

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 1978 OF 2023

BETWEEN

KWOK CHEUK KIN Applicant

and

CHIEF EXECUTIVE IN COUNCIL Putative
Respondent

and

SECRETARY FOR JUSTICE 1st Putative
Interested Party

SECRETARY FOR CONSTITUTIONAL 2nd Putative
AND MAINLAND AFFAIRS Interested Party

Before: Hon Coleman J in Court
Date of Hearing: 30 November 2023
Date of Judgment: 1 December 2023

J U D G M E N T

A. Introduction

A.1 The Nomination Requirement

1. Henry Ford is supposed to have said, “You can choose any colour you like – so long as it is black”. It may be suggested that, whilst firmly disagreeing about the colour, the HKSAR Government approves of the underlying sentiment as to choice.

2. At least, that is part of the argument in effect raised by the Applicant on his intended challenge made in these proceedings to the legislative provision containing a particular new nomination requirement (“Nomination Requirement”) applicable to the forthcoming District Council (“DC”) Ordinary Election.

3. Prior to recent legislative amendments to the District Councils Ordinance Cap 547 (“DCO”), a person seeking nomination as a candidate in respect of any constituency should be subscribed (i.e. nominated) by 10 other persons, each being an elector registered in respect of the relevant constituency. In other words, DC elections were practically open to all Hong Kong permanent residents who could gather support from 10 other electors in the constituency in which they wished to stand for election.

4. Following legislative amendments made this year, and the introduction of a new section 5A of the DCO combined with section 7(2)(b) of the District Councils (Subscribers and Election Deposit for Nomination) Regulation Cap 547A (“Nomination Regulation”), a person seeking nomination in respect of a District Council geographical constituency (“DCGC”) is required to obtain nomination – i.e. the

Nomination Requirement – from: (1) not less than 50, but not more than 100, electors for the DCGC, and (2) not less than 3, but not more than 6, members of each of the three District Committees (“3Cs”) in the District.

5. There can be no real dispute that the Nomination Requirement has made it at least significantly more difficult for a person to stand for election as a District Councillor to represent a DCGC. Not least in light of what has happened since, there is room for understanding the views of some persons that for all practical purposes it may have made it impossible.

A.2 *The Battle Lines*

6. Article 26 of the Basic Law (“BL26”) provides:

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

7. Article 21 of the Hong Kong Bill of Rights (“BOR21”), headed ‘Right to participate in public life’, provides:

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

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electorate;
- (c) to have access, on general terms of equality, to public service in Hong Kong.

8. The Applicant seeks leave to apply for judicial review, and on the substantive application for judicial review he seeks a declaration that the new provision embodying the Nomination Requirement is inconsistent with BL26 and/or BOR21, and therefore unconstitutional, null, void and of no effect. The core assertions are that BL26 and BOR21 are engaged and the Nomination Requirement cannot survive a proportionality analysis, because it is a disproportionate interference with and/or an unreasonable restriction upon the fundamental rights created by BL26 and BOR21.

9. The Putative Respondent (“CE-in-C”) and putative interested parties (“SJ” and “SCMA”) (all together, “Government”) oppose the application on various bases, including that:

- (1) the Applicant lacks the necessary locus or standing to bring this application (and has been less than frank in his response to the challenge made on that point);
- (2) the application was made only after undue delay, and there is no good reason to extend the time for making it;
- (3) the Nomination Requirement is one which has been specifically endorsed by organs of the Central People’s Government (“CPG”);
- (4) neither BL26 nor BOR21 are engaged; and
- (5) even if BL26 and/or BOR21 are engaged, the Nomination Requirement is consistent with the Basic Law and satisfies the proportionality analysis.

A.3 *The Hearing*

10. The DC Elections are due to be held on 10 December 2023, but these proceedings were commenced only by a Form 86 dated 6 November 2023. In those circumstances, I gave tight timetabling directions to bring this matter to a ‘rolled-up’ hearing of (1) the application for leave to apply for judicial review, and (2) if appropriate, the substantive hearing of the application for judicial review. The hearing was fixed for 30 November 2023.

11. That hearing date was put in jeopardy by the Applicant’s application for legal aid made on 9 November 2023, which triggered an automatic 42-day stay of the proceedings, which would have expired only after the DC Elections would have taken place. On the same date, I lifted the stay with immediate effect, so that the hearing could go ahead.

12. But the hearing was again put in doubt when, despite having solicitors acting for him on the record, the Applicant wrote personally to the Court expressing some equivocation as to whether he should proceed with the application or withdraw it. But, once his solicitors were apprised of that letter, they took instructions from the Applicant and wrote to the Court to confirm that he would continue to pursue the application.

13. The hearing has proceeded on the basis of an Amended Form 86 dated 23 November 2023, where the subject matter of the challenge has remained unchanged. In so far as it may be necessary for me formally to grant permission for the amendment, I shall grant it.

14. The Applicant has been represented by Mr Anson Wong Yu Yat and Mr Jonathan Ip of Counsel. The CE-in-C has been represented by Mr Jenkin Suen SC leading Mr Michael Lok of Counsel. The written and oral submissions presented by both teams of Counsel were of a very high standard, not least against the tight timetable for bringing this matter to an effective hearing.

15. The case was fully argued on all points. At the end of the hearing, I reserved my decision until the next day. This is my Judgment.

16. For persons who do not know their DCGCs from their DCCs or DFCCs or DFSCs etc, I have appended to this Judgment a glossary of terms which I hope will assist with navigating the alphabetical seas of acronyms adopted.

B. Historical Context and Legislative Framework

B.1 District Organizations

17. As already stated, the impugned Nomination Requirement is to be found in section 7(2)(b) of the Nomination Regulation. But, to understand the nature of the challenge made in these proceedings, it is helpful to view the Nomination Requirement in its historical context and legislative framework. Mr Wong and Mr Suen have both traversed that context, albeit with different points of emphasis.

18. The starting point in the period since the resumption of sovereignty in 1997 must be Articles 97 and 98 of the Basic Law (“BL 97” and “BL 98” respectively). Those provisions are as follows:

A		A
B	Article 97	B
C	District organisations which are not organs of political power	C
D	may be established in the Hong Kong Special Administrative	D
E	Region, to be consulted by the government of the Region on	E
F	district administration or other affairs, or to be responsible for	F
G	providing services in such fields as culture, recreation and	G
H	environmental sanitation.	H
I	Article 98	I
J	The powers and functions of the district organisations and the	J
K	method of their formation shall be prescribed by law.	K
L	19. As will be seen below, those provisions may identify not just	L
M	the starting point but may also inform the endpoint.	M
N	20. However, local district advisory bodies in Hong Kong date	N
O	back at least to the late 1970s, when they were first established in the	O
P	New Territories in 1977.	P
Q	21. In the 1980s, there were eight District Advisory Boards – for	Q
R	which I shall avoid the offered definition of “DAB” for obvious reasons –	R
S	one each to cover all Districts of the New Territories. Their terms of	S
T	reference were:	T
U	(1) to advise on matters affecting the well-being of the	U
V	inhabitants of the district;	V
	(2) to advise on the provision and the use of public facilities	
	within the district, in particular:	
	(a) on the adequacy and priorities of the Public Works	
	Programme for the district;	
	(b) on the use of funds available for expenditure within	
	the district in the Local Public Works Vote;	

(3) to undertake, using the public funds made available for the purpose:

(a) minor environmental improvements within the district;

(b) the promotion of recreation and cultural activities within the district.

22. The District Administration Scheme was introduced in 1982, and District Boards (“DBs”) with an element of election were set up in the 18 districts of Hong Kong. The purposes of that scheme were, amongst other things, to ensure the Government would be responsive to district needs and problems, as well as more effective coordination of government activities in the provision of services at district level. The DBs ceased on 30 June 1997, upon the establishment of the Hong Kong Special Administrative Region (“HKSAR”).

23. However, as the district organisations under BL 97 were not immediately established on 1 July 1997, provisional district organisations (“Provisional DBs”) were set up to fill the resultant vacuum.

24. Subsequently, a DC has been established in each of the 18 districts of the HKSAR, with effect from 1 January 2000. The sixth term of the DCs ends on 31 December 2023, and the forthcoming DC Elections are part of the process of establishing the DCs for the seventh term.

B.2 The Three District Committees (“3Cs”)

25. Alongside the DCs serving as the major advisory body in Districts, there have been other district advisory committees, addressing issues of local district concern and organising various publicity campaigns and community building activities, to promote greater public awareness of specific themes, including crime prevention and fire safety.

26. For present purposes the relevant three District Committees – i.e. the 3Cs – are: (1) the District Fight Crime Committee (“DFCC”); (2) the District Fire Safety Committee (“DFSC”) and the Area Committee (“AC”).

27. DFCCs were established in 1976, mainly for the purpose of promoting public awareness of the Fight Crime Campaign through organising activities at the district level. There is one DFCC in each District, and DFCCs are the only committees directly concerned with law and order issues in each of the Districts. Their terms of reference include:

- (1) monitoring the state of crime and law enforcement in the district;
- (2) coordinating district campaign activities;
- (3) promoting good relationship between the Police and members of the public; and
- (4) advising the Fight Crime Committee on administrative and community involvement measures to combat crime.

28. The DFSCs were established in 1998, as part of the Government’s package to promote fire safety after several tragic fire

incidents. There is one DFSC in each District, and its main objective is to enhance community involvement in promoting fire safety and building safety in private buildings. Their terms of reference include:

- (1) to enhance community involvement in promoting fire prevention and building safety;
- (2) to strengthen public education and publicity in areas of fire prevention and building safety;
- (3) to organise publicity activities in conjunction with DCs and other local bodies; and
- (4) to promote and assist in organising fire drills in cooperation with owners' corporations and owners of the buildings.

29. ACs were first formed in 1972, originally to promote participation in the Keep Hong Kong Clean Campaign and Fight Violent Crime Campaign. Over the years, ACs have evolved to become a channel for District Offices to collect public views and to act as a partner in organising community building activities. The deponent for the Government, namely the Principal Assistant Secretary for Constitutional & Mainland Affairs (3) to the CMAB ("Mr Chik") – says that after the mass resignation of members of the sixth-term DCs, ACs have taken on a more active role to provide advice to the Government and to inform the Government about the problems in their respective districts. Their terms of reference include:

- (1) to promote public participation in district affairs;
- (2) to advise and assist in the organisation of community involvement activities and the implementation of government-sponsored initiative;

- (3) to offer advice on issues of a localised nature affecting the area;
- (4) to promote a sense of community spirit among residents and local organisations in the area;
- (5) to act as a forum for the discussion of matters of public interest and to provide feedback on them; and
- (6) to support the implementation of District Administration in the area.

30. Members of the 3Cs are appointed by the Secretary for Home and Youth Affairs (“SHYA”). The appointments are made with reference to the Government’s principles in making appointments to advisory and statutory bodies, namely on the basis of the merit of individuals concerned, taking into account a candidate’s ability, expertise, experience, integrity and commitment to public service and with due regard to the functions and nature of business of the committees.

31. Mr Chik has deposed to the fact that, in the most recent appointment exercise, the SHYA received and considered nominations from District Offices and other key stakeholders in the Districts, including local organisations, NGOs, political parties, etc. Further, as the members of the 3Cs have the important responsibility of nominating candidates (see below), the Government would when appointing these members conduct reviews according to established internal procedures to ensure that all members of the 3Cs appointed are patriots with an affection for Hong Kong who will uphold the Basic Law and bear allegiance to the HKSAR. In appointing the present members, the SHYA also endeavoured to ensure the proposed appointees were patriots

A and were supportive to the good administration of the HKSAR
B Government.

C 32. On 11 March 2021, the National People's Congress ("NPC")
D promulgated its decision on improving the electoral system of the
E HKSAR (Instrument 31 to the Basic Law). It stipulates that the Election
F Committee ("EC") for the election of the Chief Executive shall be
G composed of 1,500 members from five specified sectors, the fourth of
H which comprises Legislative Council ("LegCo") members and
I representatives of district organisations. By virtue of the Improving
J Electoral System (Consolidated Amendments) Ordinance 2021, out of the
K 300 EC members under the fourth sector, the 3Cs members of Hong
L Kong and Kowloon and the New Territories shall elect 76 and 80 EC
M members respectively. By inclusion of the 3Cs members in the
N composition of the EC (which is written in Annexes I & II to the Basic
Law), the Government believes that the 3Cs have met the relevant
requirements by the standard of the NPCSC, and are entrusted with duties
to nominate and elect EC members, which will then nominate and elect
the CE as well as LegCo members.

O 33. According to Mr Chik, members of the 3Cs are appointed
P from various sectors of society, and at present approximately:

- Q (1) 42% come from NGOs and local organisations such as
R Kai-fong Associations (traditional mutual aid organisations),
S district branches of political parties and concerned groups
T for people's livelihood;
- U (2) 16% are office bearers of Owners' Corporations / Owners'
V Committees / residents associations in the districts;

(3) 8% are businessmen and committee members of district Chambers of commerce and union;

(4) 8% come from the education sector, usually school principals or vice-principals in the districts concerned;

(5) 7% come from clansman associations;

(6) the remaining comprises people representing other interests of the districts (e.g. ethnic minority representatives in districts where there are concentration of ethnic minorities) and representatives of rural committees, etc.

34. I note that the members of the current term of the 3Cs, which runs from 1 January 2023 to 31 December 2023, were appointed by the SHYA in December 2022. But, on average, the incumbent members have served on the 3Cs for more than three years but not more than six years (pursuant to the ‘Six-year Rule’, which is designed to ensure a healthy turnover of members of advisory and statutory bodies).

35. Further, most members of the 3Cs are said to have many years of previous service in the Districts, in various capacities, prior to their appointment in the 3Cs. Mr Chik deposes that nominations from 3Cs members (see below) can ensure that the elected members truly understand district affairs and can strengthen the connection between the district committees and DCs. Further, he says, as members of the 3Cs are patriots and supportive to the good administration of the HKSAR Government, it would be unlikely for a person who is not patriotic, or worse has acted against the interests of China or Hong Kong, to be in a position to obtain their subscriptions/nominations.

36. The SHYA has explained that less than 20% of the members of the 3Cs are affiliated to any political party.

B.3 Powers and Functions of DCs

37. The power and functions of the DCs were, pursuant to BL 98, established through law, originally by section 61 of the DCO, being:

- (a) to advise the Government –
 - (i) on matters affecting the well-being of the people in the District;
 - (ii) on the provision and use of public facilities and services within the District;
 - (iii) on the adequacy and priorities of Government programs for the District; and
 - (iv) on the use of public funds allocated to the District for local Public Works and community activities; and
- (b) where funds are made available for the purpose, to undertake –
 - (i) environmental improvements within the District;
 - (ii) the promotion of recreational and cultural activities within the District; and
 - (iii) community activities within the District.

38. However, as from 1 January 2024 (i.e. at the commencement of the seventh-term DCs), section 61 of the DCO shall be repealed, and the functions of the DCs shall be provided for under section 4A of the DCO, which is as follows:

The functions of a District Council of a District are –

A			A
B	(a)	to be consulted by the Government on the district affairs affecting the livelihood and living environment in the District and well-being of the people in the District;	B
C	(b)	to collect the views of the people in the District in respect of an issue specified by the Chairman of the District Council, and to submit to the Government a summary of the views collected and the suggested corresponding measures;	C
D			D
E	(c)	to establish a regular communication mechanism with the people in the District, to meet with them and listen to their views regularly;	E
F			F
G	(d)	to support, and assist in, the promotion of laws and Government policies in the District, and assist the Government in carrying out various consultation, publicity and liaison activities, such as district forum;	G
H			H
I	(e)	to assist in the smooth delivery of cultural, recreational, environmental sanitary and other services relating to the interests of the people in the District under the coordination of the Government;	I
J			J
K	(f)	to apply for funding for projects and activities relating to the functions of District Councils such as—	K
L	(i)	projects and activities for the purpose of promotion of sports, arts and culture;	L
M	(ii)	local events and celebration events; and	M
N	(iii)	greening and volunteer work;	N
O	(g)	to provide services for people in the District, such as consultation and case referral services;	O
P	(h)	to cooperate with other consultation and service organizations in the District under the coordination of the Government to achieve the best results in serving the people in the District; and	P
Q	(i)	to undertake any other matters as commissioned by the Government from time to time.	Q
R			R
S	39.	In passing, it might be noted that the “other consultation and service organisations in the District” referenced in section 4A(h) would	S
T		apparently include at least the DFCC, DFSC and AC(s), i.e. the 3Cs.	T
U			U
V			V

40. Nevertheless, despite the legislative changes, the major role of the DCs has all along been to give advice to the Government on district matters and, when the Government provides funds, to undertake specified district activities.

B.4 Previous Composition of DCs

41. The Applicant has drawn attention to the make-up of the DCs, and in particular the shift to ‘democratization’ over time, as follows:

- (1) At the beginning in 1982, elected members of the DBs made up only around 26.9% of members.
- (2) By 1994, all appointed seats were abolished and around 92.7% of DB members were elected.
- (3) During the interim arrangement of the Provisional DBs, all members serving before 1 July 1997 (i.e. mostly elected) were included, in addition to 95 additional appointees. Therefore, around 73.9% of the Provisional DBs’ members were elected.
- (4) Under the initial design put in place from January 2000, only 102 of the 519 members of all DCs were appointed, meaning the majority of members (73.7%) were elected.
- (5) In December 2011, the Government announced there would be only 68 (around 13.4%) appointed members for the fourth-term DCs, with 412 (around 81.3%) out of 507 members being elected members.
- (6) In a 2012 ‘Consultation Paper on the District Council Appointment System’, the Government proposed to abolish the DC appointment system in light of the progress of the

constitutional development and taking into account public views.

(7) In moving the District Council's (Amendment) Bill 2013, the then Secretary for Constitutional and Mainland Affairs ("SCMA") stated that the Bill aimed to abolish the appointed seats, "on which a consensus has been reached in the community", and sought to make sure that "after the passage of the Bill, a step will be taken forward in the democratization of the constitutional system in Hong Kong".

(8) In the fifth-term and sixth-term DCs formed in January 2016 and January 2020 respectively, all DC members were popularly elected by universal and equal suffrage (except for the 27 Rural Committee Chairmen).

42. As for the seventh-term DCs, their composition will significantly change as a result of the legislative amendments.

B.5 Legislative Reform

43. The problem, from the Government's standpoint amongst others, is that during the sixth-term DCs there were deviations from the DCs' major role during "the black-clad violence where they had become highly politicised and the normal advisory function has been lost" – to use the wording from the affirmation of Mr Chik.

44. As it was put at §§9 and 10 of the LegCo Brief dated 2 May 2023 on 'Improving Governance at the District Level':

9. For many years, DCs have been serving the public in accordance with the Basic Law and under the principle of mutual respect with the Government. However, the situation has drastically changed after the Sixth DC

A			A
B		Ordinarily Election. During the black clad violence,	B
C		destructive forces, including people who advocated the	C
D		so-called “independence” of Hong Kong and mutual	D
E		annihilation, and objected to our country exercising	E
F		sovereignty, joined the DCs through the DC election.	F
G		DCs, whose original functions were to serve the	G
H		districts, turned into a political battleground. Since	H
I		the start of the sixth-term DCs in 2020, some DC	I
J		members acted primarily out of personal political	J
K		stances and turned DCs into a stage for promoting their	K
L		personal political beliefs, undermining national security,	L
M		supporting the black-clad violence, objecting to the	M
N		National Security Law, whipping up confrontations, etc.	N
O		There were DC members who ignored the livelihood of	O
P		people, hijacked meetings and unscrupulously	P
Q		obstructed the administration of the Government,	Q
R		harming the well-being of the Hong Kong people.	R
S		There had been acts in DCs going against and beyond	S
T		their statutory functions as District advisory bodies.	T
U		Such acts constituted a severe violation of the original	U
V		power and positioning of DCs as “district organisations	V
		which are not organs of political power”, seriously	
		destructing community harmony and hindering district	
		development. Besides DC chairmen elected from	
		among DC members of the districts did not have a	
		thorough understanding of and arbitrarily	
		misinterpreted the nature, role and functions of DCs.	
		Some DC Chairmen even misled the public based on	
		their political stances. A large number of members	
		subsequently resigned due to refusal to take oath or for	
		other excuses, or were disqualified for making invalid	
		oath. As of April 2023, only 146 out of the total 479	
		seats of the sixth-term DCs are still filled by serving	
		members.	
	10.	The appalling situation is unacceptable, indicating that	O
		the mechanism no longer functions, and reveals serious	P
		loopholes and flaws of the relevant electoral system,	Q
		which must be plugged and rectified to ensure that DCs	
		can get back on the right track and perform their	
		functions properly.	
	45.	Those paragraphs – the essence and language of which are	R
		repeated in numerous other documents – identify part of the ‘mischief’	S
		which gives rise to what is said to be the legitimate aims of the	T
			U
			V

Nomination Requirement. Another part of the ‘mischief’ was identified in §29 of the same LegCo Brief, as follows:

29. In the sixth DC ordinary election, there was a large number of candidates/elected members who had no ties with the districts or experience in serving the districts. During the election and upon being elected, they abused public resources in the districts to conduct non-beneficial acts for political interests. Their acts severely affected the operation of DCs and the services for the residents in the districts. As mentioned in paragraph 26 above, members of “the three committees” are important stakeholders in the community. Their nomination for DCC and DCGC members in the district will increase the representativeness of the candidates, ensure that the elected candidates truly understand district affairs, and strengthen the connection between the district committees and the DCs, which is conducive to the close cooperation among the district committees, the DCs and local personalities. The introduction of the nomination requirement by members of “the three committees” can ensure that candidates are dedicated to serving the districts.

46. Against that backdrop, reform of the DCs was introduced by the Government, to be effected by amending the relevant legislation and implementing administrative arrangements, so as to “strengthen district governance structure”. The LegCo Brief included some detail of the proposed review, including the structure amongst appointed members, DCC members and DCGC members – in what is called the ‘4:4:2’ proposal – with reference to the relevant nomination requirements.

47. On the same day, 2 May 2023, the Government issued a press release which, amongst other things, identified the recommendations of the proposals for governance at the district level. The reform proposals did not expressly mention change to the nomination requirements for candidates. The press release identified that the

proposals were guided by three principles (see below). It also identified that the Government targeted to complete the legislative amendments before the summer recess of LegCo this year, so that the DC election could be held at the end of this year (2023).

48. As explained by Mr Chik, public consultation on the proposed reform was held in early May 2023. Over 99% of the views received – totalling 25,105, being 24,795 from individuals and 310 submitted by organisations – supported the proposals on improving governance at the district level (though it is fair to say that the presentation of the responses does not identify how many people specifically supported the proposal relating to the Nomination Requirement). The presentation of the public views did identify that, of the remaining less than 1% of the views received, only 10 were non-supportive views. Concerns raised included as to the nomination requirements being too stringent. The public views were subsequently taken into account when the Government took forward the proposal at LegCo.

49. The reform proposals were debated in LegCo, first through a subcommittee studying the proposals, which subcommittee subsequently became the Bills Committee after the introduction of the amendment Bill into LegCo on 31 May 2023. Scrutiny of the Bill was completed on 30 June 2023, following nine meetings conducted by the subcommittee lasting 16 hours in total over 7 working days.

50. If necessary, reference can be made to the relevant discussions as were recorded in the various papers listed by Mr Chik at §39 of his affirmation. But, as examples:

- (1) The subcommittee minutes dated 16 May 2023, included: (a) explanation of the necessity for and principles of improving governance at the district level; and (b) reference to enquiries made by members of the subcommittee ensuring that persons who are not members of the 3Cs should have a “fair chance” to approach members of the 3Cs for soliciting nomination, and that steps should be taken to deal with the concern that a person standing might capture a large number of nominations from members of the 3Cs, thereby impeding other persons from obtaining sufficient nominations to stand for election. (In passing, it might be noted that these points do not directly or wholly address the concerns about the Nomination Requirement which are the main focus of the present proceedings: see below.)
- (2) A Paper for House Committee dated 23 June 2023, which amongst other things noted that members: (a) pointed out that the 4:4:2 proposal could hardly compare with the “democratic elements” under the then existing composition of DCs, i.e. that the proposals might be regarded as a retrogression; (b) asked whether persons across the political spectrum and persons of foreign nationality would be allowed to stand the DC elections, where the Administration’s answer was that persons across the political spectrum could stand for DC elections as long as they “are patriotic and have an affection for Hong Kong”, while being capable and dedicated to serving the community; and (c) noted the proposed Nomination Requirement (expressing similar concerns as had been previously expressed: see above).

- (3) A further LegCo Brief dated 30 May 2023 mentioned, amongst other things, the then proposed Nomination Requirement and reported on the response to the public consultation.

51. The Government conducted the review on district administration based on the following guiding principles:

- (1) First, it is of utmost importance to fully, faithfully and steadfastly implement the principle of “One Country, Two Systems”, as well as to ensure the effective and sustained implementation of the system as prescribed by the Constitution and the Basic Law, including the District advisory bodies which are not organs of political power formed in accordance with BL97.
- (2) Second, fully implementing the principle of “patriots administering Hong Kong”.
- (3) Third, fully practising executive-led governance.

52. The aim of the Government identified in the briefs to LegCo was that the reformed DCs should revert to their positioning as district advisory bodies which are not organs of political power in accordance with BL97, that they should be depoliticised and fully practice the principle of executive-led governance, while enhancing their functions as an effective channel for gauging public views and serving the community in a pragmatic and practical manner. As explained by the SCMA in a speech on 4 May 2023, the reforms had not been directed at, for example, excluding certain parties from participating in district affairs. The only people excluded are those who are not patriotic and those who fail to act

A in the best interest of the HKSAR and China, regardless of their political
B beliefs or affiliations.

C 53. On the other hand, the Applicant has identified that, in the
D LegCo briefing materials, the Government has not even mentioned the
E constitutional rights to participate in public affairs, to vote and stand for
F elections, or the Hong Kong Bill of Rights. Therefore, he says, where
G no reference has been made to those constitutional rights, obviously no
balancing against those matters has been performed.

H 54. The Bill was passed by LegCo on 6 July 2023. That date
I was the resumption of debate on Second Reading of the Bill, moved on
J 31 May 2023. First to speak on the resumed debate was Mr Michael
K Tien, lending his firm support to the passage of the Bill, and in argument
L at the hearing Mr Suen asked me to pay particular attention to what Mr
M Tien said, to identify that amongst the things which LegCo took into
N account in its deliberations was a concern about “retrogression in
democracy”. Amongst Mr Tien’s comments were the following (in
English translation):

O Since the announcement of the proposals on two May, we have
P attended numerous sharing sessions of various scales and set
up street counters to diligently listen to the views of the public.
Through our participation in Street counter activities and
seminars, we have been able to grasp views from all walks of
life, including top-down and bottom-up ones.

Q Almost all the views against the proposals are based on the
R same reason – that they represent “a great retrogression in
democracy”. At the street counters, it is practically
S impossible for us to start explaining from Articles 97 and 98 of
the Basic Law, and so we only explain in terms that are most
relevant and understandable to the public.

T I sincerely hope that Members will support the passage of the
U Bill today, so as to put an end to this political farce that has
V

been jeopardising district administration in Hong Kong for many years, and to enable enthusiastic people who love the country and Hong Kong, and are willing to take up responsibilities and do something concrete, to participate in district work.

We can foresee that after one January next year, 470 dedicated DC members, more than 400 Care Teams and members of “the three committees” will serve the public wholeheartedly together with the Government for their true benefit and well-being, so as to give them a sense of happiness and fulfilment, open a new chapter for Hong Kong’s district governance, achieve good governance, enable the steadfast and successful implementation of “one country, two systems” and maintain long-term stability and prosperity in Hong Kong.

55. In passing, I note the evidence adduced by the Applicant that the same Mr Tien – who is the convenor of Roundtable – is reported to have said later: that there were significant difficulties in obtaining nominations from members of the 3Cs; that even though the intended candidates of Roundtable had served in the district for a long time and are all patriotic, all of them apart from one were unable to get any nomination from members of the 3Cs; that there was no reply to any emails sent to members of the 3Cs; and that the difficulty of obtaining nominations was 100 times more difficult than standing in LegCo and NPC elections, of which two bodies Mr Tien is himself a Member and Deputy respectively.

56. The DC(A)O was published in the Gazette and came into effect on 10 July 2023.

57. On the same day when the Bill was passed, both the Hong Kong and Macao Affairs Office of the State Council (“HKMAO”) and the Liaison Office of the CPG (“LOCPG”) issued statements confirming the passage of the Bill as an important measure to improve governance and stressing that it implemented the principle of “patriots administering

Hong Kong”, with important implications on improving district governance.

58. As already stated, the DC Elections for the upcoming seventh-term are scheduled for 10 December 2023, and the process towards them and the elections themselves will be held in accordance with the DCO as amended (and which came into effect on 10 July 2023)

59. The polling date of 10 December 2023 was made known to the public on 24 July 2023. It was specifically mentioned that the Government would endeavour to ensure that the seventh-term DCs would assume office on 1 January 2024 as scheduled.

60. The Electoral Affairs Commission (“EAC”) published ‘Guidelines on Election-related Activities in respect of the District Council Election’ (“Guidelines”), which amongst other things set out details concerning the Nomination Requirement (see §§3.17-3.20).

B.6 More about the Nomination Requirement

61. In respect of DCC elections, a candidate standing for election in respect of the DCC of the DC of a District must be nominated by electors of the DCC, i.e. members of the 3Cs – though the candidate need not himself/herself be a member of the 3Cs. The candidate’s nomination form must be subscribed by not less than 3 but not more than 6 electors in each of the 3Cs in the District (other than the candidate himself/herself) assenting to the nomination. An elector is entitled to subscribe a number of nomination forms in respect of the DCC up to the number of members to be returned for the DCC at the election.

62. In respect of the DCGC elections, a candidate standing for election in respect of a DCGC of the DC of a District must – i.e. the Nomination Requirement provided for in section 7(2)(b) of the Nomination Regulation is that the candidate must – be nominated by:

- (1) not less than 50 but not more than 100 electors of the DCGC (other than the candidate himself/herself) assenting to the nomination – where an elector is entitled to subscribe only one nomination form in respect of the DCGC; and
- (2) not less than 3 but not more than 6 electors of each of the 3Cs in the District (other than the candidate himself/herself) assenting to the nomination – where an elector is entitled to subscribe only one nomination form in respect of each DCGC of the DC.

63. To put that in numerical context as regards the number of potential nominators/subscribers, there are apparently on average 86, 27 and 27 members in the ACs, DFCC and DFSC respectively in each District.

64. A template email was later, on 6 October 2023, issued to each of the members of the 3Cs, reminding them of the relevant provisions in the DCO regarding the eligibility criteria of the election candidates, though the email was actually headed (in English translation) ‘Referral Arrangements for Requests for Contact with Members of the [3Cs]’. This was sent because, as the email itself identifies, voices in society had pointed out that the Electoral Affairs Commission (“EAC”) had not provided contact information of the DCC electors (i.e. the members of the 3Cs), rendering it difficult for prospective candidates to seek nominations.

65. The template email referred to a EAC press release issued the previous day, 5 October 2023, stated:

In view of recent views that the Electoral Affairs Commission (EAC) has not provided contact information of the District Committees constituency (DCC) electors under the 2023 District Council Ordinary Election (DCOE), rendering prospective candidate unable to seek nomination, possibly affecting their rights to stand for election, the EAC today (October 5) reiterates that:

The EAC has all along handled electors personal data in strict accordance with the prevailing electoral and other relevant legislation. According to relevant court judgments, the EAC is also obliged to respect and appropriately protect the privacy of electors' personal data. Under prevailing electoral legislation, whilst the Electoral Registration Officer may provide extracts from voter registers to specified persons (i.e. eligible bodies or organisations and validly nominated candidates) for election -related purposes after such have been published, the EAC is not authorised to make electors' personal information available to the general public. As such, the EAC has not made available to the public the personal information, including contact information, of electors in the 2023 DCEO (including DCC electors).

The EAC understands that the Government has considered the practical circumstances of prospective candidates in this election and made corresponding arrangements, whereby any person who wish to seek nomination from DCC electors may reach out to the District Offices, which serve as the secretariat of the respective District Committees, to make a request to contact the relevant members of the District Committees. The secretariat will relay such requests and contact information to the relevant members as soon as for them to decide whether to make contact with the requestors.

The EAC reiterates that it is the duty of a prospective candidate to obtain sufficient nomination in order to comply with the candidacy requirements. Separately, whether to respond to a request for nomination by a prospective candidate and subscribe to his/her nomination form is a choice for the subscriber to make. The Government has provided a reasonable channel and made arrangements for prospective candidates to reach subscribers and seek nomination. There is hence no issue of having no means of contacting subscribers such that the right to stand for election is undermined, rendering the election unfair.

As an independent, impartial and a political body, the EAC will continue to conduct and supervise public elections in strict accordance with the law, ensuring that elections are conducted in an open, honest and fair manner.

66. In other words, prospective candidates may well have no means to contact – or “reach out to”, if you prefer that phrase – persons from whom they would require nomination, except to ask the EAC to pass on a message asking to be contacted, leaving it entirely to the potential nominator to decide whether to respond at all. Yet, at the same time, prospective candidates are reminded of their “duty” to obtain sufficient nominations in order to comply with the candidacy requirements. There is perhaps room for thinking of a Kafkaesque doorway.

67. The template email also contained the following paragraph, which the Government now says provided guidance to the 3Cs members as to how to exercise their nomination rights (in the English version, emphasis in original):

6. Members of the three committees are important stakeholders in the community. Your nomination of candidates for the DCC and DCGC elections can ensure that the persons elected truly understand district affairs, and strengthen the connection between district committees and the DC, which is conducive to the collaboration between district committees, the DC and local personalities. Your nomination can also ensure that candidates are patriots who love Hong Kong and are dedicated to serving the local communities. You should read carefully the statutory eligibility for being nominated as a candidate for the DC election, including the requirements of “upholding the Basic Law and bearing allegiance to the Hong Kong Special Administrative Region” (for details, please refer to sections 20 and 21 of the District Councils Ordinance (Chapter 547)) and exercise your nomination rights discreetly in accordance with the law.

68. The English version of the template email is not identical to the offered English translation of the Chinese version of the template email (which was in the hearing bundle). Perhaps the most notable difference is in the last phrase where the word “discreetly” in the English version has been translated from the Chinese version – which presumably most members of the 3Cs would have followed – as meaning “prudently”.

69. I will identify below what in fact has been the result of that exercise of prudence.

70. The relevant nomination period – within which those aspiring to stand for election in a DCGC would need to have satisfied the Nomination Requirement – began on 17 October 2023.

71. During the nomination period, at a media session on 24 October 2023, the CE made certain remarks, including (in English translation):

It is a statutory requirement that candidates must obtain sufficient nominations in order to run for the election. Everyone has an equal opportunity and can employ their own methods to solicit nomination votes. Whether they succeed or not largely depends on the impression and knowledge that the subscribers have of that individual. Subscribers also have the responsibility to assess whether the person meets the basic requirements to become a candidate: firstly, whether they are patriotic and love Hong Kong, and secondly, whether they genuinely uphold the Basic Law and are loyal to the Special Administrative Region. Subscribers, as part of their social responsibility, should exercise judgment for any candidate. Therefore, if someone obtains the nominations, it signifies that they have gained the trust of the subscribers. If someone fails to obtain the nomination, there could be various reasons: the subscribers may believe that the person is unable to fulfil the responsibilities of a District Councillor, or they may have reservations about their performance, or they may not trust their patriotism and loyalty to the Basic Law and the SAR. If

one fails to meet these basic criteria, they should reflect on why there was an issue. I believe the most important aspect is that the rules of the entire election should be fair, just, and open such that everyone could compete to the best of their abilities.

...

I have also seen media reports about individuals successfully obtaining nominations, including some whom I consider to be political novices with relatively low popularity. This demonstrates that the mechanism is functioning smoothly. For those who do not receive nomination votes, they should continue to strive because it is part of the election process. Anyone involved in election campaigns knows that it requires effort, and votes cannot be easily obtained; one must exhaust all possible means. The Electoral Affairs Commission has also facilitated certain political parties in accessing information and contacting potential subscribers. Therefore, the most crucial aspect is to ensure fairness, justice, and transparency throughout the entire election process, and the government has already provided assistance in this regard.

72. The nomination period lasted 14 days, and ended on 30 October 2023.

B.7 New Composition of DCs

73. The new composition of DCs with the involvement of the 3Cs is provided for in sections 5 and 5A of the DCO, which provide as follows:

5. Composition of District Councils

(1) The District Council of each District is to consist of—

- (a) the District Officer of the District;
- (b) the persons appointed under Division 1 of Part IV as members of the District Council;
- (c) the persons elected under Part V as members for the District Committees constituency of the District Council;

A			A
B	(d)	the persons elected under Part V as members for the District Council geographical constituencies of the District Council; and	B
C	(e)	if there is one or more Rural Committees in the District—the persons registered under Division 2 of Part IV as ex officio members of the District Council.	C
D			D
E	(2)	For the purposes of subsection (1)(b), in relation to a District Council specified in column 2 of Part 1 of Schedule 3, the number specified in column 3 of that Part opposite to the District Council is the maximum number of members to be appointed to that Council.	E
F			F
G	(3)	For the purposes of subsection (1)(c), in relation to a District Council specified in column 2 of Part 1 of Schedule 3, the number specified in column 4 of that Part opposite to the District Council is the number of members to be returned for the District Committees constituency of that Council.	G
H			H
I	(4)	For the purposes of subsection (1)(d), in relation to a District Council specified in column 2 of Part 1 of Schedule 3, the number specified in column 5 of that Part opposite to the District Council is the number of members to be returned for the District Council geographical constituencies of that Council.	I
J			J
K	(5)	For the purposes of subsection (1)(e)—	K
L			L
M	(a)	in relation to a District Council specified in column 2 of Part 1 of Schedule 3, the number specified in column 6 of that Part opposite to the District Council is the number of ex officio members of that Council; and	M
N			N
O	(b)	a Rural Committee specified in column 5 of Part 2 of Schedule 3 is taken to be in the District specified opposite to the Rural Committee in column 2 of that Part.	O
P			P
Q	(6)	Subsection (5)(b) and Part 2 of Schedule 3 are without prejudice to any other law governing Rural Committees.	Q
R			R
S	5A.	Establishment of District Committees constituencies	S
T	(1)	A District Committees constituency having the name specified in column 3 of Schedule 3A is established for	T
U			U
V			V

each District Council specified opposite to it in column 2 of that Schedule for the purpose of returning members of the District Council at elections for that constituency.

- (2) The District Committees constituency of a District Council is composed of all members of all the District Committees in the District for which the District Council is established

74. By looking at the other provisions of the DCO there referenced, it can be deduced – and it is common ground – that the DCs will in future comprise a total of 470 seats, of which:

- (1) 179 members (approximately 38%) will be directly appointed by the SHYA;
- (2) 176 members (approximately 38%) will be elected in the District Committees Constituency (“DCC”), where the DCC of a DC is composed of all members of the 3Cs, and the members elected can be from amongst their own number or other persons;
- (3) 88 members (approximately 19%) will be elected through the DCGC elections; and
- (4) there will also be 27 *ex officio* members, being the Rural Committee Chairmen (approximately 6%).

75. If one ignores the 27 *ex officio* members, the split of membership of the DCs amongst the three other groups is approximately 40%: 40%: 20% – hence the use of the ‘4:4:2’ ratio.

76. Obviously, the 88 members who will be elected through the DC Elections to represent the DCGCs will have had to satisfy the Nomination Requirement.

77. Therefore, it may be pertinent to note at this juncture that:

- (1) Almost 4 out of each 10 seats on the DCs will be filled by direct appointments made by the SHYA.
- (2) Almost 4 out of each 10 seats on the DCs will be filled upon election amongst the members of the DCC (i.e. the 3Cs), who are themselves directly appointed by the SHYA (see below) – though candidacy is not limited to the members of the 3Cs.
- (3) Fewer than 2 in each 10 seats will be elected through the DCGC elections.
- (4) If the percentage make-up of the successfully nominated candidates for the DCGC elections is carried through to the successfully elected candidates, 66 of the 88 seats will be filled by members of the 3Cs.
- (5) On that basis, only 22 out 470 seats on the DCs (less than 5%) would be filled by persons not themselves directly appointed by the SYHA or chosen by a body of persons themselves directly appointed by the SHYA.

78. It is, however, also useful to note now that there is no constitutional challenge to the appointment mechanism in (1) above, or to the appointment and internal election mechanism in (2) above – together totalling about 8 out of each 10 members of the DCs. Only the aspect of the election mechanism in (3) above is the subject of the constitutional challenge, as being incompatible with BL26 and BOR21.

79. Though this case focuses on the Nomination Requirement as applies to the potential candidates for the DCGC seats (roughly 20%), I thought it might be helpful to see that in context of the similar application

of the Nomination Requirement as it has applied to potential candidates for the DCC seats (roughly 40%). Therefore, at the hearing, I asked Mr Suen to take instructions on that point.

80. With the benefit of that further information, it can be seen that the result of the members of the 3Cs exercising their nomination rights “prudently” has been as follows:

(1) Of the 228 candidates who have satisfied the Nomination Requirement for potential election to the 176 seats in the DCC, 206 candidates – i.e. more than 9 out of 10, 90.35% – are themselves members of the nominating body, the 3Cs.

(2) Of the 171 candidates who have satisfied the Nomination Requirement for potential election to the 88 seats in the DCGCs, 129 candidates – i.e. more than three quarters, 75.4% – are themselves members of the nominating body, the 3Cs.

81. Whilst Fortune favours the bold, perhaps Prudence favours oneself. In any event – whilst I note that there is no express bar to members of the 3Cs seeking nomination – I am not sure that people reading the reform proposals and the DCO as amended would have instinctively thought that the body of persons charged with nominating candidates would themselves end up comprising the vast majority of the candidates nominated. As it turns out, the ‘gatekeepers’ have opened the gates mainly for themselves.

82. To be fair, since the hearing, the Government has provided me with data showing that in the 2015 DC election (i.e. for the fifth-term DC): (1) 45% of the candidates who stood for election were 3Cs members,

A and 55% were not; and (2) 74% of the candidates elected as DC members
B were 3Cs members, and 26% were not. But, of course, on that occasion
C the old provisions relating to subscribers applied, and the members of the
D 3Cs were not ‘gatekeepers’ in the way triggered by the introduction of the
E Nomination Requirement in 2023.

F 83. Perhaps unsurprisingly, therefore, the Applicant draws
G attention to the facts that:

H (1) The Nomination Requirement has essentially provided
I members of the 3Cs a *de facto* “springboard” to launch each
J other onto the DCs.

K (2) That applies to the DCGCs, and is in addition to the fact that
L the members of the 3Cs, as comprise the DCC, will also
M choose largely from amongst themselves another 176
N members of the DCs.

O (3) Whereas, since 1997 and prior to the DC(A)O, at least 73%
P of members of the Provisional DB and the DCs had always
Q been popularly elected, now only around 19% would be
R popularly elected.

S (4) In other words, the only group of elected members who
T could arguably represent the will of the electors would only
U constitute a small minority in the DCs.

V (5) However, even then, a significant proportion – perhaps an
obvious majority – of that 19% would likely also be
members of the 3Cs, rather than persons from ‘outside’ the
groups already appointed by the SYHA.

84. The Applicant describes this as a “retrograde” step. As can
be seen from above, apparently many others have expressed the similar

view. But whether it is a step backwards or step forwards may depend on your point of view. In any event, that is not of itself the test of legality or constitutionality.

B.8 Additional Allegiance Safeguarding Provisions

85. The DC(A)O also created the District Council Eligibility Review Committee (“ERC”), as is now found in section 10A of the DCO. The members of the ERC are all appointed by the CE, who must report the appointments to the CPG for the record.

86. Section 10B(1) of the DCO provides that the ERC is to review and confirm the eligibility of (a) any person proposed to be appointed under Division 1 of Part IV of the DCO, (b) any person proposed to be registered under Division 2 of Part IV as an *ex officio* member; or (c) any person nominated under Part V as a candidate.

87. For present purposes, it can therefore be noted that even after a person has been nominated, for example satisfying the Nomination Requirement as a candidate for election to a DCGC, that person’s eligibility must nevertheless be reviewed and confirmed by the ERC.

88. Section 10B(2) provides that, in deciding the eligibility of a person, the ERC is to seek the opinion of the Committee for Safeguarding National Security (“CSNS”) of the HKSAR as to whether the person fails to fulfil the legal requirements and conditions on upholding the Basic Law and bearing allegiance to the HKSAR of the PRC. It also provides that if an opinion is given by the CSNS, the ERC must make the decision in accordance with the opinion.

89. Further, section 34(1A)(c) of the DCO requires a person nominated as a candidate for a DC must submit a nomination form which includes or is accompanied by a declaration by the person to the effect that the person will uphold the Basic Law and pledge allegiance to the HKSAR of the PRC.

90. Under section 21(1A) of the DCO, a person is disqualified from being nominated as a candidate and from being elected as a member at an election, if the election is held or is to be held within 5 years after: (a) the date on which the person vacates an office, or is disqualified from entering on an office, under the law, for declining or neglecting to take a specified oath; or (b) the date on which the person is declared or decided in accordance with any law (i) to be in breach of the specified oath; or (ii) to have failed to fulfil the legal requirements and conditions on upholding the Basic Law and bearing allegiance to the HKSAR of the PRC.

91. Further, under section 19A of the Oaths and Declaration Ordinance Cap 11 (“ODO”), as soon as an elected member of the DCs commences his/her term of office, he/she must take the oath to uphold the Basic Law and pledge allegiance to the HKSAR of the PRC.

92. Yet further, under section 79(1) of the DCO, the Secretary for Justice (“SJ”) may bring proceedings in the Court against any person who is acting or claims to be entitled to act as a member, on the ground that the person is disqualified from acting as such. Under section 79(2), as soon as any such proceedings are brought by the SJ against the person on the ground that the person is disqualified from acting as a member either (a) for being in breach of an oath taken under section 19A of the ODO, or (b) for failure to fulfil the legal requirements and conditions on

upholding the Basic Law and bearing allegiance to the HKSAR of the PRC, then that person's functions and duties as a member are suspended until the decision of the Court in the proceedings becomes final.

93. The Applicant also draws attention to various provisions now found in the DCO as amended which empower the Government to exercise a greater degree of control over the DCs and their members, including that:

- (1) sections 62 and 68 provide that the District Officer of a District is to be the Chairman of the DC of that District, and he can make standing orders for regulating the procedure of the DC and its committees;
- (2) section 71A provides that the District Officer, in his capacity as the Chairman of the DC, may require its members to collect views of the people in the District concerned in respect of an issue specified by him;
- (3) section 72B provides that the SHYA may issue guidelines indicating, amongst other things, (a) the standard of performance required of a member, and (b) the conduct of a member that constitutes misconduct;
- (4) section 72C and 72D provide that, following an investigation or misconduct of any member of the DCs which leads to an opinion as to what facts have been established and what appropriate sanction might be imposed, the SYHA may issue a letter of persuasion to, or impose various sanctions on the Member as the SHYA considers appropriate. Those sanctions include a warning, a financial penalty, or suspension of the member's functions and duties as a member.

94. As to what might constitute misconduct, the LegCo briefing notes identified that a guideline would be issued to set out a list of negative behaviour, including but not limited to:

- (1) failing to perform the tasks and achieve the work indicators assigned by the DC Chairman without reasonable excuses;
- (2) grossly disorderly conduct;
- (3) violating the laws of Hong Kong, and being convicted by a court and sentenced to imprisonment, including a suspended sentence (even if the penalty does not meet the criteria for disqualification under the DCO);
- (4) obstructing other DC members or officials from attending or leaving the meeting;
- (5) making insulting remarks or performing nuisance behaviour towards attendees, including DC members and officials, at the meeting;
- (6) disrupting the order of meetings;
- (7) using foul language at meetings and failing to rectify the behaviour upon advice or warning; and
- (8) disobeying the standing order for meetings and failing to rectify the behaviour upon advice and warnings.

95. I shall refer to these various provisions and matters compendiously as the “Additional Allegiance Safeguards”. To refer to them as adopting a ‘belt and braces’ approach to safeguarding allegiance might appear to be something of an understatement. When it comes to being prepared, even a Boy Scout might be impressed.

C. Other Evidential Matters

96. The bulk of the Applicant's evidential materials was set out only in his 2nd affirmation, no doubt with the benefit of the legal advice obtained since he originally commenced this application acting in person. I may come back to the Government's criticism that the Applicant has attempted to introduce new evidence and legal submission in that affirmation, exceeding the scope of both the original and the amended Form 86. But I can state at once that I agree that the affirmation does, improperly, contain matters which are really legal submissions.

97. The Applicant has however sought to draw the Court's attention to certain facts which, he says, demonstrate that the Nomination Requirement has taken away genuine choices of candidates from the electors and impaired the very essence of the right of electors to vote, to stand for elections and to participate in public affairs through freely chosen representatives.

98. He notes and asserts in particular that:

(1) As already canvassed above, 129 (75.4%) of the 171 validly nominated candidates running for the 88 DCGC seats are themselves members of the 3Cs. Hence, the suggestion that in reality the Nomination Requirement has simply provided members of the 3Cs a *de facto* springboard to launch each other onto the DCs.

(2) Rather than depoliticising the DCs as intended by the Government, the Nomination Requirement has only further politicised them, because members of the 3Cs tend to favour themselves in the interest of the political parties to which

they belong – creating, he says, a “hotbed of cronyism and nepotism”.

(3) News reports suggest that some 3C members might only nominate members of their own political party, or might nominate no one if they themselves are running as a candidate.

(4) Despite the provision of a referral service to help referring requests for contact from members of the public to members of the 3Cs, it remained very difficult to contact members of the 3Cs.

(5) Persons in what is sometimes called the ‘pan-democrat’ group have found it difficult or impossible to obtain nominations from members of the 3Cs.

(6) Hence, around 81.87% of validly nominated candidates come from the ‘pro-establishment camp’ or are ‘centrists’, but there is no candidate from the ‘pan-democratic camp’.

99. In the very short time available to it, the Government has sought to respond to the Applicant’s 2nd affirmation, through Mr Chik’s 2nd affirmation and an affirmation of Li Sze Man. I gave leave at the hearing for the Government to rely upon those affirmations.

100. In Mr Chik’s 2nd affirmation, he points to different relevant public information or public statements which give a different picture from that attempted to be painted by the Applicant. On the basis of those materials, Mr Chik suggests that it is both wrong and insulting to assume or assert that members of the 3Cs do not have the sense of civic responsibility when they exercise their nomination rights, or that they might exercise those rights arbitrarily.

101. Mr Chik also points out that about 79.2% of the members of the 3Cs who have exercised their nomination rights, by nominating DCGC candidates, are independent without political affiliation. Further, by reference to publicly available information, the candidates of the upcoming DC Election (all of whom satisfied the Nomination Requirement) can be seen to come from a diverse background, with different occupations and political affiliations. Mr Chik produced the following two tables:

(a) Occupation of the candidates

Occupation	No. of candidates	Percentage of candidates
Community Worker	35	20%
District Councillor	17	10%
Merchant / Businessman	14	8%
Trade Union Worker	13	8%
Administrative Staff	12	7%
Firm Owner / Director	11	6%
Finance Finance	7	4%
Public Relations	6	4%
Registered Social Worker	6	4%
(Not provided)	5	3%
Solicitor	4	2%
Registered Teacher	4	2%
Legislative Assistant	3	2%
Community Development Officer	3	2%
Media	3	2%
Engineer	2	1%
Information Technology	2	1%

Sports	2	1%
Others	22	13%
Total	171	100%

(b) Political affiliations of the candidates

Political parties	No. of candidates	Percentage of candidates
Hong Kong Federation of Trade Unions	25	14.6%
Civil Force	1	0.6%
Federation of Public Housing Estates	2	1.2%
Path of Democracy	1	0.6%
Democratic Alliance for the Betterment and Progress of Hong Kong	44	25.7%
Liberal Party	4	2.3%
Kowloon West New Dynamic (*)	1	0.6%
New Prospect for Hong Kong	5	2.9%
Business and Professionals Alliance for Hong Kong	9	5.3%
Professional Power	3	1.8%
The Federation of Hong Kong and Kowloon Labour Unions	2	1.2%
Bauhinia Party	1	0.6%
New People's Party	12	7%
Civil Force (#)	4	2.3%
Roundtable	1	0.6%
Independent / Not specified	56	32.7%
Total	171	100%

(*) Also affiliated with Business and Professionals Alliance for Hong Kong

(#) Also affiliated with New People's Party

102. I think it is fair to take the totality of materials as providing a more balanced picture of (a) the approach that was, or was likely to be, taken by members of the 3Cs when exercising their nomination rights as regards potential candidates for DCGCs, and (b) the results of the exercise of those nomination rights.

103. Nevertheless, the result of the exercise of the nomination rights which is perhaps the most stark is the very large proportion of the validly nominated candidates who come from the members of the nominating 3Cs themselves.

D. Locus / Standing

104. In the original Form 86, the Applicant asserted his locus or standing to make the application on the basis that he is a permanent member of the Democratic Party and a permanent resident of the HKSAR. The Amended Form 86 asserted that the case involves an issue of great general public importance.

105. When the point was taken against him that he lacked (or might lack) standing, because his name is not included as a registered elector for the upcoming DC Elections and there is no evidence that he had indicated interest in taking part in the election, the Applicant responded in his 2nd affirmation expressing some surprise and shock. He stated that, to the best of his understanding, he had always been a registered elector of the DC elections because:

(1) He is sure that he was at least registered as an elector in the past.

(2) He had in fact stood as a candidate in both the 2007 and 2011 DC Elections – and had also submitted a nomination to stand as a candidate in the 2019 DC Elections, albeit that he subsequently withdrew it.

(3) He must have been a registered elector to be able to stand in the elections.

(4) He has never taken a step to remove himself as a registered elector, nor received any notice that he would be or had been removed as such.

106. However, it seems that the Applicant may have been less than full and frank. This is shown by the evidence given in the Li Sze Man affirmation, which shows (in my summary of it):

(1) A data matching exercise conducted by the Registration and Electoral Office (“REO”) with the Housing Department in relation to the Applicant’s registered address in the records of the REO.

(2) Because there were grounds for believing the Applicant’s registered address was no longer his principal residential address, the REO invoked enquiries, under the Electoral Affairs Commission (Registration of Electors) (Legislative Council Geographical Constituencies) (District Council Geographical Constituencies) Regulation Cap 541A (“Regulation”). The enquiries included writing an enquiry letter to the Applicant at his registered address on 26 April 2023.

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- (3) The letter identified the consequences of not receiving any required reply and the requested relevant documentary proof by a deadline of 2 June 2023. It informed the Applicant that if he wished to retain his voter registration in the Final Register, he would have to return the completed reply slip in the relevant documentary proof, or make a claim under section 15 of the Regulation.
- (4) A reminder SMS was sent to the Applicant's last known mobile phone number on 3 May 2023, but the SMS was not sent successfully.
- (5) On 30 May 2023, the REO contacted the Applicant via telephone to a landline number, and ascertained and verified his identity.
- (6) According to the record in the system, during the telephone conversation with the Applicant, he expressly told the REO that he did not want to continue to be an elector. The contemporaneous record has been produced in evidence.
- (7) As the Applicant did not receive the Applicant's reply by 2 June 2023, another letter was issued to him on 27 July 2023 informing him that he would be included in the 2023 Omissions List and his name and address would be consequently removed from the Final Register unless he could submit a complete reply by 25 August 2023.
- (8) A second SMS message reminder was sent, but that was also not sent successfully.
- (9) No reply was received by the REO by the deadline of 25 August 2023. Nor did the Applicant submit any notice of claim during the statutory claims and objections period.

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(10) Therefore, the Applicant was eventually removed from the Final Register after 25 August 2023.

107. Mr Wong said from the Bar Table that the Applicant did not accept all that evidence, but he made no application to file further evidence, on the basis that it would not likely assist the Court.

108. Whilst recognising that the Applicant could not have disclosed any letter or SMS which he had not actually received, it seems to me that he plainly ought to have referred in his evidence to the telephone conversation which took place about his continued registration or not. He also knew that he had moved address, and from his previous experience would have known that he ought to have informed the REO of his move, if he were to continue to be a registered elector.

109. It is also of particular concern that the Applicant has been less than full and frank in light of the warning given by me in a previous case when the Applicant was also applicant. In *Kwok Cheuk Kin v Secretary for Health* [2022] 5 HKLRD 348 at §§156-159, I expressed the view that the Applicant had also been “less than forthcoming” as regards the question of standing in that case, and I reminded the Applicant and other future applicants that the principles relating to full and frank disclosure should firmly be borne in mind.

110. In any event, the simple fact is that the Applicant is not included as a registered elector under the Final Register published under the Regulation for the forthcoming DC Elections. Hence, it might be thought that the Applicant has at least not taken much actual “interest” in the DC Elections, prior to launching this application.

111. But the relevant legal test as to standing is whether the Applicant has “sufficient interest in the matter to which the application relates” within the meaning of section 21K(3) of the High Court Ordinance Cap 4 and Order 53 rule 3(7) of the Rules of the High Court (“RHC”).

112. In another one of the many previous cases involving the Applicant, *Kwok Cheuk Kin v Commissioner of Police* [2017] 6 HKC 93, at §34, Chow J (as Chow JA then was) sought to summarise the principles to be applicable in determining the question of standing in judicial review. Broadly adopting his summary of those principles, they can for present purposes be put as follows:

(1) Where the decision affects the applicant’s personal right or interest over and above that of the general public or a section of the public, the applicant should have little difficulty in showing a sufficient interest in the matter to which the application relates.

(2) Where, however, the decision does not have such effect and the applicant is effectively pursuing the application as a representative of the public interest, the Court adopts a holistic approach by taking into account a host of relevant considerations including the merits of the application, the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who have a greater interest in the matter, and the nature of the breach of duty against which relief is sought.

(3) In such a situation the applicant is not to be regarded as having a sufficient interest merely because the issue raised by him is of public interest.

(4) Equally, the applicant should not be regarded as having a sufficient interest merely because of the strong merits of the proposed challenge.

(5) Although there has undoubtedly been a trend to liberalise the requirement of standing in judicial review, the need to show a sufficient interest in the matter to which the application relates remains an important filter to keep judicial review within its proper bounds and to prevent abuse of the court's process. This is particularly so having regard to the explosive increase in the number of applications for judicial review and the complexities of the applications seen in recent years in Hong Kong.

(6) Where the applicant does not have a personal right or interest in the subject matter of the judicial review but claims to make the application in a representative capacity, the court ought to be vigilant in examining whether he is genuinely advancing a public interest in making the application or is motivated by other reasons.

113. Mr Wong has focused on point (2) above, and submits that the present application involves an issue of great general public importance, namely whether the election system for the DCGCs is unconstitutional for infringing the fundamental right to stand for election and to participate in public affairs through freely chosen representatives. He says it would be detrimental to the rule of law to allow an unconstitutional election system to stand, and there are no other challengers who have a greater interest in the matter. He submits that the Court should deal with the issue of constitutionality at the first available opportunity, and this is it.

114. Mr Suen submits that (1) the Applicant is not to be regarded as having sufficient interest merely because the issue raised by him is public interest, and (2) there are plainly other person to have greater interest than the Applicant, such as any person intending to stand for election and/or a person not having satisfied the Nomination Requirement. There is also force in Mr Suen's submission that the point advanced by the Applicant in his 2nd affirmation on standing would essentially suggest that any permanent resident of Hong Kong would enjoy the requisite standing to bring such a challenge, which simply cannot be correct.

115. I think the anecdotal evidence (see above) must suggest that there is a person or are persons who had an intention to stand for election but have not been able to satisfy the Nomination Requirement. However, no such person has – for whatever reason – chosen to make a challenge along the lines of the present challenge intended by the Applicant. I take that into account.

116. I note that I have received a further affirmation apparently filed by the Applicant personally on 21 November 2023, notwithstanding that he was at the time represented by solicitors on the record, in which he seems to try to address the question of standing by saying that he was previously qualified as a candidate for three pervious DC elections. I am not sure that even his own solicitors were aware of that affirmation, let alone those acting for the Government. Certainly, it did not make it into the hearing bundle. In any event, I do not think it significantly adds to the debate and I shall ignore it.

117. I also note the degree of equivocation evidenced by the Applicant even after he made this challenge, which might at least go

indirectly to the issue of standing. I think the standing of the Applicant is at best doubtful.

118. Nevertheless, in adopting a holistic approach by taking into account a host of relevant considerations, it would fall also to consider the merits of the application, the importance of vindicating the rule of law, the importance of the issue raised, and the nature of the public law deficiency against which relief is sought. Also relevant is the question of whether there has been undue delay, the topic to which I next turn.

E. Whether Undue Delay in Making Application

119. It is helpful here to set out again the key elements of the chronology relevant to the question of the timing of the application, and whether there has been (and the extent of the) undue delay:

- (1) The public announcement of the CE-in-C's decision on the proposal for legislative reform was made on 2 May 2023.
- (2) The proposed reforms received high publicity, including wide media coverage of a joint press conference by the CE, Chief Secretary of Administration, SJ, SCMA and SHYA on 2 May 2023.
- (3) The public consultation period lasted from 2 to 16 May 2023.
- (4) The Bill was introduced into LegCo on 31 May 2023, and was passed on 6 July 2023.
- (5) The DC(A)O was gazetted and came into effect on 10 July 2023.

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- (6) The polling date (for 10 December 2023) was made known to the public on 24 July 2023.
- (7) The Guidelines – which included details concerning the Nomination Requirement – were published on 28 September 2023.
- (8) The nomination period ran from 17 to 30 October 2023.
- (9) Potential concerns about the proposed and then enacted Nomination Requirement had been publicly aired almost throughout the period.
- (10) The Applicant commenced these proceedings by his Form 86 on 6 November 2023.

120. Also relevant are the following matters, by reference to dates which are all public knowledge:

- (1) The polling date for the DC Elections is 10 December 2023
- (2) The current, sixth-term of the DCs ends on 31 December 2023.
- (3) The statutory deadline for holding the DC Elections (being 15 days before the current term ends / the next term begins) falls on 16 December 2023.
- (4) It is obviously impractical to hold the DC Elections on a different basis than currently arranged, or to put off the election to a new date before 31 December 2023.

121. For his part, the Applicant seeks to emphasise that he was acting in person when he commenced the present application on 6 November 2023, which was 27 days after the expiry of the three-month time limit under RHC Order 53 rule 4(1), and that was only 7 days after

A the close of the nomination period on 30 October 2023. The Applicant
B says it was reasonable and prudent for him to take a “wait-and-see”
C approach to assess whether he should bring a challenge.

D 122. In my very recent decision in *Titan Petrochemicals Group*
E *Ltd v The Stock Exchange of Hong Kong Ltd* [2023] HKCFI 2935 at
F §§50-58, I addressed the relevant principles relating to the question of
G promptness and delay. The starting point is that RHC Order 53 rule 4(1)
H – which rule is headed “Delay in applying for relief” – imposes an
obligation on an applicant by requiring that the application for leave to
apply for judicial review shall be:

I made promptly and in any event within three months from the
J date when grounds for the application first arose unless the
Court considers that there is good reason for extending the
period within which the application shall be made.

K 123. Filing an application within three months is not in and of
L itself sufficient to satisfy the requirement of promptitude. Absent an
M extension granted by the Court upon good reason, the three-month period
N is merely a long-stop period – or a quantified default time limit –
O applicable to all cases. But, public law decisions typically affect a broad
P range of parties, and there is a significant public interest in ensuring that
any challenges to such decisions are brought expeditiously. Full weight
Q must be given to all aspects of the public interest, including the respect
which must be paid to the time limits laid down by the rules.

R 124. Therefore, whether an application has in fact been “made
S promptly” will depend upon the particular circumstances in each case.
T Depending on the context of the particular administrative decision or
U legislative provision sought to be challenged, it is possible that an
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applicant who commences proceedings even within three months may be guilty of undue delay for not having acted promptly. The circumstances to be taken into consideration include but are not limited to (1) the nature of the relevant statutory or regulatory framework, (2) the reasonableness or unreasonableness of the applicant's conduct, and (3) the impact of any delay on interested parties.

125. But, in any event, an application made outside the three-month period will entail undue delay.

126. Hence, an applicant commencing judicial review proceedings who has been guilty of undue delay will require an extension of time in which to apply for leave to apply for judicial review. To justify an extension, the applicant must show "good reason" for extending the period.

127. The existence of good reason for any undue delay does not automatically lead to the grant of leave to apply, but is but one facet of the question whether leave to apply should be granted. Leave may also be refused on the basis that the granting of the relief sought would be likely to cause hardship or prejudice, or be detrimental to good administration – although this conclusion might be less likely to be reached at the leave stage.

128. Where the Court considers that there is no good reason for extending the period, it will refuse leave to apply for judicial review. Even if leave to apply is granted, the issue of undue delay on the part of the applicant may be raised again at the substantive hearing of the judicial review application. The relevant consideration is whether, on the

substantive hearing, relief might or should be refused on the basis that the court thinks that relief would be likely to cause substantial hardship or prejudice to the rights of another or detrimental to good administration.

129. In this particular case, it is clear that the Applicant has not acted promptly in all the circumstances. For reasons including the publicly known discussions, the statutory context and the chronology, I think the requirement of promptitude in the present circumstances required the Applicant to have made the application within just a few weeks, at least during July or early August 2023.

130. In any event, it is also accepted on behalf of the Applicant that he did not even apply within the long-stop period of three months, and was almost another month late. Therefore, the Applicant will require an extension of time in which to apply for leave to apply for judicial review. I have pointed out that, if the Applicant did not make the application promptly, as I have found, he needs much more than just a 27-day extension of time.

131. In that context, it seems to me to be of real significance that the Applicant deliberately delayed. This is because he chose the “wait-and-see” approach, to see what would in fact happen during or as a result of the process involving the Nomination Requirement. The Applicant says that there was a possibility that, despite the Nomination Requirement, there would still be sufficiently diverse and genuine choices in the DCGC elections. As Mr Suen correctly submits, where the Applicant is making a systemic challenge – on the basis of alleged unconstitutionality of the legislative provisions – it should be strictly irrelevant to his case how the requirement in fact unfolds (and this may

come back into view when looking at the merits, when a systemic challenge requires demonstrating that the system is incapable of being operated in a proportionate way).

132. Adopting a “wait-and-see” approach has been consistently discouraged by the Courts. In most circumstances, the Court will not instinctively favour with an indulgence any applicant who has deliberately delayed making an application.

133. Mr Wong submits that, since the constitutionality of a statute is involved, the time factor is not as compelling as in other situations. Indeed, he says, where the constitutionality of the statute is being questioned on the basis that fundamental human rights are being breached, the public interest is very much engaged, so that it would be detrimental to the rule of law and good administration to turn a blind eye to a potentially unconstitutional election system affecting Hong Kong as a whole.

134. Mr Wong also points to the fact that the Nomination Requirement will remain in the legislation, unless otherwise amended or repealed in future. Therefore, a challenge such as the present challenge might be brought at any time in the future, since DC elections are legally required to be held regularly, and the Nomination Requirement will continue to be engaged. Mr Wong submits that that also makes time a factor of less significance. However, it seems to me that it must also be recognised that there is already potentially substantial prejudice to good administration, now that the integrity of the DC Elections is sought to be put in doubt.

135. Mr Wong also submits that there are strong merits in the application, which point to granting the extension of time. Of course, I also take into account the merits of the application itself – which I shall traverse in some detail below. This is, obviously, where the potential consequences of undue delay come into play. If there are strong merits in the application, that may of itself provide “good reason” for extending the time, even if it is thought that there has been undue delay.

136. It is therefore necessary to proceed to consider the merits of the application.

137. However, Mr Suen submits that to allow the intended judicial review to proceed would itself undermine the overall legitimacy and certainty of the DC Elections. Whilst I see something in that submission, I am not sure that it is ultimately correct. Indeed, there seems to me to be a greater danger of undermining the overall legitimacy and certainty if the current application were to be dismissed solely on what might be called technical or procedural grounds. Unless the merits of the application are in fact considered and ruled upon, there may remain some public doubt as to the overall legitimacy and certainty of the arrangements. That would be unfortunate.

138. But, in any event, the merits come into play when considering both aspects of standing and what should be the consequences of undue delay.

139. I acknowledge the great force in Mr Suen’s submissions that:

- (1) The significance of delay may be even greater in the context of a challenged election: see *R (on the application of Jane Elliott) v The Electoral Commission* [2003] EWHC 395 Admin at §§35-41.
- (2) The significant delay, and the tightness of the timetable set to bring the matter to hearing, has meant that there may be real gaps in the evidence as might otherwise have been provided with greater time available to do so.
- (3) Hence, it might be thought that the consequences of delay may have a direct link to the quality of the decision able to be made.
- (4) Applicants for judicial review who fail to act promptly – and/or who fail to be frank as regards their own standing – should not be allowed to “get away with it”, by the Court simply going on to consider the merits of the application notwithstanding.
- (5) There is a risk that future applicants will also think that they can “get away with” a failure to act promptly.

140. Nevertheless, I am ultimately persuaded that – despite the doubts about standing and the substantial undue delay – the best course overall in the wider public interest is to deal with the challenge on its merits. This seems to me to deal with the way which adopts a flexible, though principal and structured, approach. As was said at the hearing, the ‘can of worms’ is already open, and it seems to me necessary to seek to resolve the constitutional challenge, one way or the other.

141. That is not to leave any impression that applicants for judicial review can fail to comply with the rules and requirements of

A frankness with impunity. But each individual case must be approached
B on its own individual circumstances. In this case, such is the importance
C of the point which has been raised in these proceedings that I think that it
D must be addressed head-on now, at the first available occasion for the
E Court so to do. A constitutional challenge lies at the core of the rule of
law.

F 142. Awaiting some potential future challenge, possibly by way
G of an election petition (which by its nature would be of limited direct
H application to a particular election result within an individual
constituency) does not seem to be an attractive course – not least because
I that might leave open a gap in the vindication of the law. Hence, in this
J context, I think dealing with the merits of the application will best serve
the purposes of judicial review.

K 143. Further, whilst recognising that some evidence as might have
L been adduced may not be available, I do not think that materially hampers
M my ability to deal with the application properly on its merits (see below).

N ***F. Whether BL26 and/or BOR 21 are Engaged***

O 144. It is convenient again to set out here the provisions of BL26
P and BOR21.

Q 145. It is noteworthy that BL26 appears in Chapter III of the
R Basic Law which is headed ‘Fundamental Rights and Duties of the
S Residents’. BL26 provides:

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

146. BOR21, headed ‘Right to participate in public life’, provides:

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

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electorate;
- (c) to have access, on general terms of equality, to public service in Hong Kong.

147. Mr Wong submits that the DCs continue to be a means by which members of the public take part in the conduct of public affairs, because by the newly introduced section 4A of the DCO the DCs will continue to serve a range of functions in (1) being consulted by the Government on “district affairs”, (2) serving as a means of communication between the people in the District at the Government when required, and (3) providing services and activities for people in the District.

148. Mr Wong submits that BOR21(a) – which relates to the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives – is engaged. He cites *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459 at 473G-J (“*Chan Wah (CFA)*”), where Li CJ held that public affairs would cover all aspects of public administration, including at the village level. Li CJ also stated that the village representative should be

regarded as engaged in the conduct of public affairs within BOR21, and that this is also reflected by the requirement that to become a village representative, the person elected has to be approved by a public official, in that case the Secretary for Home Affairs.

149. It seems to me that public affairs covering all aspects of public administration including at the village level, identify that it would also cover public administration at the district level, and it can be noted that candidates for election to the DCGCs have to obtain confirmation/approval by a public official or body, in the form of the ERC, and if elected are subject to ongoing supervision by the SHYA.

150. Reference can also be made to the briefing and information documents provided during the legislative reform process. In those documents, the Government sought to emphasise district administration as part of the HKSAR governance structure. Indeed, if it were not, it might be asked why there would be any need to ensure full implementation of the principle of ‘patriots administering Hong Kong’ at the district level. Further, it was stated that the DCs should play the role of complementing the Government, assisting the Government in keeping its finger on the pulse of the community so that the Government can have more effective planning of district services, in turn helping to foster social cohesion. Those matters all seem to me to identify that members of the DCs are fully engaged in what might be regarded as public affairs.

151. Mr Wong further cites *Chan Wah v Hang Hau Rural Committee* [2000] 1 HKLRD 411 (“*Chan Wah (CA)*”) at 433F-H, where Chan CJHC held that BOR21 covers both organs of power as well as consultative and advisory bodies. Such bodies would naturally include

A the DCs. It was emphasised at 433J that, while BOR21(a) confers a
B general right of participation in public affairs, BOR21(b) refers to one
C particular method of participation, i.e. the right to vote in and to stand for
D elections. The view was expressed at 434B-C – with which view I agree,
E even if it were not binding on me – that if BOR21(b) is to apply in Hong
F Kong at all, it would have to cover public collections at the regional and
G local levels. In that case, it would be construed to require that all
H persons within the same class or group to which a particular public
election relates should have equal rights to vote in and to stand for such
election – though those rights may be subject to reasonable restrictions.

I 152. Hence, I accept Mr Wong’s submission that the right to stand
J for election under BL26 and BOR21(b) is also engaged, because the right
K covers public elections at the regional and local levels, such that it would
L require all persons within the same class or group to which a particular
M public relates should have equal rights to vote in and to stand for such
N election, being elections of a public nature: see *Chan Wah (CA)* at
O 433J-434C and 437C-G. Reference can also be made to *Kwok Cheuk*
P *Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20
Q HKCFAR 353 at §23(1), where it was held that BOR21(b) guarantees the
free expression of the will of the electors, so that the right stand for
election is directly linked to the interest of the electorate being given the
widest choice of candidate, and for this reason the right ought not to be
unduly restricted.

R 153. On the basis that any restrictions on the right to stand for
S election must be justifiable on objective and reasonable criteria, and
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should not act as a barrier to candidacy, Mr Wong submits that the Nomination Requirement clearly engages BL26 and BOR21, because:

- (1) the Nomination Requirement is a prerequisite for standing in a DCGC election;
- (2) the Nomination Requirement confers upon the 3Cs an unequal power to override and inhibit the free expression of the will of the general body of electors, in that if the intending candidate is unable to obtain the requisite number of nominations he would be barred from standing in the election irrespective of his popularity among the electors; and
- (3) the choice of candidates in the DCGC elections is restricted.

154. Mr Suen submits that BL26 and BOR21 are not engaged. He says that the *Chan Wah* case in fact recognised that BL26 is clearly not referring to every type of election. He further cites *Chan Yu Nam v Secretary for Justice* (unreported, HCAL 32/2009, 10 December 2009) at §92, where it was held that BL26 gives the right to vote in accordance with law, where law in this context must include the Basic Law, and in particular Annex II.

155. In the case of the DCs, they are specifically governed by BL97 and BL98, which makes clear that the district organisations are not organs of political power, and that the formation of such organisations shall be prescribed by law. In other words, Mr Suen submits, the only requirement under BL98 is that the formation of the DCs is prescribed by law, and there is no other or overarching requirement imposed by BL26.

156. As Mr Suen points out, the DCs are not a political organ, and their members might in fact be entirely appointed. He refers to the fact that there is no challenge as to the appointed membership in the roughly 4:4:2 ratio as to the different constituencies within the DCs. Where BL97 and BL98 do not prescribe or require any election, Mr Suen says, then BL26 is not engaged.

157. There is some obvious logic and force in that submission in so far as it applies to the elements constituting the DCs which are the result of appointments – and, in that regard, that would apply to the directly appointed members of the DCs, as well perhaps as to those members of the DCs elected by the appointed 3Cs members who form the DCC.

158. But the question which arises is whether the logic is equally applicable to the element constituting the DCs which the Government has decided should be the result of an election process with universal suffrage participation amongst the general electorate. Put another way, once the Government has decided that there should be an election of a public nature, does that trigger the engagement of BL26 and/or BOR21? I think it does.

159. The Government has not suggested that the election is to be presumed as aimed at identifying the true will of the people through universal suffrage. That aim is to provide members of the DCs to assist with the district administration which is part of the HKSAR governance structure. As I have pointed out, if members of the DCs had no role in administering Hong Kong, they would not be a need for them to be

confirmed as filling the requirement for ‘patriots administering Hong Kong’.

160. I am satisfied that BL26 and BOR21 are engaged.

G *‘Endorsement’ by CPG*

161. In the Government’s original submissions, attention was drawn to the press release or comment issued by the HKMAO and the LOCPG on the same day that the Bill was passed. Reference was made to the Nomination Requirement, as part of the DC reform, having been thereby “endorsed” by the CPG. However, it seemed to me to be unclear as to what precisely was being argued as to their effect. That has been helpfully clarified by Mr Suen in his oral submissions.

162. He identifies that the HKMAO and LOCPG comments are in line with the decision of the NPCSC in improving the electoral system regarding the CE and LegCo (as now found in Annexes I and II of the Basic Law). This is because those provisions require candidates for the CE and LegCo elections to obtain the requisite nomination from the EC which itself includes (in the fourth sector) representatives of district organisations including the 3Cs – and that shows that the requirement to obtain relevant subscriptions from, amongst others, members of the 3Cs is constitutionally compliant, at least in that context.

163. Mr Suen also submits that those matters provide a good guide to the contemporaneous needs and circumstances, and as to modern views as to the current social and legal landscape, which is pertinent context to the Government’s reform of district administration in light of

A the deviation and disruption in the sixth-term DCs. In other words, what
B has been said upon the passage of the Bill by the HKMAO and the
C LOCPG provide some context for the current consideration of the
D constitutionality of the Nomination Requirement, as is raised in these
E proceedings.

F 164. But, the point is contextual. As Mr Wong correctly points
G out, both the HKMAO and the LOCPG are political organs, and neither
H have the power of interpretation of the Basic Law.

I 165. Ultimately, even in the correct context, the interpretation of
J the Basic Law and the question of constitutionality is not a political
K question. It is a legal question for the Court to determine: see, for
L example, *Kwok Cheuk Kin v Secretary for Constitutional and Mainland*
M *Affairs* (2017) 20 HKCFA 353 at §46.

N ***H. Proportionality Analysis***

O ***H.1 The Test***

P 166. As Andrew Cheung J (as the Chief Justice then was)
Q commented in *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD
R 166 at §107, against a test previously noted in an observation by the
S Court of Final Appeal, “Hong Kong is indeed a democratic society”.

T 167. Incidentally, in the same case at §106, the now Chief Justice
U made the point that merely because only a proportion of the members of
V the elected body (in that case LegCo) is elected by universal suffrage, that
does not mean that “universal suffrage” should bear a lesser meaning than

what that expression requires in Western democratic societies. In the same paragraph, he went on to say:

In other words, in so far as universal suffrage is already allowed in the election of LegCo members for geographical constituencies, the presumption must be in favour of inclusion and the aim must be directed at identifying the will of people through universal suffrage. One could indeed argue that, where only 50% of the LegCo members are elected by universal suffrage, that makes the right to vote doubly important and precious.

168. On that basis, and though the mathematical translation may not be entirely apposite, it might perhaps also be argued that where only 20% of the DC members are elected by universal suffrage, that makes the right to vote (and to stand) five times more important and precious.

169. The rights to vote in and stand for election are indeed fundamental rights, crucial to establishing and maintaining the foundations of an effective and meaningful democracy. But they are not absolute.

170. Therefore, if BL26 and BOR21 are engaged, it is necessary to look at the settled four-step proportionality analysis/test.

171. That test is:

- (1) whether the impugned measure pursues a legitimate aim;
- (2) if so, whether it is rationally connected with advancing that aim;
- (3) whether it is no more than necessary for that purpose; and
- (4) whether a reasonable balance has been struck between the societal benefits of the restriction and the inroads made into

the constitutionally protected rights of the individual, asking in particular whether the pursuit of the societal interest results in an unacceptably harsh burden on the individual.

172. Those distinct elements of the analysis are not to be treated as existing in isolated airtight compartments, unaffected by each other. It is to be borne in mind that there is fluidity and flexibility in the proportionality concept, and the fact that its elements are conceptually interrelated and interdependent: see *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at §§59-60. Further, a provision which passes the rigours of the first three stages of the proportionality analysis will unlikely fail the fourth stage of the analysis, albeit that it is the fourth stage which takes full account of the severity of the deleterious effects of a measure on individuals or groups. As it was put in the *Hysan* case at §73:

One would hope and expect that most laws and governmental decisions at the sub- constitutional level internally reflect a reasonable balance between the public interest pursued by such laws and the rights of individuals or groups negatively affected by those laws. In such cases, where the law passes the first three tests, it would be unlikely to fail the test of proportionality *stricto sensu* (in the narrow, overall sense) at the fourth stage. But one may exceptionally be faced with the law whose content is such that its application produces extremely unbalanced and unfair result, oppressively imposing excessive burdens on the individuals affected.

173. The fourth step therefore requires the Court to examine the overall impact of the impugned measure and to decide whether a fair balance has been struck between the general interest and the individual rights intruded upon, the requirement of such a fair balance being inherent in the protection of fundamental rights.

174. It is also important to note that where a constitutional right is involved, the Courts will rigorously scrutinise the restrictions. But, the possible existence of extreme, difficult or borderline cases does not mean that the proportionality test cannot otherwise be justified.

H.2 Some Further Principles

175. Further, constitutionality is not assessed in a vacuum, and must be assessed against the legislative history and the overall political development in Hong Kong. Neither context nor developments are static. Therefore, the restrictions which are under review – here the Nomination Requirement – are to be assessed against the proper circumstances pertaining at the time of the assessment.

176. The applicable principles might be summarised in the following way:

- (1) Limitations on the exercise of the right to vote or stand for election must be imposed in pursuit of a legitimate aim, must not be arbitrary or disproportionate, and must not interfere with the free expression of the opinion of the people in the choice of their representatives.
- (2) Limitations on the exercise of the right to stand for election might be reasonably stricter than those limitations imposed on the right to vote.
- (3) This is because of the greater responsibility imposed upon an elected person.
- (4) Permissible restrictions can go beyond mere procedural regulations of the nomination process, and disqualification

A			A
B		criteria based on certain attributes of a candidate may be permissible.	B
C	(5)	The restrictions imposed have to be justified.	C
D	(6)	The restrictions must be reasonable, not excessive and non-discriminatory, in addition to being prescribed by law.	D
E	(7)	The limitations must not curtail the rights to such an extent as to impair their very essence, and deprive them of their effectiveness.	E
F			F
G	(8)	Nomination requirements or restrictions should be reasonable and not act as a barrier to candidacy.	G
H			H
I	(9)	Indeed, the limitations or restrictions must reflect, and not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage.	I
J			J
K	(10)	For an effective democracy, it is important to ensure access to the political arena for opposition parties on terms which allow them to represent their electorate, draw attention to their preoccupations and defend their interests.	K
L			L
M			M
N	(11)	Therefore, the Court must examine with particular care any measure which appears to operate solely, or principally, to the disadvantage of the opposition – especially where the restriction appears to impair the very essence and effectiveness of the guaranteed rights.	N
O			O
P			P
Q	(12)	Although criteria governing eligibility to stand for election in different states have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors, the criteria vary in accordance with the historical and political factors specific to each state.	Q
R			R
S			S
T			T
U			U
V			V

- (13) Therefore, justification of restrictions imposed has to be considered against the historical and political evolution or developments of Hong Kong, as they appear from time to time.

H.3 Standard of Review

177. It is appropriate to consider next the applicable standard of review be adopted, or the margin of appreciation that is to be accorded, to the impugned measure – remembering that the margin of appreciation is applicable to all steps in the proportionality test.

178. In *Wong Ho Ming v Secretary for Justice* [2020] 3 HKLRD 419, Chow J (as Chow JA then was) was considering another case relating to the right to stand for election, in the context of disqualifications from being nominated as a candidate arising from prior conviction. At §66, he accepted that the rights to vote and stand for election and to participate in public life protected by BL26 and BOR21 are important rights, but formed the view that the appropriate standard of review to be adopted in that case should be towards the lower end of the continuous spectrum of reasonable necessity (i.e. the “manifestly without reasonable foundation” standard).

179. He did so for reasons which included (but on the particular circumstances of the case were not limited to):

- (1) The case concerned the validity of an aspect of the electoral laws relating to the qualification criteria for a candidate which are inevitably much affected by political or policy considerations, and (as could be seen from the discussions

concerning the legislative history) had been the subject of active political debate.

(2) Plainly, the Legislature is better placed than the Judiciary to assess who may be suitable or unsuitable to fill the elected offices, and the appropriate means to advance the particular aims intended by the qualification or restriction.

(3) The maintenance of public trust and confidence in the public offices of, amongst others, the District Council is itself a matter of considerable public importance.

180. Indeed, there have been many other cases (which do not need to be listed) in which the different roles of the Executive, the Legislature and the Judiciary have been considered, which is the essence of the appropriate point on the sliding scale as to margin of appreciation or standard of review. For example, in *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353 at §42, Ma CJ agreed with the proposition that political decisions or legislative provisions reflecting political judgments are often precisely those areas where the courts are likely to afford a large margin of appreciation. In particular, where there has been active political debate on an issue or piece of legislation, the Court will be inclined to give a wider margin of appreciation. As it was stated, the reason for this is evident: the Courts are generally not equipped (certainly not better equipped than others) to determine political questions, although of course there are limits.

181. Mr Wong referred to §§38 and 45-46 in the same case, in support of the propositions that: (1) the nature of the writing question and the degree to which it has been encroached upon must be considered; (2) any encroachment on constitutionally guaranteed rights must be carefully

scrutinised by the courts; (3) the margin of appreciation to be accorded is but one factor in the overall consideration by the Court of proportionality, where depending on the circumstances it may assume a greater or lesser degree of importance, and (4) while the views of the legislature are to be considered, it is the Court that has the ultimate responsibility to determine whether legislation is constitutional, because that is a matter of law, only for the Courts to determine.

182. On the particular facts of this case, Mr Wong submits that the degree of encroachment on the fundamental right to stand as a candidate for election, as arises from the restriction imposed by the Nomination Requirement, applies to every would-be candidate for the DCGCs, and that should influence the standard of review.

183. I take those matters into account but, on balancing the various features in the particular circumstances of this case which I have set out above, it seems to me that the appropriate standard of review or margin of appreciation is towards the lower end of the spectrum, namely towards the “manifestly without reasonable foundation” standard.

H.4 Step 1: Legitimate Aim

184. As Mr Suen correctly submits, the legitimacy of an aim does not depend on the Court agreeing with it. The responsibility of the Court is from a legal point of view to see whether the stated aim is (1) identifiable and (2) legitimate in the sense that it lies within constitutional limits.

185. In Mr Chik's affirmation at §54, he pointed to the briefing and information papers placed before LegCo which identify the Nomination Requirement as serving three purposes:

- (1) to fully implement the guiding principle of "patriots administering Hong Kong";
- (2) to ensure that the candidates are recognised by persons who are familiar with district affairs, and thus are truly familiar with the district and would be dedicated to serving the districts, and that the connection and collaboration between the 3Cs, local personalities and the DCs could be strengthened;
- (3) to enhance stability across the political spectrum and better reflect the opinions of the majority of the people.

186. In his submissions, Mr Suen focused on the first two subparagraphs as sufficient to identify the aims.

187. In Mr Wong's submissions, he defined or recast the matters canvassed by Mr Chik at both §§54 and 55 of his affirmation as including: (1) the Patriot Aim; (2) the District Familiarity Aim; (3) the District Collaboration Aim; (4) the Stability and Representation Aim; and (5) the District Participation Aim. However, there is no suggestion that any of these aims, however described, is not a legitimate aim.

188. Indeed, these aims are entirely consonant with what was recognised as a legitimate aim in the *Wong Ho Ming* case at §42: "maintaining public trust and confidence in ... the offices of the District Council ... character, honesty and personal integrity of persons elected to those offices ... and the related electoral processes" (see above).

189. I am satisfied that these are legitimate aims.

H.5 Step 2: Rational Connection

190. I do not think any authority is needed for the proposition that whether a measure is rationally connected with advancing a name is essentially a matter of logic and common sense. A rational connection is satisfied if the measure makes it less likely for the mischief to occur. Further, the fact that a measure may subsequently prove to be ineffective to achieve the aim does not in itself disprove rational connection (although it might have a bearing on the issue of whether the measure adopted is proportionate to the pursuit of the legitimate aim, and also the issue of reasonable balance).

191. I accept that the aims identified by the Government are logically furthered by the Nomination Requirement, because that requirement can reasonably be expected to contribute towards their achievement.

192. I accept that the Patriot Aim (as described above) is rationally connected, not least because the members of the 3Cs are trusted by the Government to act appropriately, or they would not have been appointed. The widely publicised main purposes of the reforms – including the Nomination Requirement – included to ensure the principle of ‘patriots administering Hong Kong’. I accept Mr Suen’s submission that common sense and logic support the conclusion that, when deciding whether to nominate any particular person, there would be a high degree of confidence and likelihood that the 3Cs members would bear the fundamental aims in mind, and would likely agree to nominate a

candidate only if satisfied that this requirement is met. Indeed, this was amongst the points made plain in the template email (see above), and there was in any event significant media coverage which would have made the 3Cs additionally aware and mindful of their duties when exercising the nomination power.

193. For that reason, I also agree that it is unfair to suggest that the members of the 3Cs would exercise their nomination powers arbitrarily, instead of by reference to the aims and objectives already identified (a point to which I will return when considering the third step of the proportionality test). But there is in any event no challenge to the appointment of the members of the 3Cs by the SHYA, and there is no inference of arbitrariness to be drawn from the fact that the appointments are made at the SHYA's sole discretion. The basis of the making of appointment has been fully explained

194. It also seems to me to be correct that, where the members of the 3Cs have been appointed because of their familiarity with and activities within the Districts, they might be regarded as having the ability to further the Familiarity and Stability and Representation aims.

195. I am satisfied of the rational connection of the Nomination Requirement to the legitimate aims.

H.6 Step 3: Reasonable Necessity or Foundation

196. This was the main battleground at the hearing.

197. But before turning to the competing submissions, and the matters to be balanced on the assessment at Step 3, it is appropriate to mention the state of the evidence before the Court. One of the things which seems to me to be perhaps missing from the evidence – and it is something that I would have thought would, if at all, have been adduced by the Applicant not the Government – is any real and direct information as to why people from the ‘pan-democrat’ camp might not have obtained eligibility for candidacy. I note the anecdotal and indirect evidence provided by the Applicant, but he has not even provided evidence from members of the party of which he says he is a lifelong member.

198. There seem to me to be many reasons why the make-up of the candidates who have satisfied the Nomination Requirement do not include any or many ‘pan-democrats’. Of course, one possibility is that the members of the 3Cs have understood their obligations as requiring the exercise of discretion against nominating such people – though the open statements are that the only requirements are patriotism and familiarity with local affairs, irrespective of political affiliation. But other possible reasons include: (1) the person considers that he/she has contributed enough; (2) the person is not prepared, for whatever reason, to put himself/herself through the Nomination Requirement, even if that might lead to eligibility for candidacy; (3) the person assumes that he/she will not be able to meet the Nomination Requirement, so does not bother trying; (4) the person has tried but he/she has not been able to establish sufficient contact with members of the 3Cs; (5) the person has tried and has established some contact with members of the 3Cs, but he/she has not been able to obtain any or enough nominations; and (6) the person might have been a member of the sixth-term DC who resigned and did not want

A to stand again or was precluded from doing so. There may be other
B possibilities too.

C 199. I do not think it appropriate for the Court to speculate as to
D these various possibilities.

E 200. It is also in this context that it should be remembered that the
F Applicant is making a ‘first level’ constitutional challenge. This is
G where the “wait-and-see” approach adopted by the Applicant in deciding
H whether or not to lodge these proceedings counts against him. That
I approach embodies a recognition that the Nomination Requirement might
J nevertheless have led to a group of validly nominated candidates who
K might be regarded (at least by the Applicant himself) as sufficiently
L diverse and representative to permit genuine choice.

M 201. There is another related comment that can be made. Where
N the Government has made great play that the intention behind the reforms
O to district level administration is to depoliticise the DCs, it may be
P thought odd that many of the candidates who have satisfied the
Q Nomination Requirement have sought votes from the electorate by
R reference to their membership of a political party. Many of them seem
S specifically to identify themselves as, and rely upon, their membership of
T political parties – and often the individual candidate seems to exhibit a
U photograph of him or herself next to the leader of that party, to show that
V party’s support. I suppose Mr Wong is correct when he says that every
election is political. But, it may be political with a small ‘p’, and – not
least against the Government’s stated intentions – need not be political
with a big ‘p’. Hence the potential for some apparent tension between
the stated intentions and the actualities.

202. Turning to the Step 3 assessment itself, Mr Wong in his oral submissions helpfully sought to highlight eight propositions to identify why the Nomination Requirement should fail that step, as follows:

- (1) The Nomination Requirement confers unequal power of nomination on members of the 3Cs in contrast to the general body of electors, which is of particular concern where the members of the 3Cs are themselves directly appointed by the SHYA.
- (2) The members of the 3Cs can effectively override the view of the general body of electors. There are no criteria guiding them as to how to nominate or not nominate any potential candidate.
- (3) There is no effective safeguard against arbitrary refusal to nominate, where “arbitrary” in this context is intended to mean a decision based on a random choice or personal view, rather than any reasoned or systematic approach. This is heightened by the objective difficulties even to approach members of the 3Cs to seek nomination. This is not the same as suggesting that the members of the 3Cs will act in an arbitrary manner, but to say that there is simply no safeguard to prevent that occurring, or to remedy it if it occurs.
- (4) The Nomination Requirement has the effect of screening out intended candidates from the opposition / ‘pan-democratic’ camp, as can be seen from the results shown in the evidence.
- (5) The reality is members of the 3Cs then to favour themselves or their peers, to the disadvantage of others. The statistics of the result of the Nomination Requirement speak volumes.

Reference can be made to *Yumak and Sadak v Turkey* (2009) 48 EHRR 4 at §121.

(6) On assessing the impact of the Nomination Requirement upon the rights to take part in public affairs or on a free expression of the view of electors, account should be taken of the substantial reduction in the ratio of directly elected amongst the total members of the DCs. Effective representation of popularly elected 20% of members becomes all the more important when the other 80% are either directly or indirectly controlled by the Government.

(7) After the 2023 reforms, there were already significant other measures to safeguard against the concerns motivating the reforms – in the form of the Additional Allegiance Safeguards (as I have defined them above). The most obvious safeguard is the introduction of the ERC, under sections 10A and 10B of the DCO.

(8) The Nomination Requirement – coupled with the reduction in the ratio of popularly elected members – represents a serious retrogression in terms of (a) the representativeness of the DCs and (b) the inclusivity or pluralism of elected members.

203. Mr Wong submits that these are all weighty factors in the assessment of the necessity and reasonableness or proportionality of the Nomination Requirement. He invites the conclusion that the Nomination Requirement is unreasonable, excessive and discriminatory against persons not affiliated with the members of the 3Cs. Objectively, he says, the Nomination Requirement amounts to a barrier to candidacy

A and to free choice, let alone the “widest choice” referred to in the
B authorities.

C 204. Mr Wong also makes the point that the Applicant is making a
D narrow attack only against the Nomination Requirement (and not the
E reforms as a whole), and it is unrealistic to suggest that by striking down
F the Nomination Requirement that would somehow defeat the legitimate
G aims relied upon by the Government. He also submits that the concerns
H about the Nomination Requirement as were ventilated in the
I pre-enactment discussions did not really, or fully, meet the points which
are being put forward by and for the Applicant (and, rather, dealt only
with a narrow aspect of those concerns).

J 205. Lastly, Mr Wong makes the attractive point that if – as the
K Government seeks to emphasise – the DCs have no political function, but
L are merely advisory bodies at the district level, then elected members of
M the DCs should be regarded as having little power, hence only very loose
restriction against their candidacy might be justified.

N 206. In response, Mr Suen makes the general point that the
O Nomination Requirement is not a disqualification requirement or a ban
P applicable to certain individuals, but is a requirement applicable to
Q everyone, being every person who might wish to seek candidacy in the
R DCGCs. So, Mr Suen submits, there is in fact less encroachment than in
S some of the other cases/authorities. For my part, I do not think it helpful
T to identify whether it is a disqualification or something else, and the
U important point is simply to identify that it is a restriction on the
V fundamental right to stand for election, and whatever its label the degree
of its encroachment can be assessed.

207. In response to Mr Wong's eight points (see above), Mr Suen essentially made the following points:

(1) The idea behind the Nomination Requirement is to have persons nominated who have been recognised for their local efforts, by those who are well-placed to recognise that.

(2) Mr Wong's second point presupposes the result of an election, and in any event one of the aspects of mischief against which the Nomination Requirement is aimed is to avoid so-called "popular" persons without sufficient local ties.

(3) The members of the 3Cs clearly know the rationale of the aims and do so from numerous public debates and media reporting, as well as the template email.

(4) Mr Wong's fourth point is entirely speculative.

(5) No member of the 3Cs can nominate himself/herself, and even if 75% of the candidates who have been nominated are members of the 3Cs, that means that another 25% are not members of the 3Cs. In any event, membership of the 3Cs does not disentitle candidacy for a DCGC, and in fact the qualities for which they were appointed to the 3Cs may identify them as appropriate candidates to stand for election in the DCGC in which they are a member of one of the committees constituting the 3Cs.

(6) The reforms overall are to bring focus to patriots administering Hong Kong, who have participated in local affairs, so as to address the misconduct identified as having arisen during the previous sixth-term of the DCs.

(7) The fact that there are the Additional Allegiance Safeguards (as I have defined them) does not mean that the Nomination

A			A
B		Requirement is necessarily excessive. For example, the	B
C		ERC does not deal with questions such as district familiarity.	C
D		The Additional Allegiance Safeguards and the Nomination	D
E		Requirement are not mutually exclusive.	E
F	(8)	As to whether or not the changes are to be regarded as a	F
G		“retrogression”, that was a matter clearly taken into account	G
H		by LegCo in its debates, and was a judgment call to be made	H
I		by the legislature.	I
J	208.	My own view on the points is as follows:	J
K	(1)	I am not sure it is helpful or correct to talk about inequality	K
L		of power of nomination. The Nomination Requirement	L
M		relating to the need to obtain nominations from at least three	M
N		of the members of each of the 3Cs is allied to the	N
O		requirement to obtain at least 50 nominations/subscriptions	O
P		from ordinary members of the relevant constituency. Nor	P
Q		does the appointment to membership of the 3Cs seem to me	Q
R		to create the claimed inequality.	R
S	(2)	Mr Wong’s second point does, as Mr Suen submits, in effect	S
T		presuppose the result of the election. Further, there were	T
U		some criteria guiding the members of the 3Cs as to how to	U
V		nominate or not nominate any potential candidate.	V
	(3)	There is some force in the point that there is no effective	
		safeguard against arbitrary refusal to nominate. But, it is	
		relevant that the members of the 3Cs have been appointed to	
		the DFSC, DFCC and ACs generally, and not specifically for	
		the exercise of nomination triggered by the Nomination	
		Requirement. Indeed, they were all appointed for their	

A		A
B	present term before the Nomination Requirement was even proposed.	B
C	(4) Whilst it can be said that candidates from the opposition /	C
D	‘pan-democratic’ camp have not achieved eligibility through	D
E	satisfying the Nomination Requirement, I do not think the	E
F	evidence is sufficient to draw the inference that has arisen	F
G	only as a result of an unfairness in that requirement. The	G
H	Applicant has also himself accepted, whilst waiting to bring	H
I	these proceedings, that the Nomination Requirement might	I
J	nevertheless have permitted the selection of candidates	J
K	whom he would have regarded as sufficiently diverse.	K
L	(5) There is, however, force in what is shown by the statistics of	L
M	the result of the Nomination Requirement. What is shown	M
N	is that members of the 3Cs tend to favour themselves or their	N
O	peers. But that is not necessarily inappropriate when the	O
P	individual characteristic of members of the 3Cs (part of the	P
Q	reason they were appointed in the first place) is taken into	Q
R	account.	R
S	(6) I do take some account of the substantial reduction in the	S
T	ratio of directly elected amongst the total members of the	T
U	DCs. It seems to me that the fact that the directly elected	U
V	members could never on their own former majority might	V
	suggest that the hurdles to becoming a member need not be	
	high, particularly if those hurdles might shut out some	
	pluralism of viewpoints.	
	(7) The ‘belt and braces’ approach to ensuring some of the key	
	elements and aims of the reforms for administration of the	
	district level does not seem to me to be anything like	
	manifestly unreasonable.	

(8) I have already mentioned that the comment as to whether something is regarded as a retrogression may depend on the point of view of the person making the comment, and may not of itself be helpful. But Mr Suen is also correct in identifying that this idea of “retrogression” was clearly within the debate at LegCo, and the decision as to the constitution or composition of the DCs was essentially a political decision requiring some element of judgment amongst the legislature.

209. I also reject the idea that LegCo did not even have in mind the fundamental rights which might be impacted by enacting the Nomination Requirement as part of the legislative reforms to the administration at district level. First, it seems to me to be inherently unlikely that reforms to the composition of the DCs, which involved variation to the existing electoral process, and the maintenance of some element of a continuing electoral process, were enacted with no consideration of the fundamental rights arising in that process. Secondly, in the various briefings and legislative considerations, there was clearly some recognition of what was called “retrogression in democracy” (i.e. reduction in or interference with voting rights and the ability to stand for election). Hence I reject the submission made by Mr Wong that there was no considered view.

210. Mr Suen also submitted as follows (and I have added my comment to each point in brackets):

(1) The Court must not lose sight of the special constitutional framework of Hong Kong, which includes the amendments made to Annexes I and II of the Basic Law. (I have not.)

A		A
B	(2) There is no dispute that the members of the 3Cs are important stakeholders in district affairs. (That is correct.)	B
C	(3) In terms of the composition or demographics of the 3Cs	C
D	members, they come from all walks of life, and the majority	D
E	are not affiliated with any particular political party. (This is, indeed what the statistics show.)	E
F	(4) There is no suggestion that there is any other entity than the 3Cs better placed to nominate persons to deal with local	F
G	affairs. (That is also correct.)	G
H	(5) In considering the reasonableness of the Nomination Requirement, the Court must consider the nature of the DCs	H
I	and their functions, which are consultative and advisory	I
J	bodies, not organs of political power, and which need the appropriate collaboration between the various local	J
K	personalities and entities. (It is these matters which have to a large extent driven the amendments to the DCO.)	K
L	(6) Requiring nomination from three members is not unduly	L
M	stringent. (Whilst this ought to be correct, it is not necessarily so at the practical level.)	M
N	(7) The cap on nominations which any one candidate might	N
O	obtain minimises the risk of any candidate capturing an unfair number of nominations, impeding the ability of other	O
P	persons to obtain nominations. (I do not see this as an important point.)	P
Q		Q
R	(8) The Nomination Requirement applies indiscriminately to everyone/all candidates. (That ought to be correct, but it is not necessarily so at the practical level.)	R
S		S
T	(9) There is guidance as to how the members of the 3Cs should exercise their discretion whether or not to nominate, and it is	T
U		U
V		V

inappropriate to proceed on the basis that they would exercise their powers arbitrarily. (I agree.)

211. In the final analysis, I have reached the conclusion that the impugned Nomination Requirement is not manifestly without reasonable foundation. Nor do I think would have reached a different conclusion if the standard of review were somewhat closer to the higher one of “no more than reasonably necessary”.

H.7 Step 4: Reasonable Balance

212. It is settled that whether the Nomination Requirement can pass Step 4 requires the court, ultimately, to make a value judgment as to whether it operates on the Applicant/others in a similar situation with oppressive unfairness that it cannot be regarded as a proportionate means of achieving the legitimate aim in question.

213. I do not think this is a case where the analysis at Step 4 – and the additional balancing considerations which they are come into play – changes the conclusion reached that the close of the analysis of Steps 1 to 3.

214. In other words, in my view, and asking myself in particular whether the pursuit of the societal interest results in an unacceptably harsh burden on the individual a reasonable balance has been struck between the societal benefits of the restriction (the Nomination Requirement) and the inroads made into the constitutionally protected rights in BL26 and BOR21.

I. Conclusion

215. Drawing together the above strands, I reach the following overall conclusions.

216. The application for leave to apply for judicial review is granted, with the necessary extension of time for so doing, because it appears to me – and should be evident from the lengthy discussion above – that the intended application for judicial review was reasonably arguable and had a realistic prospect of success.

217. However, the substantive application for judicial review is dismissed upon full consideration of the merits.

218. As to costs, I shall reserve all questions of costs to be determined by me on paper submissions to be filed after the parties have had an opportunity to consider this Judgment. In the circumstances, I see no reason why cost submissions need be staggered or sequential, and instead I shall simply direct that the parties should make their submissions on costs by filing those submissions at or before 4.30pm on 15 December 2023. I shall then proceed to make a separate Costs Ruling.

(Russell Coleman)
Judge of the Court of First Instance
High Court

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Mr Anson Wong Yu Yat and Mr Jonathan Ip, instructed by Kenneth Lam,
for the applicant

Mr Jenkin Suen SC and Mr Michael Lok, instructed by the Department of
Justice, for the putative respondent, 1st and 2nd putative interested parties

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Glossary of Terms

DC	District Council
DCO	District Councils Ordinance Cap 547
Bill	District Councils (Amendment) Bill 2023
DC(A)O	District Councils (Amendment) Ordinance 2023
DFCC	District Fight Crime Committee (<i>one per District</i>)
DFSC	District Fire Safety Committee (<i>one per District</i>)
AC	Area Committee (<i>one or several per District</i>)
3Cs	The DFCC, DFSC and AC(s) in any District
DCC	District Committees Constituency (<i>comprised of the members of the 3Cs</i>)
DB	District Board (<i>precursor to District Council</i>)
CE	Chief Executive
SHYA	Secretary for Home and Youth Affairs
HYAB	Home and Youth Affairs Bureau
SCMA	Secretary for Constitutional and Mainland Affairs
CMAB	Constitutional and Mainland Affairs Bureau
SJ	Secretary for Justice