

The Hong Kong Executive Authorities' Monopoly on Legislative Power: Analysis of the Legislative Council's Second Term Voting Records

by
Christopher Chaney

**Centre for Comparative and Public Law
Faculty of Law
The University of Hong Kong**

Occasional Paper No. 13

June 2004



Centre for Comparative and Public Law
Faculty of Law
The University of Hong Kong

The Centre for Comparative and Public Law was established in 1995 within the Faculty of Law of The University of Hong Kong. The purposes of the Centre are to promote research and other activities in the field of public and comparative law. The Centre has organised many seminars relating to international law and human rights in Hong Kong, and has active research projects covering such topics as the reform of constitutional law in Hong Kong, the implementation of international human rights standards in Hong Kong law and practice; equality and the law; trafficking of women into Hong Kong; and comparative sexual harassment law.

The Director of the Centre is Associate Professor Carole Petersen; the Deputy Directors are Associate Professor Donald Lewis and Associate Professor Simon Young. The Assistant Research Officer is Lison Harris; and the Executive Secretary is Flora Leung.

This Occasional Paper was written by Mr. Christopher Chaney, BA, MA (Chinese Studies). Mr Chaney is currently pursuing a JD at the University of Hawaii at Manoa, William S. Richardson School of Law. Mr Chaney completed this Occasional Paper when he visited the Centre as a research extern for the Spring semester of 2004.

Further information about the Centre and other occasional papers published by the Centre are available on the Centre's website: <http://www.hku.hk/ccpl/>.

Published by

Centre for Comparative and Public Law
Faculty of Law
The University of Hong Kong
Pokfulam Road
HONG KONG
Tel: (852) 2859 2941
Fax: (852) 2549 8495
Email: fkleung@hku.hk

©2004 Centre for Comparative and Public Law

The contents of this paper may be freely reproduced, provided that acknowledgement is made of the original source.

I. INTRODUCTION

The Legislative Council (hereinafter “Legco”) of the Hong Kong Special Administrative Region (hereinafter “Hong Kong”) plays a limited role in initiating legislation under the Basic Law, the region’s mini constitution. Legco members' bills are restricted to those “which do not relate to public expenditure or political structure or the operation of the government,” and those relating to government policy require “the written consent of the Chief Executive.”¹ The majority of Legco's legislative power, therefore, is found in the process of amending bills drafted by the executive authorities. The voting procedures that govern this process, however, further limit the extent of Legco's power. Member-moved committee stage amendments (hereinafter “CSAs”) are subject to a bicameral voting system so that passage of a CSA is dependent upon a majority vote among both (a) the functional constituency seats, and (b) the combination of the geographical constituency seats and the election committee seats.² Executive-moved CSAs, conversely, are subject to a unicameral voting system that requires a simple majority among Legco as a single unit.³ The essential difference between the unicameral and bicameral systems is that fewer votes are needed under the bicameral system to negative a movement. Member-moved CSAs, therefore, are more easily negated than those moved by the executive authorities.

This paper argues that the voting procedures governing the legislative process, when considered in light of the pro-executive tendencies of the functional constituency seats, grants the executive authorities an un-checked passage of bills in all but the most extreme cases, resulting in restrictions on Legco's legislative role that surpasses even the “executive-led” system envisioned in the Basic Law. While abolishing the functional constituency seats, and hence the bicameral voting system, is one solution to the situation, according to Basic Law Annex II such an undertaking

¹ See Art 74, Basic Law, available at: http://www.info.gov.hk/basic_law/fulltext/index.htm.

² See Annex II, Sec II, Basic Law. See also Sec 46, Legco Rules of Procedure, available at: <http://www.legco.gov.hk/general/english/procedur/content/rop.htm>.

³ Id.

cannot be pursued until 2008 at the earliest.⁴ Another solution involves amending the provision in the Legco Rules of Procedure that governs voting on executive-moved CSAs, a provision not required by the Basic Law. This second solution, however, also can not be pursued at the present time due to the National People's Congress Standing Committee's (hereinafter "Standing Committee") recent rulings on Hong Kong's democratic development, rulings that ensure Legco's legislative voting procedures remain unchanged until 2012 at the earliest.⁵

This paper analyzes the voting records of Legco's second term (2000-2004) to demonstrate the executive authorities' monopoly over legislative power, and discusses how the Standing Committee's rulings serve to preserve this monopoly for the next two Legco terms.⁶ Part II briefly explores the role of the functional constituencies in Legco, focusing on their development in the years leading up to the 1997 handover. Part III looks at the composition of the current Legco, and develops a system of classification based on voting records that divides members into "executive-supporters" and "executive-challengers." Based on this system, Part IV then analyzes the voting records of Legco's second term, illustrating the extent to which executive-moved bills and CSAs are un-checked, as well as the near-zero passage rate of member-moved CSAs that challenge the executive authorities' legislation. Part V discusses how the Standing Committee's rulings subvert Article 75 of the Basic Law and entrench the executive authorities' monopoly over legislative power for at least eight more years.

⁴ The PRC central authorities recently promulgated their "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 the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008" (April 26, 2004) (hereinafter "Electoral Reform Decision"), ruling that the functional constituencies will remain in Legco's fourth term, and therefore abolishing the bicameral system in 2008 is highly unlikely. See "Electoral Reform Decision," available at: <http://www.info.gov.hk/cab/cab-review/eng/basic/pdf/es5200408081.pdf>.

⁵ See *id.*, "Electoral Reform Decision." See also "Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article 3 of Annex II to the Basic Law of the Special Administrative Region of the People's Republic of China" (April 6, 2004) (hereinafter "Electoral Reform Interpretation"), available at: <http://www.info.gov.hk/cab/cab-review/eng/basic/pdf/es22004080554.pdf>.

⁶ The Legco voting records analyzed in this paper do not cover the complete second term but consist of votes up through March of 2004. The records are available at: <http://www.legco.gov.hk/general/english/counmtg/yroo-04/meetings.htm>.

II. THE HISTORY OF FUNCTIONAL CONSTITUENCY SEATS IN HONG KONG

The use of functional constituencies in Legco is a relatively recent phenomenon. Prior to the early 1980s, the United Kingdom did not grant the people of Hong Kong the power to determine who occupied the seats of their government.⁷ A system of representative government began to emerge only after planning for the decolonization of the territory commenced.⁸ As the impending handover of sovereignty to the People's Republic of China (hereinafter "PRC") grew close, leaders in London moved to liberalize the system in order to prevent a usurpation of authority by communist Beijing.⁹ Elections were gradually introduced as a means of forming the municipal administration,¹⁰ and in 1985 twelve Legco seats were determined through the use of functional constituencies.¹¹ The use of functional constituencies developed through the mid-1980s and 1990s and survived the handover, but the varying perceptions on the nature of this electoral system, on the part of both leaders in Beijing and democracy advocates in Hong Kong, also progressed during this time, with each side developing their own conception of how the seats were meant to function within the electoral system.

A. *The Development of Functional Constituencies Prior to the Handover*

When functional constituencies were first introduced into Legco in 1985, the practice was not immediately embraced by the public. Of the 60 seats, 12 were designated as functional constituencies, and during the 1985 election only seven of these twelve were contested, and only a third of this electorate participated.¹² The people of Hong Kong did not jump at this opportunity to partake in the liberalization

⁷ See generally N. Miners, "Plans for Constitutional Reform in Hong Kong, 1946-52" (1986) 107 *China Quarterly* 463. See also N. Miners, "Moves Towards Representative Government 1984-1988" in K. Cheek-Milby and M. Mushkat, eds., *Hong Kong: The Challenge of Transformation* (Hong Kong: University of Hong Kong, 1989) 19 at 19-21.

⁸ See T. Sher Singh, "Democracy in Hong Kong no thanks to the British," *The Toronto Star* (May 25, 1998), noting that "democracy in Hong Kong was non-existent during most of the century-and-a-half occupation under British rule."

⁹ See L. C. Kuen, *Hong Kong's Colonial Legacy*, (Hong Kong: Chinese University Press, 1997), 33-35, suggesting that a representative government was meant to insulate Hong Kong from the PRC.

¹⁰ See B. Tai, "The Development of Constitutionalism in Hong Kong" in R. Wacks, ed., *The New Legal Order in Hong Kong*, (Hong Kong: Hong Kong University Press), 50 fn 50. One-third of the District Board members were elected in 1982, and two-thirds were elected in 1985.

¹¹ *Id.*, 51.

¹² See S. Young, "The Meaning of the Right to Vote in Hong Kong," 42 *McGill L.J.* 649 (1997) at 666. The electorate of the contested functional constituency seats consisted of 68,900 people, of which 46,645 registered to vote and 24,806 actually voted.

of their government because few were actually given the opportunity - less than 69,000 people had standing to vote in the functional constituencies in the 1985 Legco election.¹³ While British leaders spoke of introducing a representative government, the people perceived them to be doing so half-heartedly.¹⁴ Beijing, on the other hand, revealed its concern over the development of such democratic tendencies. The Basic Law was in the process of being written, and Beijing described the new electoral system as a “very significant problem” because it potentially conflicted with their envisioned constitutional system of the territory.¹⁵

The 1988 election saw even fewer contested functional constituency seats in the Legco election.¹⁶ This is possibly due to a British desire to maintain a workable relationship with Beijing, or as a means of retaining complete authority over decisions regarding the territory's future during the last years of colonial rule.¹⁷ Following the June Fourth incident, however, electoral reform in Hong Kong began to intensify. Functional constituencies in the 1991 Legco election increased to 21 seats, and 18 seats were chosen through direct election based on geographical constituencies.¹⁸ Further reform came in 1992 when newly appointed governor Chris Patten brought from London a populist form of politics that was meant to solidify Britain's liberalization in the time remaining before handover.¹⁹

Reforms to the electoral system in the early 1990s, however, were not drawn entirely from reaction to the June Fourth incident. The PRC completed its final draft of the Basic Law in 1990, and therein specified the composition of the first Legco session following the handover - it was to retain its 60 seats, 20 of which would be determined by geographical constituencies, 10 by election committee, and 30 by

¹³ Id.

¹⁴ See Martin C M Lee QC, “A high degree of autonomy and Hong Kong's future,” *Financial Times* (July 29, 1986), stating that the use of functional constituencies “is by its very nature extremely limited . . . clearly the present system could not produce a truly representative or democratic government.”

¹⁵ See David Bonavia, “Peking doubts on reforms send a chill through Hong Kong / China's chief representative criticises democratization of local government,” *The Times (London)* (November 25, 1985), quoting Xu Jiatun, head of the Xinhua News Agency Hong Kong branch and considered the chief representative of the PRC in Hong Kong.

¹⁶ See *supra* note 12 at 666. Of the 14 seats, only 4 were contested, and less than a third of the electorate voted.

¹⁷ See *supra* note 10 at 52-53.

¹⁸ See *supra* note 12 at 666.

¹⁹ See *supra* note 10 at 55.

functional constituencies.²⁰ Beijing had decided that a legislature composed of a combination of seats directly elected, appointed, and indirectly elected was the apotheosis of the “one country, two systems” model.

The 1991 system of elections, therefore, can be attributed to an adherence to the “principle of convergence,” the idea that any changes instituted by the UK government were to coincide with the provisions of Hong Kong's future constitutional document.²¹ Because the geographical constituency seats remained at less than 20, and the functional constituency seats remained at less than 30, the 1991 reforms respected the principle of convergence.

Governor Patten's election reforms that were to follow, however, seemingly lacked the required respect. While the Basic Law had addressed the total number of functional constituency seats, it did not specify the nature of these seats. Patten interpreted this vagueness as an opportunity to greatly expand the electorate, granting the final nine seats to broadly defined constituencies.²² By the 1995 election, the potential electorate of the functional constituencies had expanded from 104,609 to approximately 2.9 million people, and included the majority of Hong Kong's working population.²³ Patten also restructured the election committee such that all members were drawn from the District Boards, the seats of which are determined by geographical constituencies.²⁴ Finally, Patten abolished the use of corporate electorates, under which the power to vote was given to corporate bodies such as banks and business subsidiaries rather than individual people.²⁵

Beijing was not pleased with Patten's electoral reforms, characterizing them as “the three violations” - they contravened the Joint Declaration, the Basic Law, and

²⁰ See “Decision of the NPC on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR of the PRC” (1990), paragraph 6.

²¹ See *supra* note 12 at 667, describing how the PRC continually urged the UK “to follow the 'principle of convergence' in its administration of Hong Kong during the period of transition.”

²² See *supra* note 12 at 668. See also *supra* note 8 at 56, fn 77 and 79. The existing functional constituencies had been commercial (2 seats); industrial (2 seats); finance; financial services; social services; medical; health services; teaching; legal; engineering; architectural; accountancy; real estate and construction; tourism; Urban Council; Regional Council; and rural. The new functional constituencies were: primary production, power and construction; mining and quarrying; electricity and gas; construction; textiles and garments; manufacturing; import and export; wholesale and retail; hotels and catering; transport and communication; and community, social and personal services.

²³ See *supra* note 10 at 56.

²⁴ See *supra* note 10 and accompanying text.

²⁵ See *supra* note 12 at 668.

subsequent correspondence between the PRC and the UK regarding Hong Kong's political make-up.²⁶ While not in direct violation of the Basic Law, the reforms were viewed by Beijing as contradicting its spirit.²⁷ Functional constituencies had traditionally been reserved for specially chosen groups within the workforce, namely elitist professional and business groups,²⁸ and it was this principal that the drafters of the Basic Law embraced when including functional constituencies in Legco's post-handover electoral scheme.²⁹ Because of these violations, Beijing threatened to completely replace Legco after the 1997 handover.³⁰

Patten's Legco electoral reforms took effect for the 1995 elections. Beijing subsequently declared that the seats were determined by a system that was in violation of the Basic Law. The NPC established a "provisional" legislature that replaced the 1995 elected Legco on July 1, 1997.³¹

B. *The Nature of Functional Constituencies Following the Handover*

All sixty seats of the first "provisional" Legco under Chinese sovereignty were chosen by a selection committee in Beijing.³² This selection process, however, seemingly contradicted provisions in the Basic Law that specifically outlined the characteristics of Legco in the initial years under Chinese sovereignty, and its legality was therefore challenged in the HKSAR courts.³³ The Court of Appeal, however, held that the provisional legislature did not violate the Basic Law because it was not the

²⁶ See "Translation of the Closing Address by Qian Qichen to Members of SAR Preparatory Committee at the Second General Meeting," *South China Morning Post* (December 12, 1993).

²⁷ See *supra* note 10 at 57.

²⁸ See Carole J. Petersen, "Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong," 34 *Colum. J. Transnat'l L.* 335, 361-362.

²⁹ Ministry of Foreign Affairs of the People's Republic of China, *Facts about a Few Important Aspects of Sino-British Talks on 1994/95 Electoral Arrangements in Hong Kong* (Hong Kong: Joint Publishing, 1994).

³⁰ See "BBC Summary of World Broadcasts" (April 22, 1993), quoting Lu Ping, director of the Hong Kong and Macao Affairs Office under the State Council: "If the British side refuses to take a cooperative attitude, then we will be forced to 'set up another kitchen' after 1997. This 'kitchen' has in fact been designed in the Basic Law. If the 'kitchen' set up in 1995 goes against the spirit of the Basic Law, then we can only have the 'kitchen' set up in 1997 according to the model designed in the Basic Law."

³¹ See "Measures for the Formation of the Provisional Legislative Council of the HKSAR of the PRC," adopted by the NPC Preparatory Committee of the HKSAR (October 5, 1996). See also Y. Ghai, "Back to Basics: The Provisional Legislature and the Basic Law" 25 *H.K.L.J.* 2 (1995) at 2.

³² *Id.*

³³ *HKSAR v. Ma Wai-kwan*, 2 HKC 315 (1997).

first Legco but rather a provisional Legco, and thus did not need to conform with the nature of the first Legco as outlined in the Basic Law.³⁴

The 1998 Legco, therefore, was officially deemed the first Legco under Chinese sovereignty, and its election was thus required to conform with the provisions outlined in the Basic Law. In accordance with Article 68, it lasted two years and its membership was divided between 30 functional constituency seats, 20 geographical constituency seats, and 10 seats appointed by election committee.³⁵ Subsequent Legco sessions would last four years and the election committee seats were gradually phased out. In 2000, Legco was divided between 30 functional constituency seats, 24 geographical constituency seats, and 6 seats appointed by the election committee, and in 2004 it will be divided between 30 functional constituency seats and 30 geographical constituency seats.³⁶

The nature of Legco's functional constituency seats were altered in two ways following the handover. First, the nine functional constituencies created under Patten were replaced with nine new seats designed according to traditional principles, and the majority of the Hong Kong people, therefore, were again excluded from partaking in the functional constituency elections.³⁷ Second, the use of corporate electorates was reinstated, and thus the majority of the functional constituencies were altered to consist of corporate rather than individual memberships.³⁸ As the following two sections demonstrate, the nature of the seats returned through the traditional system of functional constituencies allowed the executive authorities during the second term to sideline the geographical constituency seats in the legislative process.

³⁴ Id.

³⁵ See Art 68, Basic Law.

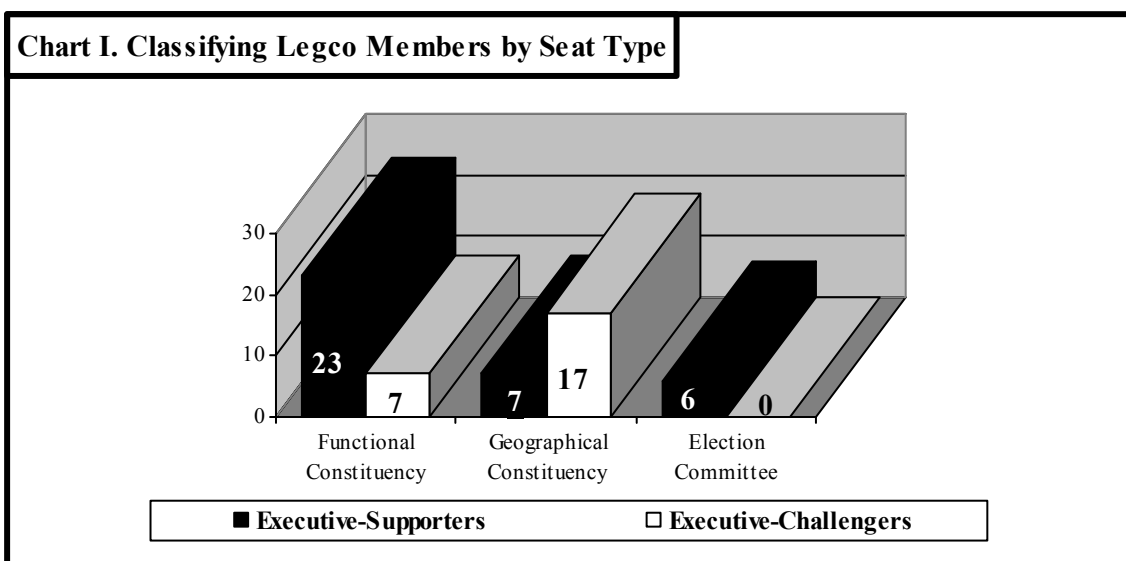
³⁶ Id.

³⁷ See A. Conner, "Human Rights in Post-1997 Hong Kong: Still a Key Role for International Law?" 22 S. Ill. U. L. J. 307 (1998) at 315, noting that the electorate for the functional constituency seats was reduced from 2.7 million voters under the 1995 electoral system to 180,000 voters under the 1998 election. See also *supra* note 10 at 70 fn 151, noting that the new functional constituencies were: sports, performing arts, culture and publication; imports and exports; textiles and garments; wholesale and retail; information technology; insurance; transport; agriculture and fisheries; and an additional labour seat.

³⁸ See S. Mosher, "Seats of Power" *Far Eastern Economic Review* (August 29, 1991) 18-19.

III. CLASSIFYING LEGCO MEMBERS: EXECUTIVE-SUPPORTERS AND EXECUTIVE-CHALLENGERS

Legco members often are classified according to their political affiliation. For the purposes of this paper, the underlying system of classification will divide members into two groups based on voting records: executive-supporters and executive-challengers. Executive-supporters are defined here as those who always, or almost always, side with the executive authorities, and executive-challengers are defined as those who are more likely to challenge the executive authorities' position.



Member classification is determined by analyzing CSA division votes.³⁹ Voting records of bills are not included because third readings sometimes can be approached with a “better-this-than-nothing” mentality, where members, when faced with a need to promulgate a law, will sacrifice any misgivings with the content of the bill to ensure that legislation is completed. Voting for an executive-moved CSA is classified as siding with the executive authorities, as is voting for a CSA moved by an executive-supporter.⁴⁰ Voting for a CSA moved by an executive-challenger is

³⁹ The term ‘division vote’ refers to those votes in which members are required to cast their individual votes. A member may claim a division after an initial showing of hands indicates that a majority has not obviously been reached, or if a majority has obviously been reached but the member wishes the question to go on record as resulting in a division vote.

⁴⁰ Only one division vote CSA was moved by an executive-supporter during the second term. As would be expected, the majority of executive-supporters voted in favor and executive-challengers voted against. Subjected to the bicameral voting system, the CSA was negated by the combination of the geographical constituency and electoral commission seats. Interestingly, had the executive authorities moved the CSA rather than the member, it would not have been subject to the bicameral voting

classified as challenging the executive authorities' position. Because not all members unanimously side with or challenge the executive authorities, a line must be drawn somewhere other than at 100% versus 0%. This paper will draw the line at 95%, with members siding with the executive authorities in at least 95% of votes considered executive-supporters, and all others considered executive-challengers. Using a 95% division line allows for members who are willing to challenge the executive authorities at least on several occasions, though not often, to still be considered executive-challengers and those who side with the executive authorities 24 out of 25 times, for example, to be considered executive-supporters.

Appendix I shows the individual members' voting records on CSA votes for the second term. The votes are divided between those that sided with and those that challenged the executive authorities. The analysis indicates that executive-supporters hold 36 of the 60 seats. Further dividing the data into the nature of the seats indicates that executive-supporters hold 23 of the 30 functional constituency seats, or 77%; 7 of the 24 geographical constituency seats, or 29%; and 6 of the 6 election committee seats, or 100% (see Chart I).

IV. LEGCO'S SECOND TERM VOTING RECORDS: BILLS AND COMMITTEE STAGE AMENDMENTS

The voting records of Legco's second term demonstrate the level of control held by the executive authorities over the legislative process. They have a perfect record for bills passed,⁴¹ and an almost-perfect record for CSA division votes. Executive-challengers, on the other hand, more often than not agree with the executive authorities' position, but when they disagree their lack of power dictates that it ultimately does not matter – the executive authorities can not be challenged under the current system. Furthermore, the executive authorities are free to ignore the executive-challengers in the legislative process that takes place before a bill is introduced.

A glance at the voting records on bills shows that a total of 110 bills were passed in Legco's second term (101 moved by the executive authorities), not one was

system and thus would have passed – this may explain why it was the last division vote CSA to be moved by an executive-supporter.

⁴¹ The “perfect record” does not include bills withdrawn or postponed. *See infra* note 42.

negated, and only one was deferred.⁴² Of the 110 bills passed, only 11, or 10%, resulted in a third reading division vote. While this low percentage might partially be due to the better-this-than-nothing mentality, it nonetheless indicates an underlying characteristic of executive-challengers: to be a executive-challenger does not mean to eternally oppose the executive authorities on all issues.

Chart II. Legco Second Term CSAs					
	Division Vote Not Required		Division Vote Required		Total Moved
	Passed	Negatived	Passed	Negatived	
Executive Authorities	156	1	15	1	173
Supporters	5	0	0	1	6
Challengers	2	2	0	31	35
TOTAL	163	3	15	33	214

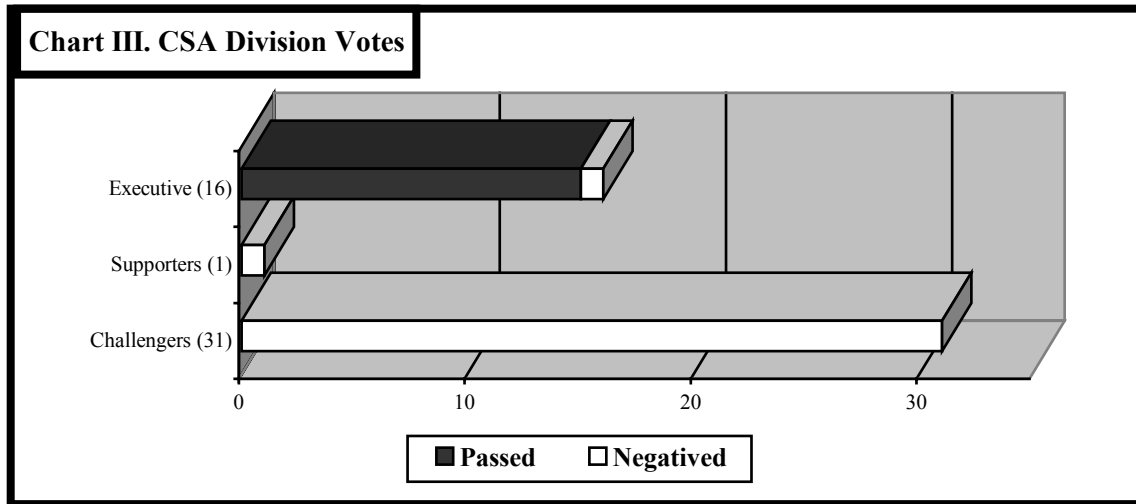
While the executive authorities’ passage rate of bills is high, a more accurate determination of whether it has a monopoly on legislative authority is one based upon a survey of CSAs. Not only is the better-this-than-nothing mentality taken out of the equation, but members are not as restricted on the type of CSAs that they can move as they are for bills. Members are not allowed to introduce bills that relate to public expenditure, political structure or government operations, and bills that relate to government policy require the Chief Executive’s consent.⁴³ The only restriction on CSAs under the Basic Law is that members obtain the Chief Executive’s consent for those that would “dispose of or charge any part of the revenue or other public moneys.”⁴⁴ While the Standing Committee’s recent rulings further restrict the type of

⁴² The deferred bill was the *Industrial Training (Construction Industry) (Amendment) Bill 2001*. In addition, the executive authorities confirmed that two bills would not be completed by the end of the current legislative session, namely the *National Security (Legislative Provisions) Bill* and the *Boundary Facilities Improvement Tax Bill*. The chronicle of second term bill legislation is available at: <http://www.legco.gov.hk/general/english/bills/billo304.htm#0304>.

⁴³ See *supra* note 1.

⁴⁴ See Sec 31(1) and 57(6), Legco Rules of Procedure.

CSAs that members can introduce (see discussion in Part IV below), the decision was promulgated toward the end of Legco’s second term and thus does not effect the voting records analyzed in this study.



Turning to the voting records, of the 214 CSAs moved in the second term, 178 were passed and 36 were negatived. The executive authorities moved 173 CSAs, 171 of which were passed. Executive-challengers moved 35 CSAs, only 2 of which were passed (see Chart II).

To further strengthen the accuracy of this survey, it can be restricted to CSAs that resulted in division votes, thus removing the numerous technical amendments that received unanimous support. During the second term, 48 CSAs resulted in division votes. Of these 48, the executive authorities moved 16 and passed 15. Executive-challengers moved 31 and passed none (see Chart III).

The data extracted from these voting records demonstrates the executive authorities’ monopoly on legislative power in the HKSAR. Not one executive-moved bill was negatived during Legco’s second term, and the executive authorities won 96% (46 out of 48) CSA votes. The extent of the executive authorities’ power over the legislative process is further demonstrated when one considers that 71% of the geographical seats are executive-challengers (as indicated in Chart I above). With the support that the executive authorities enjoy in the functional constituency seats, the members returned by universal suffrage are virtually ignored in the legislative process.

V. THE STANDING COMMITTEE'S RULINGS ON LEGISLATIVE PROCEDURES: ENTRENCHING THE EXECUTIVE AUTHORITIES' MONOPOLY

April of 2004 was a busy month for Hong Kong's democratic development. On April 6, amidst a heated debate on how the 2007 Chief Executive and 2008 Legco elections would take shape, the Standing Committee promulgated its "Electoral Reform Interpretation," specifying the steps toward electoral reform.⁴⁵ The central conclusion of the interpretation is that the Standing Committee initiates the procedure for electoral reform by first determining whether reform is needed. If the Standing Committee decides that electoral reform is needed, then and only then may the reform procedures continue under the direction of the Hong Kong government. Twenty days after the interpretation, the Standing Committee's "Electoral Reform Decision" stated that electoral reform was not needed for the 2007 and 2008 elections.⁴⁶

This was a blow to Hong Kong's democratic aspirations. The position of Chief Executive will continue to lack a popular mandate, and the functional constituencies will continue to occupy half of the Legco seats. Universal suffrage, it seems, will have to wait at least another eight years.

The Standing Committee's rulings affect more than the timetable for electoral reform. Two legislative procedures not governed by the Basic Law also fell into the Standing Committee's line of fire. First, "Electoral Reform Interpretation" holds that Legco members no longer can move CSAs on bills that relate to public expenditure, political structure or the operation of the government, yet such a requirement is not found in the Basic Law.⁴⁷ Second, the "Electoral Reform Decision" holds that legislative voting procedures shall remain unchanged, yet not all such procedures are required by the Basic Law.⁴⁸ The following two sections speak to how these two procedural changes not only contravene Basic Law Article 75 but also entrench the executive authorities' monopoly on legislative power for the next two Legco terms.

⁴⁵ See *supra* note 5.

⁴⁶ See *supra* note 4.

⁴⁷ See *infra* note 51 and accompanying text.

⁴⁸ See *infra* notes 54 and 55 and accompanying texts.

A. *Restricting Member-moved Committee Stage Amendments to Non-political Bills*

With its “Electoral Reform Interpretation,” the Standing Committee brought to a conclusion the long-running debate about the type of bills for which members are permitted to move CSAs. The conservative ruling will severely diminish the scope of Legco’s capabilities, thus granting the executive authorities an even greater control over the legislative process.

The debate has centered on the extent of restrictions on member-moved CSAs under the Basic Law. Article 74 of the Basic Law states:

Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.⁴⁹

The executive authorities have argued that although Article 74 does not explicitly mention CSAs, the restrictions discussed therein nonetheless refer to both bills and their accompanying CSAs.⁵⁰ Legco members, on the other hand, have unanimously held that Article 74 refers exclusively to bills because other sections of the Basic Law distinguish between the terms “bill” and “CSA,” and therefore it would be inconsistent to equate the two terms in this article.⁵¹ Legco’s position is reflected in the Legco Rules of Procedure, under which the only restriction on member-moved CSAs covers those that “dispose of or charge any part of the revenue or other public moneys of Hong Kong.”⁵²

⁴⁹ See Art 74, Basic Law.

⁵⁰ See, for example, Legco Committee on Rules of Procedure, “Procedure in dealing with the introduction of Members’ Bills as provided in Article 74 of the Basic Law and the interpretation of Article 48(10) of the Basic Law,” Paper for the House Committee meeting on 24 July 1998, LC Paper No. CB(1) 45/98-99. The Solicitor General argued that interpreting Article 74 to not cover member-moved CSAs “would create the anomaly that Members might achieve by way of a CSA that which they could not attain by way of a bill.”

⁵¹ This debate materialized during committee stage procedures during the Legislative Council (Amendment) Bill 1999, available at: <http://legco.gov.hk/yr98-99/english/counmtg/hansard/99714fe1.pdf>. The government argued that the introduction of CSAs by members would violate Article 74. Yeung Sum was among the members who argued otherwise, saying that “the government’s remarks have neglected the unanimous view of [Legco], that is, Article 74 of the Basic Law applies only to government motions but not [CSAs].”

⁵² See *supra* note 44.

Analysis of voting records reveals that the executive authorities' interpretation of Article 74 did not prevail during Legco's second term. A number of the bills that were subject to the 41 member-moved CSAs can be seen as relating to either political structure or the operation of the government. Two of the member-moved CSAs that passed were moved on bills introduced by the executive authorities, namely the Anti-Terrorism Bill and the Interest on Arrears of Maintenance Bill. The Anti-Terrorism Bill was designed to curb terrorist activities, and the Interest on Arrears of Maintenance Bill addressed judicial procedure. Even a strict reading of the term "operation of the government" would encompass these two bills. Interpreting the restrictions of Article 74 to include CSAs would bring into question the constitutionality of these bills.

Even though Legco members have repeatedly moved CSAs on bills relating to either political structure or the operation of the government, the "Electoral Reform Interpretation" has deemed the practice a violation of Article 74:

The bills on the amendments to the method for selecting the Chief Executive and the method for forming [Legco] and its procedures for voting on bills and motions *and the proposed amendments to such bills* shall be introduced by the [Executive Authorities] of the Hong Kong Special Administrative Region into [Legco] (emphasis added).⁵³

Annex II of the Basic Law, which discusses Legco election and legislative voting procedures, does not address who may or may not move CSAs on election amendment bills. The Standing Committee's ruling, therefore, must be read as an interpretation of Article 74, the only Basic Law provision that addresses legislative procedural restrictions.

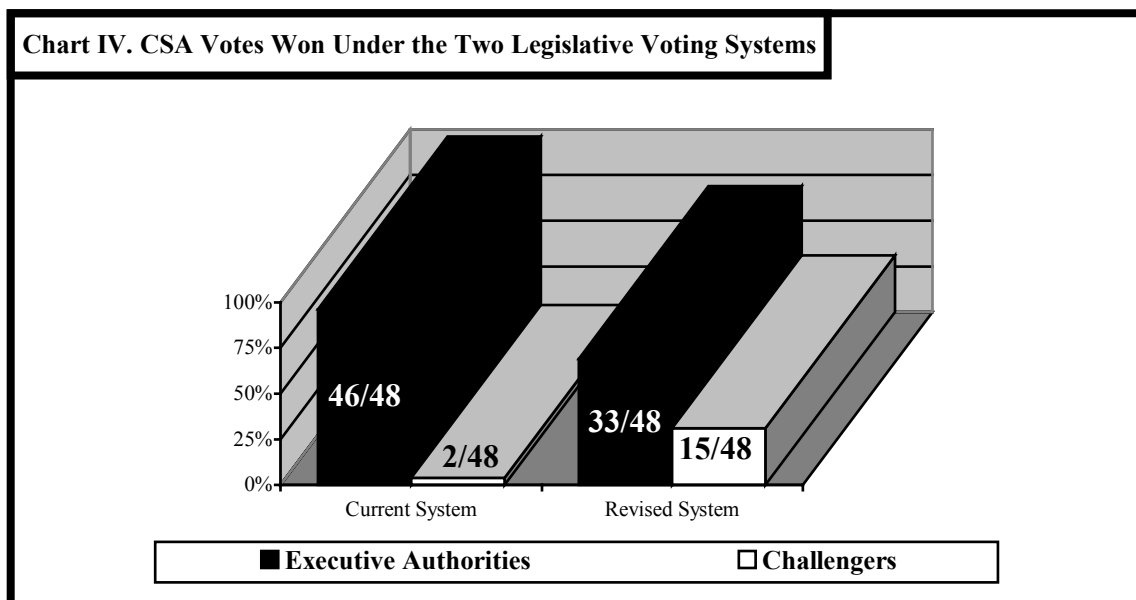
B. *Confining Executive-moved Committee Stage Amendments to a Unicameral Vote*

This section turns to how the legislative process would be affected if executive-moved CSAs were subject to the bicameral voting system. Focus is placed on this particular process because, of the four types of votes involved in bill legislation, it is

⁵³ See *supra* note 5.

the only one not prescribed by the Basic Law. The Basic Law requires that executive-moved CSAs be subject to the unicameral system; member-moved bills be subject to the bicameral system; and member-moved CSAs be subject to the bicameral system.⁵⁴ The rule governing executive-moved CSAs, however, is not found in the Basic Law but only the Legco Rules of Procedure.⁵⁵ The first reason for focusing on this particular process, therefore, is that were it not for the “Electoral Reform Decision” the rule could have been changed without the need to amend the Basic Law or one of its annexes.

The second reason involves the potential balancing effect that amending the rule would have had on the legislative process. As discussed above, the Legco seats returned by universal suffrage, of which executive-challengers hold 71%, are left powerless in the face of the executive authorities’ domination of the legislative process. This section demonstrates that subjecting executive-moved CSAs to a bicameral vote would grant the geographical constituencies the ability to negative an executive-moved CSA without the need for support from the functional constituencies. More importantly and perhaps more likely, the executive authorities would be forced to take into consideration positions held by executive-challengers in the negotiations that precede the committee stage votes.



⁵⁴ See Annex II, Sec II, Basic Law.

⁵⁵ See *supra* note 2.

One method of determining how a bicameral system would have changed the outcome of executive-moved CSAs is to simply apply the proposed rule to the voting records. As Chart IV demonstrates, 13 of the 48 CSA division votes would have had different results under the revised system, with executive-challengers winning 14 of the executive-moved CSA division votes rather than just one. In other words, executive-challengers would have won 31% of the total CSA division votes, rather than the mere 4% under the current system. For a comparison of how the votes fared under the two systems, see Appendix II.

The data presented in Chart IV and Appendix II represents the outcome if the voting system had suddenly and unexpectedly been changed to bicameral at the time of the votes. While such a scenario is not realistic, the analysis is nonetheless helpful in that it demonstrates the increased power of the executive-challengers if executive-moved CSAs had been subject to the bicameral system. The effect likely would have been seen in the negotiation period leading up to the vote rather than the outcome of the vote itself. Facing a potential negated vote, the executive authorities would have been compelled to negotiate with the executive-challengers.

The Standing Committee, however, precluded the possibility of such a procedural change by stating that “[t]he procedures for voting on bills and motions in [Legco] are to remain unchanged.”⁵⁶ As discussed above, the Basic Law does not prescribe the type of vote applied to executive-moved CSAs. Basic Law Article 75, however, states that “[t]he rules of procedure of [Legco] shall be made by the [Legco] on its own, provided that they do not contravene this Law.”⁵⁷ The Standing Committee ruling, therefore, acts as an exception to Article 75, and raises the question of how much control Legco has over its rules of procedure.

The ruling also diminishes any hopes of granting the geographical constituency members more legislative power. Subject to a unicameral vote, the executive authorities can continue to rely on the support of the majority of functional constituency members and ignore the positions of the majority of geographical constituency members. With a strong foundation of executive-supporters in the functional constituency seats, the executive authorities can continue legislating

⁵⁶ See *supra* note 4.

⁵⁷ See Art 75, Basic Law, available at: http://www.info.gov.hk/basic_law/fulltext/index.htm.

without oversight. The only outcome that would provide a check on the executive authorities' legislation is if executive-challengers secure a majority of Legco seats. Even this scenario, however, does not increase the legislative power of the geographical constituencies as an institution. In order to secure a majority, executive-challengers must win at least some functional constituency seats – unanimous support among seats returned by universal suffrage is not enough to curb the executive authorities' monopoly.

While the chances of such a procedural change being passed in a Legco controlled by executive-supporters might have been low, it was nonetheless possible. Why would executive-supporters have supported this change? First, it would have increased the legitimacy of the executive authorities. Had the executive authorities themselves proposed that their CSAs be subject to a bicameral vote, their legitimacy would have increased in the eyes of the citizens. Second, the underlying policies of the executive authorities would have continued to be safeguarded from the executive-challengers in the original drafts of the bills. By enhancing the focus on the content of a bill during the preliminary drafting process, the executive authorities could theoretically prevent potential CSAs by including such amendments in the original draft. Facing a bicameral vote for CSAs, therefore, would increase the quality of the executive authorities' bill drafting.

VI. CONCLUSION

The above discussion focuses on the voting records of CSAs in Legco's second term to demonstrate the extent of the executive authorities' legislative power, as well as the lack of legislative power held by the geographical constituency seats. One may argue that the CSA voting records do not represent the complete legislative process, for indeed the lobbying that leads up to the committee stage dictate the direction that a bill's content will take.⁵⁸ The fact that the executive authorities can pass legislation through Legco without the support of the executive-challengers, however, means that the executive-challengers - who hold more than 70% of the geographical constituency seats – also have no power during the negotiation phase.

This imbalance of power is one of the key problems with the current legislative system. The executive authorities can be confident of passing bills and CSAs no matter what the content, except in the most extreme cases. An extreme case presented itself once during the second term when 500,000 people protested against the content of the National Security (Legislative Provisions) Bill. The executive authorities decided to postpone the second reading of the Bill, demonstrating that it was not completely un-checked. But should Hong Kong be satisfied with a system that has as its only form of legislative oversight the act of citizens taking to the streets in protest?

The public's strong reaction to the National Security Bill was due in part to the fact that the executive authorities had placed the Bill on a rushed schedule yet refused to issue a white paper. While executive-challengers had little chance of passing CSAs under the bicameral system, under the revised voting system discussed above the executive authorities would also have faced difficulties passing its own CSAs and thus would have had greater incentive to issue a white paper. Subjecting the executive authorities' CSAs to the bicameral system would have removed the un-checked ability to correct any drafting errors by means of CSAs. Because they would have needed the support of executive-challengers for any proposed discrete amendments, the executive authorities would also have had a greater incentive to negotiate with executive-challengers over the content of the entire bill.

⁵⁸ See, for example, Ng Hon-wah, "The larger story behind voting patterns in Legco," *South China Morning Post* (April 26, 2004). Please note that some of the conclusions that Ng referred to as being a product of this study were in fact interpretations of this study as drawn by a reporter.

With its recent rulings on legislative procedures, the Standing Committee has ensured that the executive authorities' current monopoly will continue into the future. The only possibility of a check on the executive authorities' legislation under the pre-rulings legislative voting procedures would have come if executive-challengers secured a majority of Legco seats. With the new rule governing the type of CSAs that Legco members can move, however, the executive authorities' monopoly can continue even under a Legco controlled by executive-challengers. Members can no longer move CSAs that relate to public expenditure, political structure or the operation of the government, which can be interpreted to encompass a wide range of legislation. So long as the executive authorities are careful in the drafting of their bills, the only way for members to challenge legislation is in the bills themselves rather than the content of the bills. Will the better-this-than-nothing mentality of legislators endure, or will the Standing Committee's rulings result in an inoperable government? Or will the people of Hong Kong have to spend more Sunday afternoons taking to the streets in protest? No matter what happens, Hong Kong is no longer engaged in a gradual and orderly progression toward universal suffrage.

Appendix I. Classifying Legco Members into Executive-Supporters and Executive-Challengers

	Name	Votes with Govt	Votes against Govt	Total Votes	% Votes Supporting Govt	Member Type (E S / E-C)
	Ting K.	44	1	45	98%	E-S
	Tien J.	24	1	25	96%	E-S
	Ho R.	47	1	48	98%	E-S
	Li E.	38	0	38	100%	E-S
	Li D.	7	6	13	54%	E-C
	Lui M.W.	44	0	44	100%	E-S
	Ng M.	7	37	44	16%	E-C
	Chow S.	41	1	42	98%	E-S
	Cheung M.K.	2	45	47	4%	E-C
	Hui C.C.	26	0	26	100%	E-S
	Chan K.K.	41	1	42	98%	E-S
	Chan B.	26	1	27	96%	E-S
	Leung S.	38	1	39	97%	E-S
FC	Sin C.K.	2	41	43	5%	E-C
	Wong P.	44	0	44	100%	E-S
	Wong Y.K.	44	1	45	98%	E-S
	Young H.	37	0	37	100%	E-S
	Lau W.F.	37	0	37	100%	E-S
	Lau M.	46	2	48	96%	E-S
	Fok T.	28	0	28	100%	E-S
	Law C.K.	2	45	47	4%	E-C
	Shek A.	28	0	28	100%	E-S
	Li F.Y.	27	11	38	71%	E-C
	Wu H.	47	0	47	100%	E-S
	Cheung T.	36	1	37	97%	E-S
	Mak M.	1	42	43	2%	E-C
	Leung F.W.	32	0	32	100%	E-S
	Lo W.L.	39	1	40	98%	E-S
	Ip K.H.	43	1	44	98%	E-S
	Lau P.C.	37	1	38	97%	E-S

	Name	Votes with Govt	Votes against Govt	Total Votes	% Votes Supporting Govt	Member Type (E S / E-C)
	Ho C.	1	40	41	2%	E-C
	Ho A.	2	44	46	4%	E-C
	Lee C.Y.	1	35	36	3%	E-C
	Lee M.	1	33	34	3%	E-C
	Li F.	2	44	46	4%	E-C
	To J.	2	40	42	5%	E-C
	Chan Y.H.	26	0	26	100%	E-S
	Chan K.L.	41	1	42	98%	E-S
	Leung Y.C.	0	28	28	0%	E-C
	Wong A.	22	5	27	81%	E-C
GC	Tsang Y.S.	44	1	45	98%	E-S
	Yeung S.	2	44	46	4%	E-C
	Lau C.S.	2	24	26	8%	E-C
	Lau K.W.	45	0	45	100%	E-S
	Lau E.	1	39	40	3%	E-C
	Choy S.Y.	30	1	31	97%	E-S
	Cheng A.	2	44	46	4%	E-C
	Szeto W.	2	45	47	4%	E-C
	Tam Y.C.	42	1	43	98%	E-S
	Tang S.T.	34	0	34	100%	E-S
	Chan A.	2	39	41	5%	E-C
	Wong S.C.	2	39	41	5%	E-C
	Fung F.	8	25	33	24%	E-C
	Eu A.	5	33	38	13%	E-C

	Name	Votes with Govt	Votes against Govt	Total Votes	% Votes Supporting Govt	Member Type (E S / E-C)
	Chu D.	36	0	36	100%	E-S
	Ng L.S.	47	0	47	100%	E-S
EC	Yeung Y.C.	39	1	40	98%	E-S
	Lau A.	41	0	41	100%	E-S
	Ng / Ma	39	0	39	100%	E-S

Key	FC = Functional Constituencies	E-S = Executive-Supporters
	GC = Geographical Constituencies	E-C = Executive-Challengers
	EC = Election Committee	

Appendix II. Executive-moved Division Vote CSAs as Subjected to the Two Legislative Voting Systems				
Bill Under Consideration	Date	Original Vote - Unicameral	Vote if Bicameral	Result if Bicameral
Immigration (Amendment) Bill 2000	27/6/2001	Passed 30-20-0	FC - pass: 19-5-0 GC/EC - neg: 11-15-0	Negated
Chief Executive Election Bill	11/7/2001	Passed 35-18-0	FC - pass: 23-5-0 GC/EC - neg: 11-13-0	Negated
Securities and Futures Bill	13/3/2002	Passed 30-20-0	FC - pass: 19-5-0 GC/EC - neg: 11-15-0	Negated
United Nations (Anti-Terrorism Measures) Bill	12/7/2002	Passed 31-17-0	FC - pass: 21-5-0 GC/EC - neg: 10-12-0	Negated
		Passed 29-16-0	FC - pass: 20-5-0 GC/EC - neg: 9-11-0	Negated
		Passed 29-20-0	FC - pass: 17-6-0 GC/EC - neg: 12-14-0	Negated
		Negated 20-19-0		Negated
		Passed 33-20-0	FC - pass: 20-6-0 GC/EC - neg: 13-14-0	Negated
		Passed 42-10-0	FC - pass: 22-4-0 GC/EC - neg: 20-6-0	Passed
		Passed 33-20-0	FC - pass: 20-6-0 GC/EC - neg: 13-14-0	Negated
		Passed 34-6-12	FC - pass: 19-2-4 GC/EC - neg: 15-4-8	Passed
		Passed 32-21-0	FC - pass: 19-7-0 GC/EC - neg: 13-14-0	Negated
		Passed 32-17-0	FC - pass: 20-5-0 GC/EC - neg: 12-12-0	Negated
Registration of Persons (Amendment) Bill 2001	19/3/2003	Passed 27-17-1	FC - pass: 16-5-1 GC/EC - neg: 11-12-0	Negated
Occupational Deafness (Compensation) (Amendment) Bill 2002	7/5/2003	Passed 27-15-7	FC - pass: 19-3-2 GC/EC - neg: 8-12-5	Negated
Betting Duty (Amendment) Bill 2003	10/7/2003	Passed 29-14-7	FC - pass: 22-3-1 GC/EC - neg: 7-11-6	Negated

**Occasional Papers published
by the Centre of Comparative and Public Law**
Available at www.hku.hk/ccpl/pub/occasionalpapers/index.html

- No. 1: Andrew Byrnes, “The Convention on the Elimination of All Forms of Discrimination against Women: Implications for Hong Kong”, May 1999.
- No. 2: Moana Erickson, “Implementing the CEDAW Convention in Hong Kong: Gender Policy Analysis”, June 1999.
- No. 3: Robyn Emerton: “Trafficking of Women into Hong Kong for the Purpose of Prostitution: Preliminary Research Findings”, February 2001.
- No. 4: Carole J. Petersen: “Sexual Harassment in the Workplace”, June 2002.
- No. 5: Roda Mushkat: “‘Fair Trial’ As A Precondition To Rendition: An International Legal Perspective”, July 2002.
- No. 6: Carole Petersen and Kelley Loper: “Submission on The Proposals to Implement Article 23 of the Basic Law”, December 2002.
- No. 7: Simon N.M. Young: “Hong Kong’s Anti-Terrorism Measures Under Fire”, January 2003.
- No. 8: Robyn Emerton and Carole Petersen: “Migrant Nightclub/Escort Workers in Hong Kong: An Analysis of Possible Human Rights Abuses”, April 2003.
- No. 9: Fu Hualing, Kelley Loper, Carole Petersen, and Simon N.M. Young: “Group Submission to the Legislative Council, the Department of Justice, and the Security Bureau of the Hong Kong SAR on the National Security (Legislative Provisions) Bill”, May 2003.
- No. 10: Simon N.M. Young, “Knock, knock. Who’s there?’ - Warrantless Searches for Article 23 Offences”, June 2003.
- No. 11: Johannes Chan, “Unauthorized and Damaging Disclosure of Protected Information: A Comment on the National Security (Legislative Provisions) Bill 2003”, July 2003.
- No.12: Kelly Loper, “Race and Equality: A Study of Ethnic Minorities in Hong Kong’s Education System”, February 2004