October 2016) <www.scmp.com/news/hong-kong/politics/article/2038382/hong-kong-pro-establishment-lawmakers-turn-tables> accessed 4 September 2017.
27. See Johannes MM Chan et al (eds), *Hong Kong’s Constitutional Debate: Conflict Over Interpretation* (Hong Kong University Press 2000).

seek an interpretation from the NPCSC under Article 158(3) and, in particular, whether the various electoral provisions on universal suffrage are part of this category of provisions.

On the first issue, there is a lack of clarity over whether the NPCSC's plenary powers of interpretation are autonomous, or can only be exercised when there is a specific trigger for interpretation (namely, a request from the various organs of government in Hong Kong). In practice, the NPCSC has issued interpretations autonomously without any specific trigger.²⁸ In exercising such autonomous plenary powers, the NPCSC demonstrates its view of the Basic Law as a 'statutory' instrument issued pursuant to the *Constitution of the People's Republic of China* (PRC Constitution). This is clear from the preambles to the various interpretations. The preambles typically state that the interpretations are made pursuant to Article 67(4) of the PRC Constitution which, in turn, gives the NPCSC the power to interpret 'laws'. While the Basic Law was indeed promulgated pursuant to the PRC Constitution, as set out in the Preamble to the Basic Law, it is clear, from the perspective of the common law (which is 'entrenched' and protected under Article 8 of the Basic Law), that the latter is regarded as 'constitutional' in nature.²⁹ It is apparent that the NPCSC does not share this characterization of the Basic Law and, in treating it as statutory, the NPCSC assumes legislative authority over the Basic Law. This leads to a number of secondary issues: whether NPCSC interpretations need to consider prior interpretations in Hong Kong as part of the 'constitutional' matrix for interpretation; whether the NPCSC can issue an interpretation *during* judicial proceedings on an issue, and in the absence of a judicial request; and the binding impact of any NPCSC interpretations on local institutions.³⁰ Lack of clarity on the last of these issues precipitated the unilateral extension of the NPCSC's powers in the local political reform exercises; local institutions did not query or push back on those interpretations. Politically, it is now difficult to do so.

The second issue in need of clarity is this: given the strong powers that are asserted by the NPCSC over the interpretation of the Basic Law, can there be any room for the courts in Hong Kong to interpret the electoral provisions, or are these matters on which the courts must refer to the NPCSC for an interpretation? Article 158(1) authorizes the Hong Kong courts '[t]o interpret on their own, in adjudicating cases, the provisions of [the Basic Law] which are *within the limits of the autonomy of [Hong Kong]*' (emphasis added). Article 158(3), however, states that a reference to the NPCSC is mandatory

28. There are instances where it is responding to a particular situation (eg the NPCSC's interpretation on the mode of calculating the duration of the term of office of a Chief Executive following the early resignation of the first Chief Executive of Hong Kong), or a particular request (from, for example, the Chief Executive). However, it has not considered these triggers to be the requirements before issuing the interpretations discussed above in Section I(A).

29. For this discussion of the meaning of 'constitutional' to identify 'constitutional statutes', see Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37 *Oxford Journal Of Legal Studies* 461; Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' (2014) 10 *European Constitutional Law Review* 379; Tarunabh Khaitan, "'Constitution" as a Statutory Term' (2013) 129 *Law Quarterly Review* 589; David Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) 129 *Law Quarterly Review* 343.

30. The only explicit obligation on the NPCSC is that, in issuing an interpretation, it must consult its committee for the Basic Law.

where the provisions being interpreted concern ‘affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region’. Are Articles 45 and 68 within the former or latter category?

The courts have sought to clarify the precise conditions for a referral to the NPCSC and have identified three conditions. First, the provision engages the subject matters explicitly identified in Article 158(3) (the classification condition). Second, an interpretation is *required* to decide a case³¹ (the necessity condition). Finally, even if the first two conditions point to a referral, this is only necessary where the meaning of the relevant provision is contested or unclear (the arguability threshold).³² Therefore, the Court of Final Appeal has given itself considerable discretion in deciding whether to make a referral.³³

Despite the now powerful role of the NPCSC, there is thus still room for arguing that not all reform issues are areas that are *automatically* and *completely* excluded from input by the local courts.³⁴ Indeed, while the NPCSC may have assumed authority on the ‘need’ and ‘timetable’ of reform, the specific mechanics and design could still be argued to be within the authority of the local government. In addition, in applying the three conditions mentioned above, while the classification and necessity conditions may arguably be met for provisions like Articles 45 and 68, it is possible for the courts to conclude that the arguability threshold is not. The meaning of ‘universal suffrage’ under Articles 45 and 68 is amenable to interpretation with sufficient clarity using normal common law methods of constitutional interpretation, as will be further discussed in Section IV(A) below. In addition, some of the fundamental rights provisions (for example, the right to vote under Article 26) that are utilized to problematize aspects of the electoral system in Hong Kong, may not even meet the classification condition. This leaves a considerable range of reform issues within the powers of the local courts.

There is a possible residual concern that the courts might lose their perceived legitimacy and influence once they are viewed as being more active in constitutional adjudication in this area. This could lead to push back from the NPCSC, who may issue retaliatory interpretations of the Basic Law. Worse still, the NPCSC may issue a ‘clarifying’ and perhaps contrary interpretation of Article 158 on the conditions for an interpretation by the NPCSC. This could ultimately lead to the diminishment of the judicial role, as the courts would become bound by more interpretations of the

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31. *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 [30]–[31] (Court of Final Appeal) (on the classification and necessity conditions).
32. *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* [2011] 14 HKCFAR 95, [84] (Bokhary PJ), [398] and [404] (Chan and Ribeiro PJJ) and Sir Anthony Mason NPJ), [521] (Mortimer NPJ); *Vallejos Evangelina Banao v Commissioner of Registration & Anor* [2013] 2 HKLRD 533 (Court of Final Appeal). See also the articles in Volume 41, Issue 2 of the Hong Kong Law Journal (2011) for discussions of the Congo Case.
33. As was clarified by the majority judgment in *Congo* (ibid) [398].
34. See also a recent article: Simon NM Young, ‘Judicial Review of Elections In Hong Kong: Resolving a Contradiction’ in Po Jen Yap (ed), *Judicial Review of Elections in Asia* (Routledge 2016) 11–37; Cora Chan, ‘State Immunity: Reassessing the Boundaries of Judicial Autonomy in Hong Kong’ [2012] Public Law 601 and Cora Chan, ‘Reconceptualising the Relationship Between the Mainland Chinese Legal System and the Hong Kong Legal System’ (2011) 6 Asian Journal of Comparative Law 1.

Basic Law from the NPCSC in future cases. This could be an irreversible position in the absence of any democratic or constitutional mechanisms to combat any unilateral constitutional usurpation by the NPCSC.³⁵ However, it is not suggested that the courts engage in such brinkmanship in a way that leads to this position. Subject to the following discussion, they should not challenge the authority of or any legitimate input by the NPCSC on reform issues, or reverse the established jurisprudence on the scope of Article 158(3). Instead, it is argued that the courts should not *automatically* assume a deferential and exclusionary role for itself in the area of political reform, but should instead deal with it on a case-by-case basis by applying the three conditions for a referral.

The above proposed stronger role for the courts also only applies where the courts are considering the scope of their interpretive authority over provisions that have not yet been interpreted by the NPCSC and there is, therefore, scope for fresh interpretation by the local courts. A problematic area is where an autonomous interpretation is issued by the NPCSC *during* the course of judicial proceedings in the absence of a request from the Court of Final Appeal. There may be a scenario where the NPCSC issues an interpretation of provisions that applicants seek to rely on in judicial review proceedings while those proceedings are ongoing.

This was recently a live issue. In September 2016, two individuals were elected to geographical constituency seats in LEGCO elections. Article 104 of the Basic Law states that '[w]hen assuming office...members of [LEGCO]...must, in accordance with law, swear to uphold the Basic Law...and swear allegiance to the [HKSAR of the PRC]'. This is mirrored in Section 18 of the *Oaths and Declarations Ordinance* (OADO).³⁶ Section 21 of the OADO further provides that if LEGCO members decline or neglect to take the prescribed form of the oath, they shall be disqualified from entering office. The prescribed form of the oath is set out in Part IV of Schedule 2 of the OADO (mirroring Article 104 of the Basic Law). When taking their oath to assume office as members of LEGCO, both individuals – pro-democracy candidates – deviated significantly from the prescribed form, as a form of protest against the state of progress towards universal suffrage in Hong Kong. The President of LEGCO decided that the oath taken by them was invalid and allowed them the opportunity to re-take the oath at a subsequent LEGCO meeting if they made a written request to do so. However, before that opportunity arose, the Chief Executive of the HKSAR and the Secretary for Justice applied for judicial review on two main grounds. First, on a proper reading of Section 21 of the OADO, both individuals must be regarded as having vacated their office, if they have already entered office on the basis of their defective oath, or be disqualified from entering their office if they have not done so. Second, the President of LEGCO had erred in law in allowing the two individuals to re-take their oath. The applicants applied for interim injunctions to prevent the re-taking of the oaths and for related

35. The concern being that there could be retaliation against strong judicial review. See Yap (n 9) chs 1 and 12 and Stephen Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 *Columbia Journal of Transnational Law* 285, 289.

36. *Oaths and Declarations Ordinance* (c 11) 2017.

declaratory relief to the effect that the President had no power to allow this to happen. The interim injunctions were refused by the Court of First Instance. However, the Court granted leave for the application for judicial review.³⁷ Before the full hearing of the application for judicial review, the NPCSC issued an interpretation of Article 104.³⁸

The design of the Basic Law and in particular Article 158, allows for (or at least does not reduce) the risk of these situations arising given the ambiguity over whether the NPCSC's powers are free-standing or reactive. The issue that remains is how to resolve such design issues when they occur, and in particular, how the local courts ought to react when they do occur. There are several possibilities in order of decreasing deference to such interpretations. First, the court is bound by such interpretations and must follow them.³⁹ Second, the court could and should apply common law interpretive techniques to any such NPCSC interpretation. It should not accept them at 'face value'. Such common law interpretive techniques include the full remit of constitutional interpretive tools (for example, purposive, originalist, living tree).⁴⁰ Here the courts could have a role to play in adopting a more Basic Law-consonant and -compliant interpretation of an NPCSC interpretation.⁴¹ Third, the court could evaluate the validity of such 'interpretations' and 'strike them down' should they amount to, for example, 'amendments' via the back door outside the prescribed Article 159 amendment procedure.⁴² A fourth possibility, which has not yet been explored in the literature or cases in Hong Kong, is the utilization of some form of a basic structure or basic features doctrine to evaluate the legitimacy of such interpretations. Courts in various common law jurisdictions have sought to identify 'basic features' or the 'basic structure' of the Constitution to varying ends. In India, for example, the Supreme Court of India has stated on multiple occasions that such basic features are beyond amendment by Parliament and the courts will strike down any amendments that seek to limit or

37. *The Chief Executive of the Hong Kong Special Administrative Region & Another v The President of the Legislative Council*, HCAL 185/2016, 18 October 2016 (Court of First Instance).

38. Standing Committee of the National People's Congress (NPCSC), 'Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress' (Adopted by the Standing Committee of the Twelfth National People's Congress at its Twenty-fourth Session, 7 November 2016), <www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc25.pdf> accessed 4 September 2017, confirming the Chief Executive and Secretary Of Justice's position. See Cora Chan 'How Hong Kong's Courts Interpret Beijing's Interpretation of the Basic Law May Yet Surprise' *South China Morning Post* (Hong Kong, 10 November 2016) <www.scmp.com/comment/insight-opinion/article/2044385/how-hong-kongs-courts-interpret-beijings-interpretation> accessed 22 August 2017.

39. Yap (n 9) ch 12 (relying on *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 222G–H (Li CJ)).

40. See Peter W Hogg, 'Canada: From Privy Council to Supreme Court' in Jeffrey Goldsworthy(ed), *Interpreting Constitutions: A Comparative Study* (OUP 2006) 82–93 for a summary of the main approaches to constitutional interpretation.

41. See Chan (n 38).

42. Following *Ng Ka Ling* (n 31), where the Court of Final Appeal asserted such a role for itself. This has not been directly challenged or undermined and some academics argue is still a possible role for the Hong Kong courts: see Cora Chan, 'The Legal Limits on Beijing's Power to Interpret Hong Kong's Basic Law' (*HKU Legal Scholarship Blog*, 3 November 2016) <<http://researchblog.law.hku.hk/2016/11/cora-chan-on-legal-limits-of-beijings.html>> accessed 22 August 2017.

constrain or violate such features.⁴³ This idea of the basic structure or features of a constitution makes particular sense in the Hong Kong context. It could serve as a constitutional hurdle for any decisions or interpretations by the NPCSC that have to comply with certain constitutional fundamentals of the Basic Law, including the idea of autonomy and the division of power built into the Basic Law. Article 159(4) states that: ‘No amendment to this Law shall contravene the established basic policies of the People’s Republic of China regarding Hong Kong.’ The interpretive division of powers is a key aspect of these ‘basic policies’ and one that can be the subject of review by the courts in Hong Kong on the basis of a ‘basic features doctrine’-style approach to interpreting NPCSC interpretations and decisions.

Despite the above possibilities for a judicial response to an NPCSC interpretation in an ongoing case, the Court of First Instance ultimately felt bound by the interpretation.⁴⁴ Interestingly, however, it also noted that ‘*independent of the Interpretation*’, the various laws and Basic Law when ‘*properly construed*’ would carry effectively the same meaning as the NPCSC had ascribed to Article 104 via its interpretation.⁴⁵ The Court, therefore, still felt free to exercise its independent judgment on the issues dealt with in the interpretation. It is unclear how far the Court would have gone with this had they disagreed with the interpretation. On appeal, the Court of Appeal engaged further with the question of the validity and true effect of the interpretation, given that the appellants made specific arguments about its validity. The Chief Judge of the High Court, giving the judgment for the Court of Appeal, took a much more conservative position, holding that: (1) there is no issue with the purported retrospectivity of the interpretation; (2) the Chinese legal system allows for a legislative interpretation to clarify *or supplement* laws; and (3) the critical issue of whether the local courts can assess the validity of an interpretation of the NPCSC is undecided in Hong Kong.⁴⁶

The latter offers the most promise for a stronger role by the courts in such situations, despite the conservative tenor of the Court of Appeal’s judgment. Ultimately, the Court of Appeal preferred to leave the issue for resolution by the Court of Final Appeal, given its constitutional importance. The respondents (the two individuals) sought an appeal to the Court of Final Appeal, which refused their application for leave on a number of grounds.⁴⁷ More important for present purposes is the Court of Final Appeal’s view on the NPCSC interpretation. It concluded that the interpretation was binding on the courts. It would thus appear that as the highest court, the Court of Final Appeal did not

43. *Kesavananda Bharati v State Of Kerala* [1973] AIR SC 1461 (Supreme Court of India) and *Minerva Mills v Union Of India* [1980] AIR SC 1789 (Supreme Court of India). Singapore has a more muted version of the doctrine: *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1158; Andrew J Harding, ‘Does the “Basic Structure Doctrine” Apply in Singapore’s Constitution? An Inquiry into Some Fundamental Constitutional Premises’ in Jaclyn L Neo (ed), *Constitutional Interpretation in Singapore: Theory and Practice* (Routledge 2016). See also Swati Jhaveri, ‘Recent Judicial Comments on the Basic Structure of the Constitution’ (*Singapore Public Law Blog*, 20 April 2016) <<https://singaporepubliclaw.com/2016/04/20/recent-judicial-comments-on-the-basic-structure-of-the-constitution/>> accessed 22 August 2017.

44. See (n 37) [20]–[22].

45. *ibid* [23].

46. *Chief Executive of the Hong Kong Special Administrative Region & Another v The President of the Legislative Council* [2016] 6 HKC 541 (Court of Appeal) [52]–[59].

47. *Chief Executive of the Hong Kong Special Administrative Region & Another v The President of the Legislative Council*, FAMV Nos. 7, 8, 9 and 10 (1 September 2017) (Court of Final Appeal).

seem prepared to engage with the NPCSC interpretation along the stronger legal lines suggested above or even on the basis of the lower courts' decisions. However, there are several principles that can be extracted from the Court of Final Appeal's judgment on the foundations for treating the NPCSC interpretation as binding, that leave some decisional space for local courts in cases of these kind. First, as the interpretation was clear in its scope and effect, it was therefore binding.⁴⁸ Second, like the Court of First Instance, the court concluded that the outcome (on the interpretation of the OADO) would be the same *irrespective* of the NPCSC's interpretation.⁴⁹ Third, on the applicants' arguments, that the effect of the NPCSC interpretation was to oust the jurisdiction of the Hong Kong courts on issues arising under the OADA, the court concluded that this was not reasonably arguable and therefore, it was not necessary to interrogate the NPCSC interpretation further as requested by the applicants.⁵⁰ From this it is again clear that an NPCSC interpretation is not going to be treated as binding *per se*, but only where it is clear and where it does not purport to oust the courts' jurisdiction on matters that are properly within the remit of local courts. In addition, the court will still carry out its own interpretation of the underlying provisions – in this line of cases, the courts' interpretation at all levels happened to coincide with that contained in the NPCSC interpretation.

The above discussion therefore shows how the role of the Hong Kong courts is in no way *automatically* abridged by the plenary interpretation powers of the NPCSC under Article 158, either as a matter of design or in the way the powers have been utilized to date. The lack of clarity in the constitutional set-up should, therefore, not be utilized to weaken the role of the courts proposed in Section III.

The article now turns to consider, beyond such design issues, how flawed litigation strategies employed by applicants have failed to resolve the stalemate that currently exists on issues of political reform.

II. LITIGATING THE DEMOCRATIC CONSTITUTION: FAILED STRATEGIES

This article analyzes three main litigation strategies to date.⁵¹ The first concerns challenges to the *process* of reform, including the conduct of public consultations and the content of executive reports to the NPCSC on public 'opinion'. The second is

48. *ibid* [36].

49. *ibid* [37].

50. *ibid*.

51. This article does not look at peripheral challenges to aspects of the electoral system that are not part of the broader aspirations of arts 45 and 68. These include, for example, challenges to restrictions on prisoner voting rights (*Chan Kin Sum Simon v Secretary For Justice* [2009] 2 HKLRD 166 (Court of First Instance)) and restrictions on voting in local village elections (*Secretary for Justice & Others v Chan Wah & Others* [2000] 3 HKLRD 641 (Court of Final Appeal)). On that, see Swati Jhaveri and Anne Scully-Hill, 'Executive and Legislative Reactions to Judicial Declarations of Constitutional Invalidity in Hong Kong: Engagement, Acceptance or Avoidance?' (2015) 13 International Journal of Constitutional Law 507 and Swati Jhaveri, 'The Content of Fundamental and Other Constitutional Rights in Hong Kong' in Richard Gordon and Johnny Mok (eds), *Judicial Review in Hong Kong* (2nd edn, LexisNexis 2014) 181–249.

challenges to restrictions on access to the political sphere.⁵² The third involves challenges to the most stubborn aspects of the design of the political system that have been difficult to push on to the reform agenda. This section explains each of the strategies, highlighting the main reasons the applicants failed. The following section will then propose alternative strategies, taking into account these reasons for failure.

A. Strategy 1 – Challenge the Process of Reform

Residents have challenged the manner in which public consultations on reform have been conducted and reported on in two cases: *Leung Lai Kwok Yvonne v Chief Secretary for Administration*⁵³ (*Yvonne Leung*) and *Kwok Cheuk Kin v Chief Executive of HKSAR*⁵⁴ (*Kwok Cheuk Kin*). In *Yvonne Leung*, the applicant sought to challenge the public consultation exercise conducted in 2015 on two grounds. First, the respondent had misdirected herself in law that a decision by the NPCSC (as discussed in Section I(A)) on the nature of political reform was legally binding. The applicant was willing to concede that the NPCSC had given itself a role in deciding on whether there is a *need* for reform, but argued that this did not extend to a role in deciding on the *content* of that reform. The only approval role that the NPCSC had on the content of reform was in relation to the election of the Chief Executive and only after any amendments had been passed by LEGCO. The second ground for challenge was based on the report by the executive after the public consultation. The applicant argued that it failed to take into account, as a relevant consideration, the electoral rights of the applicant. Alternatively, the applicant argued that the report constituted a disproportionate restriction on those rights.

The court started by observing that they could not review the validity of the NPCSC decision itself. The court would have been willing to review the legality of the consultation exercise on its own as being tainted by the alleged illegality of the NPCSC's decision, but only if it could be shown that the alleged error of law had a material impact. The applicant sought to argue that such an impact was apparent from the fact that the executive did not entertain proposals that ran counter to the NPCSC's decision. However, the court held that even if the government had accepted those alternative proposals, the NPCSC still has a role to play in approving the final package passed by LEGCO and approved by the Chief Executive. This latter role of the NPCSC (and its constitutionality) is non-justiciable.

The court also refused leave on the basis that the application was premature. The recommendations, in the form of a reform bill, were yet to be debated by LEGCO. It is only in exceptional circumstances that the court would review such a pre-enactment bill. This includes the situation where it would lead to immediate and irreversible damage following its enactment that requires prophylactic action on the part of the courts. This was not the case here. Any challenge of recommendations further down

52. See Simon NM Young, 'Rethinking the Process of Political Reform in Hong Kong' (2015) 45 Hong Kong Law Journal 381 for alternative approaches to changing the process of political reform in Hong Kong and an argument for a generally more participatory process that will involve a relaxation of the role of the Central and Hong Kong governments.

53. *Leung Lai Kwok Yvonne v Chief Secretary for Administration*, HCAL 31/2015 (Court of First Instance) 5 June 2015.

54. *Kwok Cheuk Kin v Chief Executive of HKSAR*, HCAL 103/2014 (Court of First Instance) 25 June 2015.

the line once they had been either passed by LEGCO or approved by the Chief Executive⁵⁵ would not be defeated on grounds of prematurity, although the applicant would have difficulties in making the substantive arguments as discussed above.

On the argument on electoral rights under Article 26, the applicant argued that the absence of any reference to these rights by the executive showed a failure to take account of a relevant consideration.⁵⁶ Alternatively, there was an unjustified interference with such rights by the proposals and, in particular, the restricted representativeness of the proposed Nominating Committee in charge of vetting candidates for Chief Executive; the qualitative and quantitative restrictions on candidates that can stand for election as Chief Executive; and the fact that electors did not have the option to vote for none of the candidates. Aside from the same prematurity issues, the court held that these were all issues concerning the form of elections. This was an area of high policy where the courts accord a high degree of deference to the views of the executive and LEGCO.⁵⁷

The second case dealing with challenges to the consultation process itself – *Kwok Cheuk Kin* – also sought to challenge the reports made to the NPCSC. The applicant applied for a broad declaration that the reports were unlawful on four grounds.

First, the public consultations and resultant reports to the NPCSC were unfair. On this, the applicant raised a number of concerns, ranging from procedural to substantive ‘fairness’ concerns. The government appeared to have formed a pre-determined view on the issues. In addition, the executive did not provide enough information to allow people to form an opinion on the issues (including information on the relevance of the electoral rights in the Basic Law and BORO, issues relating to the restrictions on the number of candidates, and the voting mechanism of the nominating committee). There was also a failure to make recommendations on the need for a ‘broadly representative nominating committee in accordance with democratic procedures’ in furtherance of the aspirations contained in Article 45 of the Basic Law. The applicant also argued that the respondent gave more time to meet pro-government organizations than pro-democracy organizations. This was evident from the fact that a report by twenty-three pro-democracy LEGCO members was not reflected in the public consultation documents. Finally, the reports stated that public opinion was in favour of a requirement that the Chief Executive be someone who loves the country and Hong Kong – something on which the various consultation documents did not ask the public to give an opinion.

A second ground of review was that the applicant had a legitimate expectation that the government would accurately summarize and report public opinion in reports to the NPCSC. Third, Articles 45 and 68 constitutionally obliged the government to accurately reflect the ‘*actual situation*’ in Hong Kong to the NPCSC. Fourth, the

55. *Yvonne Leung* (n 53) [48]. It would still not be open to the applicant to challenge the NPCSC’s approval of it.

56. As a result of a reservation to the ICCPR. See (n 10).

57. See earlier decisions on the judicial review of legislation relating to election petitions and restrictions on the commencement of such petitions: *Re Ho Chun Yan Albert* HCAL 83/2012, 30 July 2012; *Ho Chun Yan Albert v Leung Chun Ying (No. 1)* [2012] 5 HKLRD 149 (Court of First Instance); *Leung Chun Ying v Ho Chun Yan* (2013) 16 HKCFAR 735.

findings and conclusions in the reports were irrational (in the *Wednesbury* sense)⁵⁸ because they were not based on material and opinion that would support the reports.

Again, the applicant was refused leave. The reports in question had *already* led to the NPCSC's decision in 2014 (discussed in Section I(A) above), so even if the reports were quashed, the courts could not do anything about the NPCSC's decision itself: it was non-justiciable. The court also held that there was evidence to suggest that the NPCSC had already been apprised of the alternative views of the pro-democracy LEGCO members.⁵⁹ The court further rejected the view that a decision was necessary in the case to set out useful guidance for the conduct of future consultations, on the basis that fairness is highly contextual and fact-specific.

B. *Strategy II – Challenging Access to the Political Sphere*

The way in which the Basic Law is to be amended is set out in Article 159, and in the case of political reform, Annexes I and II. There is no provision for amendment by referendum. Frustrated by the formal constitutional amendment process, pro-democracy legislators have sought to conduct *informal* constitutional 'referendums' through various means. One of the most prominent ways has been by resigning *en masse* from LEGCO and forcing a by-election, with the resigning members standing for re-election on the basis of a manifesto pushing for immediate and full universal suffrage. Their view is that re-election on the basis of such a manifesto is a *de facto* referendum, with residents expressing their support for universal suffrage via the ballot box in re-electing the resigning legislators.

Therefore, in January 2010, five LEGCO members resigned to trigger such a by-election. Eventually, the five members were re-elected in by-elections that cost HKD 126 million and with a record low voter turnout (17.19 per cent). The executive followed this with a public consultation and debate in LEGCO, and the subsequent enactment of an amendment to the *Legislative Council Ordinance* (LCO) to mitigate the risk of such engineered by-elections.⁶⁰ The new Section 39(2A) of the LCO disqualified a member of LEGCO, who resigned from office, from being nominated and elected as a candidate at a by-election within six months of their resignation, unless there was an intervening general election. The applicant commenced judicial review proceedings challenging this provision for infringing Article 26 of the Basic Law and Article 21 of BORO.⁶¹

The applicant was unsuccessful, largely because of the deferential standard of review adopted by the Court of First Instance and Court of Appeal in

58. *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA). *ibid* 229 (Lord Greene MR): 'something so absurd that no sensible person could ever dream that it lay within the powers of the authority'.

59. *Kwok Cheuk Kin* (n 54) [26].

60. Legislative Council Ordinance 2012 (c 542).

61. *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2014] 2 HKLRD 283 (Court of First Instance) and CACV 57/2014, 22 October 2015 (Court of Appeal) (referred to as *Kwok Cheuk Kin By-Election*) (currently on appeal to the Court of Final Appeal, hearing and appeal pending). Both provisions of the Basic Law and BORO set out the right of permanent residents to participate in politics and public affairs.

reviewing restrictions on the rights in question.⁶² The courts in Hong Kong typically utilize a proportionality test when reviewing restrictions on rights.⁶³ The applicant argued for a higher level of scrutiny in the application of the proportionality test because of the fundamental nature of the rights of political participation at stake. Accordingly, the applicants argued that the court should also scrutinize whether there was indeed any legitimate aim to be pursued in enacting the restriction on standing for a by-election following a voluntary resignation. The applicant argued that resigning to trigger a by-election and gaining a renewed mandate on a controversial issue is an accepted political mechanism used in most developed Western democracies, and there were reasonable views both for and against such a tactic. The Court of First Instance did not accept this, deferring to the legislature and holding that the nature of the right is only one of the considerations in deciding on the degree of scrutiny.⁶⁴ This has to be balanced against the nature of the *issues* at stake and in particular whether there are any polycentric or socio-economic considerations.⁶⁵

On appeal, in rejecting the further argument that under the third limb of the proportionality test, the court should look into whether the restriction in question was a *minimal* impairment, the Court of Appeal held:

Our courts have repeatedly recognized that this formulation does not remove the possibility of a reasonable range of options within which the relevant arm(s) of the government has a discretionary area of judgment... no matter how the third limb of the test is formulated, the ultimate question is the same...⁶⁶

In any event, this was not a situation involving fundamental rights that would rationalize any differential formulation or treatment in the application of the proportionality test. The political context was highly relevant for the Court of Appeal in adopting a deferential posture.

C. Strategy III – Challenge Aspects of the Design of the Political System

Two of the most problematic aspects of political design are the functional constituencies and the practice of corporate voting – both relate to the election of LEGCO members and both have been the subject of challenge.

62. The court drew support from European and Canadian cases on this point: *Yuman & Sadak v Turkey* (2008) 48 EHRR 61, 86-89; and *Sauve v Canada* [2002] 3 SCR 519. The latter case was held to be authority for the proposition that there may be stricter requirements imposed on who can stand for election compared with who can vote (a point that was also made in a case *Wong Hin Wai v Secretary for Justice* [2012] 4 HKLRD 70 (Court of First Instance), [29] where the applicant had been convicted by a court of law and sentenced to imprisonment and challenged the constitutionality of the disqualification provisions of s 39(1)(B)(I) and s 39(1)(D) of the LCO).

63. Swati Jhaveri, Michael Ramsden and Anne Scully-Hill, *Hong Kong Administrative Law* (2nd edn, LexisNexis 2013), ch 12.

64. The Court of First Instance rejected the view of the applicants that since there were fundamental rights at stake, there should be a higher level of scrutiny: *Kwok Cheuk Kin* (n 61) [38]–[42].

65. *ibid* [4]–[7].

66. *ibid* [21] and [31]. The court eventually held that the political wisdom or otherwise of such a tactic or maneuver was not to be decided by the courts but was a political question (see also [58]–[59]).

1. *Corporate Voting*

This was the subject of challenge in *Chan Yu Nam v Secretary for Justice* ('*Chan Yu Nam*').⁶⁷ Seats in LEGCO are returned not only from geographical constituencies, but also from industry-specific functional constituencies. The argument for functional constituencies is that they promote balanced political participation from a range of professional, commercial, and industrial interests.⁶⁸ However, they are also heavily criticized as being populated by members drawn mostly from commercial sectors of society (for example, they do not include ethnic or minority-based constituencies or grassroots community-based sectors). Members of functional constituencies constitute 50 per cent of LEGCO and are in a position to veto or approve proposals, bills, and motions even though they represent a smaller scope of interests, and even if the geographical constituencies vote against such decisions. Functional constituencies are generally considered to be pro-government entities that naturally align with the executive as a way of maintaining stable and favourable business conditions.⁶⁹ This highlights why it may be difficult to achieve the modification or abolition of either functional constituencies or corporate voting through a legislative vote. These constituencies are also inconsistent with universal suffrage, as they allow some voters to have more than one vote if that voter is registered to vote in a geographical constituency as well as a functional constituency.⁷⁰

Voters in functional constituencies can include corporations. This leads to further problems. Group companies may have strong representation in a particular functional constituency as some of its subsidiaries also carry a vote. Similarly, companies that operate in different industries may be eligible to vote in more than one functional constituency.⁷¹ No change has been seriously mooted or recommended thus far.⁷²

The applicants in *Chan Yu Nam* were not eligible to vote in their respective functional constituencies (they had to be a corporate or statutory body or a member of

67. *Chan Yu Nam v Secretary For Justice*, HCAL 32/2009, HCAL 55/2009, December 10, 2009, Constitutional and Administrative Law List (Court of First Instance) and CACV 2/2010, CACV 3/2010, December 7 2010 (Court of Appeal) [Hereinafter *Chan Yu Nam*]. See also Swati Jhaveri, 'Judicialising Politics: A Role for the Courts in Electoral Reform in Hong Kong' [2011] Public Law 227.

68. They reflect the sectors from which the governor appointed members to LEGCO before 1997. See s 20(1) of the LCO for a list. Examples include insurance, transport, finance, financial services, and labour.

69. See Simon NM Young and Anthony Law, 'Privileged to Vote: Inequalities and Anomalies of the FC System' in Christine Loh and Civic Exchange (eds), *Functional Constituencies: A Unique Feature of The Hong Kong Legislative Council* (Hong Kong University Press 2006) 59–109 and Simon NM Young, 'Can Functional Constituencies Co-Exist with Universal Suffrage?' in Chan and Harris (n 16) 53–58.

70. See Section II(C)(2).

71. *Wong Chi Fung v Secretary for Justice*, HCAL 198/2015 (Court of First Instance), 22 June 2016.

72. Constitutional and Mainland Affairs Bureau, 'Green Paper on Constitutional Development' (Constitutional and Mainland Affairs Bureau July 2007), <www.legco.gov.hk/yr06-07/english/panels/ca/papers/ca0716-gppr200707-e.pdf> accessed 4 September 2017; and Constitutional and Mainland Affairs Bureau, 'Consultation Document on the Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012' (Constitutional and Mainland Affairs Bureau 18 November 2009), <www.legco.gov.hk/yr13-14/english/panels/ca/papers/ca1209-cdoc20131204-e.pdf> accessed 4 September 2017; and Constitutional and Mainland Affairs Bureau, 'Package of Proposals for the Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012' (Constitutional and Mainland Affairs Bureau April 2010), <www.cmab-cd2012.gov.hk/doc/package/package_e.pdf> accessed 4 September 2017. This package of proposals focused on ways of enhancing the representativeness of functional constituencies rather than their abolition *per se*.

specified industrial associations to qualify).⁷³ Cheung J at the Court of First Instance specified that he would only tackle the ‘constitutionality’ of corporate voting under Article 26 and not the ‘political legitimacy’ of corporate voting or functional constituencies *per se*.⁷⁴ Notwithstanding these concerns over judicial overstepping, Cheung J at the Court of First Instance did not maintain judicial agnosticism on the issue but constitutionally validated both the practice of corporate voting and functional constituencies. He opined:

[F]unctional constituencies came into being as a more systematic way of representing the various functional constituencies’ interests in the Legislative Council. In turn, those interests represented, at least in terms of political theory, people’s common interests in the society...That being the case, corporate voting is not surprising at all.⁷⁵

The applicants relied on Article 26’s application of the right to vote to ‘[p]ermanent residents’. As corporations are not ‘permanent residents’, they should not have the right to vote. Cheung J concluded that this argument is valid ‘insofar as [Article 26] applies to a particular election or form of election’.⁷⁶ Therefore, the first issue was whether Article 26 applied to LEGCO elections involving functional constituencies.⁷⁷ Given that corporate voting and functional constituencies existed at the time of the enactment of Article 26 of the Basic Law, Cheng J concluded that Article 26 does not apply to invalidate both, and even then, any infringements were capable of being justified using the proportionality test.⁷⁸

The Court of Appeal differed: it preferred not to use proportionality. It took a categorical approach to deciding what was permitted by Article 26,⁷⁹ utilizing a purposive approach to constitutional interpretation that was focused primarily on the *historical* (versus *eg living*) purpose behind Article 26.⁸⁰ The Court of Appeal based its conclusions on Article 68 and Paragraph 2 of Part I of Annex II of the Basic Law. The relevant part of Article 68 provides that the method for forming LEGCO shall be specified ‘in the light of *the actual situation* ... and in accordance with the principle of gradual and orderly progress’ (emphasis added). Paragraph 2 of Part I of Annex II of the Basic Law specifies the use of corporate voting in relation to the formation of the first, second and third terms of LEGCO (ie up to 2007). These provisions were held to be reflective of the intention to maintain both. The Court of Appeal indicated that the spirit of the drafting documents and various constituent documents that preceded the Basic Law (such as the Joint Declaration) was a continuation of pre-1997 electoral systems. Therefore, any changes to such historical and continuing practices would need

73. LCO, s 20D (transport functional constituency); s 20N (real estate and construction functional constituency).

74. The Court of Appeal similarly defined the issues narrowly: see *Chan Yu Nam* (n 67) [82]–[84], [86].

75. *ibid* [74]–[75].

76. *ibid* [62].

77. *ibid*.

78. *ibid* [64].

79. *ibid* [93], [104] and [126].

80. *ibid* [29] and [32].

to be made in accordance with the principle of ‘gradual and orderly progress’ under Article 68 of the Basic Law.⁸¹ The Court of Appeal reinforced its decision with an earlier decision of the NPCSC.⁸² Paragraph 6 of that decision acknowledged the ability of pre-1997 members of LEGCO to continue as members of LEGCO post-handover.⁸³ This would include members elected from functional constituencies via corporate voting and was further evidence, for the Court of Appeal, of the constitutional validity of both.⁸⁴

2. *Functional Constituencies*

The only challenge to functional constituencies was prior to 1997 and therefore the enactment of the Basic Law. In *Lee Miu Ling v Attorney-General of Hong Kong*,⁸⁵ the applicant challenged the pre-handover electoral reforms initiated by the last British governor which sought to introduce, *inter alia*, functional constituencies. The grounds for challenge are academic, as they are based on the pre-1997 position on universal suffrage. However, the applicants’ argument based on the principle of ‘one person, one vote’ raises the same question of the possible incompatibility of an uneven distribution of votes with the idea of universal suffrage. The government sought to justify the infringement on various grounds. First, the government had reserved the right not to apply Article 21 on the establishment of an elected Executive or Legislative Council in Hong Kong.⁸⁶ Therefore, the government has the discretion to decide how persons could become members of LEGCO. Second, Article 7(3) of the *Hong Kong Letters Patent*⁸⁷ (Letters Patent) (the pre-1997 constitutional document) provided a mandate to the executive to enact laws which imposed limits on the persons entitled to vote in the functional constituencies.

The applicant lost at both first instance and on appeal. At first instance, the court interpreted Article 21(1)(a) and (b) of BORO to require only that every Hong Kong permanent resident shall have the right to vote and be effectively represented. However, it did not require that every resident shall have the same voting power with votes of equal weight in each election. In any event, the rights in Article 21 could be subject to reasonable restrictions. This may include, for example, the need to have different sized constituencies to represent different sectors and better the governance of Hong Kong. In any event, the court was unwilling to use Article 21 to structure representation in the legislature at that ‘embryonic’ stage of the development of Hong Kong’s electoral process.⁸⁸

81. *ibid* [44], [80], [82]–[84] and [86].

82. National People’s Congress (NPC), ‘Decision of The National People’s Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region’ (Adopted at the Third Session of the Seventh National People’s Congress, 4 April 1990), <www.asianlii.org/cn/legis/cen/laws/dotnpcotmftotfgatfcothksar1588/> accessed 4 September 2017.

83. *ibid* [6].

84. See Jhaveri (n 67).

85. [1995] 5 HKPLR 181 (High Court) and [1995] 5 HKPLR 585.

86. See (n 10).

87. Hong Kong Letters Patent 1917 (SR & O 1917 c 1317), as amended by LN 406 of 1994.

88. *Lee Miu Ling* (High Court) (n 85) [2].

The Court of Appeal disagreed that the infancy of an electoral system was relevant to a constitutional assessment of the issues. Instead, the Court of Appeal was concerned with whether there was an unconstitutional inequality of universal suffrage.⁸⁹ On this, since the Letters Patent permitted additional voting rights to be conferred on certain persons, it was not unconstitutional. On the issue of different sized functional constituencies, the test to be applied was a multi-pronged proportionality-based test, by asking whether: (1) a sensible and fair-minded person would recognize the need for some difference in treatment; (2) the differential treatment was a rational way of achieving such a need; and (3) the differential treatment was also a ‘proportionate’ way of achieving such a need. On this, it concluded that the difference in the size of the functional constituencies passed the test. However, the Court of Appeal just asserted without much explanation that the fair-minded person would recognize the need for different sizes, and would not regard it as irrational and disproportionate. It is clear from the judgment that the Court was taking a deferential posture when it came to drawing the proportionality line for differential voter rights between different categories of voters.

However, as they have done elsewhere, the Court could have been more prescriptive at least in terms of where to draw the line. This is apparent in the courts’ approach when reviewing election issues unrelated to Articles 45 and 68.⁹⁰ In the case of *Chan Shu Ying v Chief Executive of the HKSAR*,⁹¹ the applicant challenged the constitutionality of a new framework for the conduct of local municipal governance. Municipal affairs had previously been in the hands of urban and regional councils that had executive and administrative powers. They were abolished and in their place, new ‘district’ councils were created which, while elected bodies, only had advisory powers. The applicant argued that this was inconsistent with the right to take part in the conduct of public affairs. The court held that the right to participate in ‘public affairs’ could include participation by way of debate, consultation and advice, and did not mandate participation through actual policy design and implementation.⁹² This is an interesting interpretation of Article 25(a) of the *International Covenant on Civil and Political Rights* (ICCPR) (incorporated in BORO and which formed the basis of the applicant’s challenge) and makes sense to the extent that it does not mandate the establishment of *new* political structures. However, it should not determine the permanent constitutionality and legitimacy of *existing* practices. Such practices should always be open to assessment, especially as universal suffrage is an aspirational objective to be achieved over time. Of equal importance is therefore the court’s approach to the interpretation of the scope of this provision (which will presumably apply to Article 26 of the Basic Law) from a temporal perspective. The Court held:

Even the most rigid or traditional of societies are organic. By that I mean that they are constantly evolving. Governments change, laws and institutions change. The changes may

89. *Lee Miu Ling* (Court of Appeal) (n 85) [2].

90. They have also done this in the context of voting rights for prisoners: *Chan Kin Sum* (n 51).

91. *Chan Shu Ying v Chief Executive of the HKSAR* [2001] 1 HKLRD 405 (Court of First Instance).

92. *ibid* 422f–423c.

be gradual or they may be sudden. They may even be revolutionary... This, I believe, is one of the reasons why art.25(a) does not attempt to direct at what level there should be compliance or the modalities that must be put into place to ensure compliance. As societies evolve so the manner in which they seek to comply with the requirements of art.25(a), indeed with the requirements of the Covenant as a whole, will change... a new constitutional order is now in place and the matters in issue in this case must be judged only in the context of that new order.⁹³

Therefore, the fact that a practice existed prior to the Basic Law (in this case, advisory and non-elected bodies) does not mean that the current practice is constitutional simply because it perpetuates a historical system. The issue for the courts is whether the current system, viewed contemporarily, violates the relevant constitutional provisions. This approach is critical when looking at litigation strategies and, in particular, arguments that may be made to invite the courts to revisit earlier positions taken prior to the enactment of the Basic Law (such as the historical approach in *Chan Yu Nam* on corporate voting).

III. OPTIMISING LITIGATION STRATEGIES: RECONSTITUTIONALIZING POLITICS

The cases thus far demonstrate that applicants have failed for a multitude of reasons: perceived amenability of the issue for judicial review; concerns over whether the rights in question are engaged or applicable to certain practices; the grounds of review were substantive versus procedural and outside of the judicial comfort zone; the declaratory relief sought was too broad; and the adoption of a deferential posture on the part of judges on issues of interpretation and the application of the proportionality test. While applicants have failed in their attempt to challenge a significant range of issues, there remain issues to be challenged. This section will sketch out possible questions that litigants can still bring to courts, despite the failures discussed in Section II. In view of the political deadlock discussed above, any political resolution, or even compromise, on the issues may be difficult.⁹⁴ Such a political resolution or compromise, even if it is achieved, will most likely be at the expense of the interests of the residents of Hong Kong, in light of the balance of power that currently exists in the reform process in favour of the central and local pro-government groups in LEGCO. Accordingly, if the residents are to have any input, this may need to be via the courts and on the basis of a more considered or optimal litigation strategy, bearing in mind the reasons for failure thus far. This section highlights three novel kinds of cases that would be optimal vehicles for re-orienting the debate to the constitutional foreground.

93. *ibid* 413f–415d. This echoes the views of the Court of Appeal in an earlier appeal on the application for leave to apply for judicial review: *Wong Chung Ki & Another v The Chief Executive of the Hong Kong Special Administrative Region & Anor*, CACV 1/2000, 20 June 2000 (Court of Appeal).

94. On which see Albert HY Chen, “The Hong Kong Basic Law and the Limits of Democratization under “One Country Two Systems”” (2017) 50 *International Lawyer* 69.

A. *Aspects of the Design of the Political System*

There remain a number of ways in which functional constituencies can be challenged. In *Chan Yu Nam*, the Court of Appeal protected the continuance of functional constituencies (and corporate voting) *at that time*. However, the issue needs to be revisited as the political system works its way towards the ‘ultimate aim’ of universal suffrage: there could arguably be a point in time where advancing towards this aim requires the abolition of functional constituencies and corporate voting.⁹⁵

Parallel to such systemic challenges are other possible design challenges, including, for example, challenges to the Election Committee for the election of the Chief Executive. It is made up of 1,200 persons elected from sectors that resemble functional constituencies. Article 45 sets out that ultimately, the Chief Executive is to be elected by a ‘broadly representative nominating committee in accordance with democratic procedures’. There are a number of open-textured phrases here: ‘broadly representative nominating committee’ and ‘democratic procedures’. The precise scope and meaning of these phrases will need to be worked out when looking at reform going forward. It is arguable that ‘broadly representative’ will require a change of the demographics of the committee and the mode of the selection or election of members ‘in accordance with democratic procedures’.

If these design changes are not made via the political process, as functional constituencies themselves could obstruct any such changes being voted through in LEGCO, the issue may come before the courts. For both of these design-based challenges, the courts will need to revisit their position on the interpretation of Articles 45 and 68.⁹⁶ While it could be argued that it is constitutionally inappropriate for the court itself to abolish or re-design the system, it is possible for the courts to interpret the temporal phrases in the two provisions (‘actual situation’, ‘ultimate aim’, and ‘gradual and orderly progress’) to continue to revisit the constitutionality of various aspects of the electoral system over time. This builds on the courts’ approach elsewhere of re-evaluating historical electoral practices in light of contemporary development in democratic conditions. For example, in the context of indigenous voting rights in the rural areas of Hong Kong in *Chan Wah*,⁹⁷ the court held that indigenous electoral practices that were justified in one era may not be justified in another. This is also evident in the court’s decision in *Lee Miu Ling*, where the court explicitly set out the need to periodically revisit constitutional practices and meaning (see Section II(C)(2) above).

95. See comments by the Secretary for Constitutional and Mainland Affairs in 2010, acknowledging that the electoral method for the functional constituencies did not comply with the principles of universality and equality: Legislative Council, ‘LCQ5: Functional Constituencies’ (Press release, Legislative Council 26 May 2010) <www.info.gov.hk/gia/general/201406/29/p201406290926.htm> accessed 22 August 2017.

96. The issues relating to the division of interpretive power between the NPCSC and the local courts over these provisions have been discussed in Section [I(A)] above. These are issues that will need to be considered in relation to both Articles 45 and 68. It is open to litigants to make the argument that even if the provisions in question meet the first three criteria, there is no contest or lack of clarity on the scope of the provisions (ie the arguability threshold for a referral under Article 158 is not met) or alternatively, that the meaning of Articles 45 and 68 is not directly in issue /nor the predominant issue for consideration.

97. *Chan Wah* (n 51).

Building on any advances in the interpretation of Articles 45 and 68, the courts will also need to revisit Article 26 as a tool for tackling these design questions. As the meaning and application of Articles 45 and 68 evolve, so too will that of Article 26. It has been argued elsewhere that these are a block of provisions whose meaning will need to evolve in tandem.⁹⁸ As a right to participate in politics, it is arguably a fundamental right given the broader framework of universal suffrage that the Basic Law aspires to. In this respect, the courts should be slow to conclude to the contrary (as they did in *Yvonne Leung and Kwok Cheuk Kin*) that any infringement of Article 26 is capable of justification via some form of the proportionality test. Elsewhere, the Hong Kong courts have been willing to recognize, in the case of fundamental rights, that there is a certain core to the right, the infringement of which is incapable of justification via a proportionality analysis.⁹⁹ In addition, in other contexts when considering voting rights, the courts were prepared to undertake a more rigorous approach to review. For example, in *Chan Kin Sum v Secretary for Justice*,¹⁰⁰ in reviewing restrictions on prisoners' voting rights, the court found that while restrictions on the right to vote were permissible, unreasonable restrictions were not. The court applied the proportionality test and did so rigorously in investigating the precise scope of the restrictions, given that the right to vote was the most important political right in Hong Kong.¹⁰¹ The court issued declarations that struck down the relevant provisions of the LCO.¹⁰² This more involved review runs contrary to the approach taken in *Kwok Cheuk Kin By-Election*. Applicants need to push courts to reconcile these two conflicting lines of cases dealing with the same political rights.¹⁰³

A further right that has yet to be utilized to its full extent when challenging design issues is Article 25 of the Basic Law: 'all Hong Kong residents shall be equal before the law'. The unequal distribution of voting rights is arguably the biggest design issue standing in the way of 'universal suffrage'. In *Chan Yu Nam*, the inequality argument was narrowly constructed by the applicants. They argued that, by restricting voting in certain functional constituencies to corporate entities, the relevant provisions of the LCO discriminated between individuals who had the financial means to set up companies and those without.¹⁰⁴ Alternative formulations

98. See Jhaveri (n 67) 232.

99. See discussion in Jhaveri (n 51). While the courts have not yet taken this approach to Article 26, they have affirmed its importance and maintained that restrictions on such a right must be narrowly construed: see *Chan Kin Sum* (n 51).

100. *Chan Kin Sum* (n 51) (on prisoners' voting rights).

101. See also *Mok Charles v Tam Wai Ho* (2010) 13 HKCFAR 762. In this case, the court held that a fundamental right in terms of the constitutional guarantee of free elections through independent oversight by a judicial process is engaged, and that once the fundamental nature of the rights involved is appreciated, the inaptitude of the application of a strong margin of appreciation should be apparent.

102. *Chan Kin Sum* (n 51) [112] and [116].

103. As argued elsewhere – see Jhaveri (n 67). See also Po Jen Yap, 'A Typography of Constitutional Arguments in Hong Kong' (2014) 44 Hong Kong Law Journal 459.

104. A more detailed version of this is found in Article 22 of BORO:

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.

of the equality argument may have been worth exploring.¹⁰⁵ For example, functional constituencies and corporate voting undermine the idea of equal *weighting* of votes arguably embodied in the concept of universal suffrage. There is evidence to suggest that such arguments may succeed. In previous cases, the courts have been willing to explore the issue of differential access to participation in political affairs, and have awarded remedies to applicants to achieve wholesale changes to the electoral system to allow access where they felt that the differential access was problematic.¹⁰⁶

Aside from the substantive arguments discussed above, applicants seeking to challenge design issues will also need to respond to judicial concerns relating to the scope and repercussions of any declaratory relief. Here, applicants can argue that, to give the government time to implement the courts' decisions, any declaratory relief can be temporarily suspended. The courts have, more recently, granted temporary suspension orders for its declarations of unconstitutionality in order to provide the government with time to re-consider the scope of any restrictions that they wish to impose on residents' rights in a way that is compliant with the court's judgment.¹⁰⁷ The use of such orders may have helped the courts in some of the earlier cases, especially in relation to more systemic concerns such as the operation of functional constituencies and corporate voting.¹⁰⁸ There is sufficient precedent for this in contemporary judicial review cases in Hong Kong, as is evident from the court's wide-ranging declaratory judgment in *Chan Kin Sum* on prisoners' voting rights that required major changes at a systemic level.¹⁰⁹

Ultimately, the above multi-fold strategy for reviewing aspects of the design of Hong Kong's political system could achieve two things: (1) the gradual clarification, as a matter of interpretation, of the constitutional baselines and parameters for reform contained in the various provisions and rights in the Basic Law highlighted above; and (2) remedially, the gradual and incremental re-examination of the constitutionality of aspects of the system's political design.

B. Access to the Political Arena

A likely novel challenge in this area is going to be restrictions on the creation or continuance of political parties. This is topical with the recent establishment of parties advocating, in some form, the idea of the complete independence of Hong Kong from

The identity of political rights – i.e. fundamental or not – is therefore the subject of conflicting positions in the case law, leaving room for argument by applicants.

105. See Section II(C)(1).

106. See (n 51) on *Chan Kin Sum* and prisoners' voting rights, albeit not on grounds of equality but Article 26. See also *Chan Wah* on indigenous voting rights (n 51). See also Jhaveri and Scully-Hill (n 51) on the government's positive response to the courts' decisions in both cases.

107. First mooted in *Koo Sze Yiu & Anor v Chief Executive of the HKSAR* [2006] 2 HKLRD 455 (Court of Final Appeal).

108. In particular, on the issue of functional constituencies and corporate voting. Indeed, this was the main barrier to awarding remedies in *Lee Miu Ling*.

109. See Young (n 34) 19 and Po Jen Yap, 'New Democracies and Novel Remedies' [2017] Public Law 30 for a discussion of suspension orders.

China. There are concerns that such pro-independence movements undermine sovereignty arrangements established by the Basic Law.¹¹⁰

Hong Kong currently has no formal legal framework for the establishment of political parties. Parties therefore formalize their establishment either as a company or a registered society.¹¹¹ The *Companies Ordinance*¹¹² (CO) does not contain any restrictions on the registration of political parties as companies by reason of their activities, but the *Societies Ordinance*¹¹³ (SO) arguably does.¹¹⁴ Constitutional challenges may therefore come in the form of challenges to the application of such restrictions in the SO on new political parties.

As this issue has not yet been litigated in Hong Kong, it would be useful to consider the experiences of other jurisdictions. A common comparative point for Hong Kong courts has been the jurisprudence of the European Court of Human Rights (ECtHR).¹¹⁵ The ECtHR has considered the issue of restrictions to political entry by political parties extensively in the context of the Turkish constitution, which contains some of the most developed provisions on party exclusion.¹¹⁶

110. Article 1 of the Basic Law states that ‘The Hong Kong Special Administrative Region is an inalienable part of the People’s Republic of China.’ A number of members from these political parties were barred from running in the most recent general elections for seats in LEGCO in September 2016. They have issued election petitions to challenge this, and the proceedings are ongoing. See also Tony Cheung, ‘Explain this: why all the fuss about Hong Kong independence?’ *South China Morning Post* (Hong Kong, 7 September 2017) <www.scmp.com/news/hong-kong/politics/article/2110059/explain-why-all-fuss-about-hong-kong-independence> accessed 8 September 2017. See also recent events surrounding public advocacy (mostly by students) of pro-independence ideas: Tammy Tam, ‘Hong Kong independence banners present a real test of Carrie Lam’s political wisdom’ *South China Morning Post* (Hong Kong, 10 September 2017) <www.scmp.com/news/hong-kong/article/2110528/hong-kong-independence-banners-present-real-test-carrie-lams> accessed 28 September 2017.

111. Under the Societies Ordinance or the Companies Ordinance.

112. Companies Ordinance (c 622) 2014.

113. Societies Ordinance (c 151) 1949.

114. For example, s 5A of the SO states:

The Societies Officer may, after consultation with the secretary for security, refuse to register or to exempt from registration a society or a branch- (a) if he reasonably believes that the cancellation is *necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others* (emphasis added).

Ss 5D and 8 contain similar provisions. Several pro-independence political parties face restricted access to the political arena for other reasons. For example, a member of one of the political parties, Hong Kong Indigenous, is challenging a refusal by the Registration and Electoral Office to mail out material relating to his party (Stuart Lau and Owen Fung, ‘Hong Kong Localist asks High Court to Rule on City’s Freedoms Amid Rising Political Tensions’ *South China Morning Post* (Hong Kong, 4 May 2016), <www.scmp.com/news/hong-kong/politics/article/1941392/hong-kong-localist-asks-high-court-rule-citys-freedoms-amid> accessed 4 September 2017). In addition, another pro-independence party, the Hong Kong National Party, is currently under scrutiny by the Secretary for Justice for any possible violations of local laws and the Basic Law (Owen Fung, ‘Hong Kong National Party Under Legal Scrutiny as Government Studies Whether Group Broke Law’ *South China Morning Post* (Hong Kong, 24 April 2016) <www.scmp.com/news/hong-kong/politics/article/1938026/hong-kong-national-party-under-legal-scrutiny-government> accessed 4 September 2017). The final resolution of these matters is pending.

115. This is largely due to textual similarities. See *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 (Court of Final Appeal) and *Koon Wing Yee v Insider Dealing Tribunal* [2008] 3 HKLRD 372 (Court of Final Appeal). See also PY Lo, ‘Impact of Jurisprudence Beyond Hong Kong’ in Simon NM Young and Yash Ghai (eds), *Hong Kong’s Court of Final Appeal: The Development of The Law in China’s Hong Kong* (CUP 2013) 579.

116. See Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (CUP 2015) 79–83 and Dicle Kogacioglu, ‘Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain’ (2003) 18 *International Sociology* 258.

Article 68(4) of the Turkish Constitution states:

The statutes and programs, as well as the activities of political parties shall not be contrary to...the principles of the democratic and secular republic; they shall not aim to promote or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.

Article 69 empowers the Constitutional Court of Turkey to dissolve or withdraw state funding from any political party that violates Article 68(4). The ECtHR has reviewed the compatibility of this provision with Article 11 (on freedom of association) of the *European Convention on Human Rights* (ECHR), and it has outlined several principles.¹¹⁷ First, Article 11 can and should be read as protecting even those parties who undermine the constitutional framework of a State: ‘it is necessary for the proper functioning of democracy that political groups should be able to introduce [their views] into public debate in order to help find solutions to general problems concerning politicians of all persuasions.’¹¹⁸ Second, the dissolution of political parties could be done in the pursuit of at least one of the legitimate aims outlined in the proviso to Article 11: the interests of national security (but not on the basis of public safety and territorial integrity, or protecting the rights and freedoms of others). Third, the means used by the relevant political party must be violent, as opposed to legal and democratic, before it can be subject to any restriction. Fourth, a measure as radical as the immediate and permanent dissolution of a political party may not be ‘necessary’ if the dissolution is done before its activities had even started.

This discussion could be instructive in the Hong Kong context, and can be utilized to assess the application of restrictions in the SO to political parties advocating independence.¹¹⁹

C. Process of Reform

The views of the ‘average’ Hong Kong resident (as opposed to, for example, members of the business and industrial sectors) on political reform are arguably underrepresented in LEGCO in view of the system of functional constituencies. The underrepresentation problem could be compounded by the perceived dissatisfaction with the consultative process for political reform. And although the government has, in practice, carried out public consultations prior to constitutional reform, this is not mandated by the Basic Law. Therefore, the continuation and quality of public consultations could be crucial to ensuring the involvement of residents, pending broader reform of the functional constituency system in LEGCO. Here, the concern of

117. See eg *Refah Partisi (The Welfare Party) v Turkey*, ECHR 2003-II 267; *Yazar v Turkey* ECHR 2002-II 395 (*Yazar*); *Freedom and Democracy Party (Ozdep) v Turkey* ECHR 1999-VIII 293 and *United Communist Party Of Turkey and Others v Turkey* App no 19392/92 (ECtHR, 30 January 1998). See also *Herri Batasuna & Anor v Spain* App no 25803/04 (ECtHR, 30 June 2009).

118. *Yazar*, *ibid* 413–414.

119. See Simon NM Young, ‘Restricting Rights in the Basic Law of Hong Kong’ (2004) 34 *Hong Kong Law Journal* 109 and Jhaveri (n 51) on the use of jurisprudence from the ECtHR in Hong Kong.

the applicants is that the executive does not adequately engage with or reflect the views of the public. However, as discussed in Section II(A), the courts have expressed a reluctance to review the merits or content of the report on consultations to the NPCSC.¹²⁰

The applicants may, therefore, need to re-focus their arguments on more procedural grounds of judicial review (focusing on the deliberation process and whether, for example, it was influenced by ‘irrelevant considerations’), rather than on substantive grounds which look at the outcome of the reform exercise (on the basis that, for example, the report was ‘irrational’).¹²¹ There is evidence of the success of such grounds when looking at cases relating to public consultations more generally outside of the political reform context.¹²² For example, the recent English case of *R (on the application of Moseley (in substitution of Stirling Deceased)) (Appellant) v London Borough of Haringey (Respondent)* set out the optimal features of an adequate consultation exercise:¹²³

First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit intelligent consideration and response. Third...that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.¹²⁴

The Supreme Court further added that:

[T]he degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting...the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit.¹²⁵

These principles are derived from a common law duty of procedural fairness, which is an accepted and well settled obligation for decision-makers in the Hong Kong context.¹²⁶

It is important to note that the application of the common law duty of procedural fairness in *Moseley* was triggered by the existence of a prior duty to consult in the first

120. See Jhaveri, Ramsden and Scully-Hill (n 63) ch 1; Section II(A), above.

121. See *ibid*, ch 7 for a discussion of the courts preference for procedural over substantive grounds of judicial review in areas of high policy.

122. See generally Andrew Edgar, ‘Judicial Review of Public Consultation Processes: A Safeguard Against Tokenism?’ (2013) 24 Public Law Review 209. See also, in the Hong Kong context, the applicants’ partial success on issues of process in the area of environmental issues in the Zhuhai-Macau-HK bridge case: *Chu Yee Wah v Director of Environmental Protection* [2011] 5 HKLRD 469 (Court of Appeal) and HCAL 9/2010, 18 April 2011 (Court of First Instance).

123. *R (on the application of Moseley (in substitution of Stirling Deceased)) v London Borough of Haringey* [2014] UKSC 116.

124. *ibid* [25] (Lord Wilson), borrowing from *R v Brent London Borough Council, ex p Gunning* (1985) 84 Local Government Reports 168.

125. *ibid* [26] (Lord Wilson).

126. See Swati Jhaveri, ‘Transforming “Fairness” as a Ground of Judicial Review in Hong Kong’ (2013) 11 International Journal of Constitutional Law 358.

instance. Here too there is scope for clarification by the Hong Kong courts. Aside from the process of consultation, there is a need to clarify the existence of an *obligation* to consult on issues of political reform. On this point, it is evident from the various decisions of the NPCSC and, in particular, the 2007 decision of the NPCSC, that the NPCSC itself takes public opinion on the issue of political reform very seriously.¹²⁷ It is also evident from its later decision in 2014, where the NPCSC commented that the Chief Executive's report accurately and comprehensively reported on public opinion and in this respect 'complied' with the Basic Law.¹²⁸ The NPCSC therefore views public opinion on the issue as, at least, constitutionally *relevant*. This could form the basis of argument in favour of mandating consultations as a matter of constitutional custom or convention, given this build-up in consultation and the attitudes of political institutions towards consultation. There is also case law from common law courts, including in Hong Kong, that evidences the success of such purposive arguments in favour of public consultations or engagement where there is no express legal requirement for it.¹²⁹ In addition, the doctrine of legitimate expectations that was relied upon in *Kwok Cheuk Kin* to argue that any reports made by the executive should accurately reflect public opinion, could be redirected to establish a duty to consult arising from past consultations. Improving the process of consultation with judicial review by setting out the various process-based parameters for such consultations would advance the democratization process. Attaching a stronger sense of public participation and opinion in the reports would also make it harder for the NPCSC to ignore the content of such reports.¹³⁰

IV. CONCLUSION

In proposing various litigation strategies for reconstitutionalizing politics in Hong Kong, this article proposes a stronger but balanced role for the courts. The proposed role is for the courts to take a stronger *interpretive* role on the meaning of the constitutional provisions, a stronger role on the consultation process of reform as a constitutional requirement, and a role in the piecemeal correction of the system's design. It is increasingly clear from the Umbrella Movement and the various NPCSC

127. See NPCSC (n 25), where the NPCSC recognized and acknowledge the apparent presence of divergent opinions on the issue of universal suffrage in the HKSAR.

128. *ibid.*

129. See *Chu Yee Wah* (n 122); for the Australian context, see *Scurr v Brisbane City Council* (1973) 133 CLR 242; for the English context, see *Moseley* (n 123).

130. A further issue for the applicants to consider is the possibility that the courts will hold that while there were issues with the consultation process, this had no impact on the final outcome of the consultation. The courts may therefore exercise their discretion and refuse to set aside or declare any consultation to be invalid. Therefore, the applicants need to consider the precise scope of any declaratory relief. As discussed in Section II(A), the courts felt that the scope of the declaratory relief that the applicants sought in *Yvonne Leung* and *Kwok Cheuk Kin* was too broad in its scope, especially in light of the absence of any impact of any perceived deficiency on the outcome of the consultation process. Accordingly, the precise scope of the declaratory relief sought needs to be carefully considered. This is an issue faced elsewhere – courts do take into account public inconvenience and expense and prejudice when considering whether to order a fresh consultation: see *Moseley* (n 123) and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

decisions that the key players are pulling in fundamentally different directions on almost all aspects of the reform exercise. More importantly, this dialogue has started moving outside of the Basic Law.¹³¹ This is evident when comparing preambles of earlier and later NPCSC decisions. Earlier preambles were grounded in the written provisions of the Basic Law. However, the more recent narrative also refers to a presumed hierarchy of political roles in relation to the overall governance of Hong Kong between Hong Kong and China that are not explicit in the text of the Basic Law.¹³² In Hong Kong, new political parties have also been established and elected into LEGCO on the basis of a manifesto of self-determination and complete independence of Hong Kong as their main objective. This self-determination is not part of the constitutional design for the Special Administrative Region of Hong Kong in the Basic Law. The need to re-orient all parties to the provisions of the Basic Law is thus clear.

A further factor that indicates a stronger role for the courts is evidence of the further disenfranchisement of residents on the issue of universal suffrage. Some commentators highlight evidence of partisan self-dealing where the ‘political actors devise electoral rules that govern voting, political parties, electoral boundaries, apportionment, the administration of elections, and campaign finance that are designed to entrench themselves in power’ and inhibit change.¹³³ The continuance of functional constituencies in LEGCO is evidence of an embryonic version of such self-dealing, given the ability of functional constituencies to self-entrench their hold on LEGCO.

These political realities highlight a need for the courts, which sit outside the dysfunctional political process, to re-situate parties in the Basic Law. This article approaches the issue by looking at what may be the right kinds of cases to be brought before the courts to complete this reconstitutionalization of political debate. The strategies in Section IV ultimately hinge on a relatively ‘weaker-form’¹³⁴ of judicial review through, for example, a more robust approach to constitutional interpretation while respecting the separation of powers through the courts’ award of weaker, or more piecemeal or tailored remedies.¹³⁵ The continued stream of litigation proposed in this article serves to nudge the courts into this role, and to make a difference within permissible political and separation of powers-related boundaries through gradual and incremental judgments. This may feel counter-intuitive in newer democracies, where

131. See also Eric Ip, ‘Constitutional Conflict in Hong Kong under Chinese Sovereignty’ (2016) 8 Hague Journal on the Rule of Law 75.

132. ‘Full text: Chinese State Council white paper on ‘One Country, Two Systems’ policy in Hong Kong’ *South China Morning Post* (Hong Kong, 10 June 2014) <www.scmp.com/news/hong-kong/article/1529167/full-text-practice-one-country-two-systems-policy-hong-kong-special> accessed 4 September 2017.

133. See Po Jen Yap (ed), *Judicial Review of Elections in Asia* (Routledge 2016). See also Yasmin Darwood, ‘Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review’ (2012) 62 University of Toronto Law Journal 499.

134. See Mark Tushnet, *Weak Courts, Strong Rights – Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008), where the court takes a strong approach to interpretation but a weaker one in terms of remedial impact beyond the judgment in a particular case.

135. Jeffrey Goldsworthy, ‘Homogenizing Constitutions’ (2003) 23 Oxford Journal of Legal Studies 484, 484. See also Tushnet (ibid); and Robert Leckey, ‘Remedial Practice Beyond Constitutional Text’ (2016) 64 American Journal of Comparative Law 1, 35.

some may yearn for a more pronounced role for the courts while the political branches work themselves out. However, a weaker form of judicial review is advocated to prevent political retaliation against strong courts and *in order to* preserve some role for the courts.¹³⁶

Conversely, it may also be felt that the strategies proposed, while weak, are stronger than the courts' current unwillingness to step into such a role. There are two responses to this. First, the above suggestions take into account and work around the courts current deferential posture.¹³⁷ Second, the discussion also exemplifies how the motivations for judicial deference are becoming increasingly diverse. The target of deference is arguably evolving from deference to the central government, to deference to the local legislative process of constitutional reform, and to legislative opinion as a proxy for public opinion. There is therefore scope for applicants to chip away at different aspects of the deference displayed by the courts, depending on the context of their argument and the particular issue being mooted before the courts.

The Umbrella Movement and its aftermath are evidence of the Hong Kong people's efforts to resort to direct forms of political engagement to achieve genuine universal suffrage, rather than approaches based on constitutional negotiation. Courts can be part of an alternative constructive mode of trying to achieve political and constitutional engagement on issues relating to reform. It is not an ideal forum given its binary format and in view of obvious concerns over the separation of powers and judicial overreaching. The litigation strategies discussed in Section III above take this into account in proposing ways of challenging some of the more systemic problems with the electoral system. This is with a view to maximizing not just the judicial rectification of these systemic problems, but maximizing the court's normative input on the meaning of constitutional terms applicable to those problems.¹³⁸

136. See Yap (n 9) ch 12; Gardbaum (n 35) 289.

137. See also Cora Chan, 'Deference and the Separation of Powers: An Assessment of the Court's Constitutional and Institutional Competences' (2011) 41 Hong Kong Law Journal 7 for a discussion of the motivations for deference in Hong Kong.

138. Gardbaum (n 35) 290.