Status of the Reservation to the Right to Vote in Hong Kong

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Abstract

The Hong Kong government continues to invoke the 1976 reservation to the International Covenant on Civil and Political Rights (ICCPR) entered by the United Kingdom government in relation to Hong Kong. This paper focuses on a major argument proposed by the Hong Kong government before the United Nations Human Rights Committee (HRC) on the issue of universal suffrage. The government believes it can rely on the reservation to the ICCPR on the right to vote. The view is contested by the HRC.

The paper applies the international law on validity of reservations and argues that although the UK reservation is valid its scope would not be broad enough to cover the current situation in Hong Kong, given that elections have already taken place. A hypothetical scenario involving the People's Republic of China (PRC) withdrawing the ICCPR for Hong Kong and re-acceding to it with a modified reservation which explicitly provides for the system of functional constituencies (FCs) is also discussed on attempt to clarify the procedural rules on reservation.

Introduction

In 1976, the United Kingdom ratified the International Covenant on Civil and Political Rights (ICCPR)[1] for itself and extended it to Hong Kong. Given that the United Kingdom did not have the option to exclude its dependencies from the application of the ICCPR, it entered a number of reservations in relation to Hong Kong.[2] Amongst them is one whereby the United Kingdom reserved "the right not to apply article 25(b) in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong,"[3] and thereby suspended the application of the right relating to free elections and universal suffrage.

This paper seeks to examine the status of this reservation under international law. First, the main elements of the right to vote, expounded in article 25(b) of the ICCPR, are considered. It is argued that the arrangement of functional constituencies (FCs) as a method to return members of the Hong Kong legislature constitutes a violation of the right provided in article 25(b). This is followed by a discussion of the submissions of the Hong Kong government before the United Nations Human Rights Committee (HRC),[4] and the concluding observations of the HRC, which suggests the inapplicability of the reservation to the present circumstances of Hong Kong. This view of the HRC is scrutinized. In particular, the validity of the reservation is examined. Finally, this paper contemplates a scenario in which the People's Republic of China (PRC) withdraws as a party to the ICCPR in respect of its obligations for Hong Kong and reaccedes to it with a stronger reservation. The legality of such a move is considered in the hope of further clarifying the legal issues surrounding the reservation to the right to vote in Hong Kong.

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[1] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, (entered into force 23 March 1976).

[2] Ghai observes that "there is no provision [in the ICCPR] for the exclusion of any territories under a state party's jurisdiction. Article 1 requires each signatory state to ensure rights to 'all individuals within its territory and subject to its jurisdiction.'" On the other hand, it was then accepted that a state could modify the ICCPR in relation to a territory through reservations. Yash Ghai, *Hong Kong's New Constitutional Order*, 2nd ed. (Hong Kong: HKUP, 1999), at 406.

[3] *Declarations and Reservations to the ICCPR*, online: Office of the United Nations High Commissioner of Human Rights <http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm> (last modified: 1 November 2006).

[4] The Human Rights Committee is the body set up to monitor compliance with and implementation of the ICCPR.

I. Infringement of the Right to Vote

Article 25(b) of the ICCPR provides that:

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

This provision incorporates three conceptual elements, namely the right to universal suffrage, that of equal suffrage, and non-discrimination. By universal suffrage, it means everyone should be entitled to vote. There is a consensus amongst the drafters that minors and lunatics might be excluded. However, any qualifications based on property or the level of income were considered inadmissible; the right to vote is a basic right of all individuals and may not be restricted to certain groups or classes.[5]

The second element incorporated in article 25(b) is the principle of equal suffrage, or one person, one vote. In essence, this means each vote carries equal weight. Manfred Nowak observes that the principle primarily aims at the "equal *numerical value* of votes", and thus, "curia, class or plural suffrage that, e.g., accords more weight to the votes of large land owners than to those of voters in other curiae violates the principle of equal suffrage."[6] Further, the HRC imposes a positive duty on State Parties "to ensure that the drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of those entitled to be enfranchised to choose their representatives freely."[7]

The third element embodied in the provision on the right to vote is the principle of non-discrimination. Article 25 protects the rights of "every citizen" to vote and its chapeau refers to article 2 of the Covenant. Article 2(1) of the ICCPR requires States Parties to respect and to ensure the recognition of all the rights of the Covenant in a non-discriminatory

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[5] *See*, Karl Josef Partsch, "Freedom of Conscience and Expression, and Political Freedoms" in Louis Henkin ed., *The International Bill of Rights: the Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), pp. 238-245, at 240. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein, Strasbourg, Arlington, Va.: N.P. Engel, 1993), pp. 435-457, at 444-5.
[6] *Ibid*, p. 448.
[7] *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)*, Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), ¶21. [Hereinafter *General Comment No. 25*].

manner.[8] Although the right to vote is not an absolute right and may be subjected to limitations, Nowak comments that "the authority to make reasonable restrictions is not applicable to the prohibition of discrimination in Art. 2" and such attempts may be "deemed unreasonable in any event."[9]

As early as 1995, the HRC commented that the arrangement of FCs constitutes a violation of articles 2(1), 25(b) and 26 of the ICCPR as they give "undue weight to the views of the business community" and "discriminates among voters on the basis of property and functions".[10] The HRC maintained its position in its observations of 1999 as well as 2006.[11]

It is submitted that the assessment of the HRC is correct. First, the arrangement of FC violates the principle of equal suffrage, or one person, one vote. Young and Law find "systematic inequalities" in the system, given that it privileges a very small proportion of the general electorate with an additional right to vote in Legislative Council elections.[12] The variability in constituency size, the gross size differential between the largest and smallest constituency, and the system of corporate voters are highlighted as vivid examples of the inequalities in voting power.[13]

Second, the arrangement of FC discriminates a group of voters at the expense of the other, since it does not provide any rational basis for granting an extra vote to a privileged class of professionals. Worse, not every Hong Kong permanent resident working in those privileged sectors is enfranchised. Within some FCs, only certain persons are considered sufficiently worthy to be entitled to express the will of those sectors or those permanent

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[8] Karl believes that reference to article 2(1) in article 25 "adds no further legal obligation but was doubtless made for additional emphasis." Karl Josef Partsch, "Freedom of Conscience and Expression, and Political Freedoms", *supra*, at 238.
[9] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, *supra*, at 456-7.
[10] *Concluding observations of the Human Rights Committee (Hong Kong): United Kingdom of Great Britain and Northern Ireland*, Human Rights Committee, UN Doc. CCPR/C/79/Add.57 (1995), ¶19, online: Home Affairs Bureau of the Hong Kong SAR <http://www.hab.gov.hk/en/publications_and_press_releases/reports.htm> (last modified: 1 November 2006).
[11] *Concluding observations of the Human Rights Committee (Hong Kong): United Kingdom of Great Britain and Northern Ireland*, Human Rights Committee, UN Doc. CCPR/C/79/Add.117 (1999), ¶12. *Concluding observations of the Human Rights Committee: Hong Kong (China)*, Human Rights Committee, UN Doc. CCPR/C/HKG/CO/2 (2006), ¶18, online: Home Affairs Bureau of the Hong Kong SAR <http://www.hab.gov.hk/en/publications_and_press_releases/reports.htm> (last modified: 1 November 2006).
[12] Simon Young and Anthony Law, "Privileged to vote: inequalities and anomalies of the FC system" in Christine Loh and Civic Exchange, eds., *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong: HKUP, 2006), pp. 59-109, at 63.
[13] *Ibid*, p. 107.

residents in that sector. Li and Kat describes this as "discrimination…piled upon discrimination."[14]

By the same token, it is submitted that the current system for electing the Chief Executive (CE) also breaches article 25. The current system functions in such a way that the CE is indirectly elected. Eligible electors of Hong Kong who fall under one of the 48 designated sub-sectors shall cast their votes to form an 800-member Election Committee, which will in turn be responsible for electing the CE.[15] This system is a breach of article 25 since many eligible voters (e.g. students over 18 and housewives) do not fall under the designated sub-sectors and thus cannot vote for members of the Election Committee. In this regard, the system violates the one person, one vote principle and discriminates a group of voters at the expense of the other.

II. Justifications before the HRC

As argued above, both the arrangement of FCs and the method of election of the CE infringe the right to vote as provided in article 25(b). It is observed that both the colonial government and the government of the Hong Kong Special Administrative Region (SAR) have been relying on the reservation to article 25(b)—in which the UK government reserved "the right not to apply article 25(b) in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong"—in attempt to justify the infringement.[16] However, the HRC has commented on the scope of the reservation in its Concluding Comments of 1995 (and has maintained such a position ever since), that once an elected Legislative Council is *established*, its election must conform to article 25 of the Covenant.[17]

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[14] Gladys Li and Nigel Kat, "The legal status of functional constituencies" in Christine Loh and Civic Exchange, eds., *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong: HKUP, 2006), pp. 143-153, at 149.

[15] s 7, *Chief Executive Election Ordinance* (Cap. 569). The 48 sub-sectors are provided in s 2 of the Schedule to the same Ordinance.

[16] *See, Supplementary Report by the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong under the ICCPR* (May 1996), ¶35, *First Report of the HKSAR of the PRC in the light of the ICCPR* (January 1999), ¶461, *Second Report of the HKSAR of the PRC in the light of the ICCPR* (January 2005), ¶275, *Response to the List of Issues presented by the Human Rights Committee on 7 November 2005* (March 2006), §1.11. All available online: Home Affairs Bureau of the Hong Kong SAR <http://www.hab.gov.hk/en/publications_and_press_releases/reports.htm> (last modified: 1 November 2006).

[17] *Concluding observations of the Human Rights Committee (Hong Kong)* (9 November 1995), *supra*, ¶19, *Concluding observations of the Human Rights Committee (Hong Kong): United Kingdom of Great Britain and*

Regrettably, the HRC did not justify its conclusion with elaborate legal arguments. Further, both the colonial and the SAR governments did not provide convincing legal reasoning in response to the HRC Concluding Comments.

Four arguments were advanced by the colonial and the SAR governments. First, it was suggested the HRC has overlooked the reservation to article 25(b) when it delivered its comments.[18] Second, the FCs serve a historical function, which is to provide a representative voice for Hong Kong's economic and professional sectors so as to reflect their importance in the community.[19] Third, the arrangement of FCs is a transitional measure in the pursuit of the ultimate aim of universal suffrage declared in Article 68 of the Basic Law.[20] Fourth, the current system gives rise to no incompatibility with any of the provisions of the ICCPR as applied to Hong Kong. On this the SAR government relies on article 39 of the Basic Law[21] and argues that since Hong Kong's mini-constitution provides for the continued application of the reservation, the reservation must apply.[22]

The first argument is weak. The HRC was well aware of the reservation but there is a fundamental disagreement with the SAR government over its continued significance. Concerning the second and the third arguments, it is submitted that they are not arguments contesting the HRC's Concluding Comments as to the scope of the reservation. Rather, they are mere *justifications* as to why the SAR government cannot fulfil its obligations under article 25. The second argument attempts to justify why the article was violated in the past. The third argument attempts to justify why the article is being violated at present. To rely on these justifications, the SAR government must accept that the reservation no longer applies to Hong Kong and that article 25(b) now applies. Only then will it see a need to proceed to advance its justifications for the violation of the article.

Northern Ireland, CCPR/C/79/Add.117 (15 November 1999), *supra*, ¶12, *Concluding observations of the Human Rights Committee: Hong Kong (China)* (21 April 2006), *supra*, ¶18.

[18] *First Report of the HKSAR of the PRC in the light of the ICCPR* (January 1999), *supra*, ¶461(b).

[19] *See, Supplementary Report by the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong under the ICCPR* (May 1996), *supra*, ¶34, *First Report of the HKSAR of the PRC in the light of the ICCPR* (January 1999), *supra*, ¶461(b).

[20] *Ibid*.

[21] Article 39 of the Basic Law provides that: "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions *as applied to Hong Kong* shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region." [emphasis added] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted on 4 April 1990 by the seventh National People's Congress of the People's Republic of China at its third session.

[22] *First Report of the HKSAR of the PRC in the light of the ICCPR* (January 1999), *supra*, ¶461(b), *Response to the List of Issues presented by the Human Rights Committee on 7 November 2005* (March 2006), *supra*, §1.11.

Regarding the last argument which invokes article 39 of the Basic Law, it is submitted that the SAR government is once again talking past the HRC's Concluding Comments. The comment that the reservation does not cover Hong Kong is based on an interpretation of the scope of the UK reservation. The SAR government responded to a point that has not been made by the HRC, that is, a reservation entered by the old sovereign could no longer be relied upon by the new sovereign. Thus, the argument that the Basic Law pronounced that reservations entered by the UK in relation to Hong Kong still apply to Hong Kong will not assist the Government.

III. The Status of the Reservation before the Hong Kong Courts

On the domestic front, the jurisprudence of the HRC are persuasive and not binding authority,[23] and the Court of Appeal has held that the views of the HRC are, in so far as they reflect the interpretation of the provision of the ICCPR and are directly related to Hong Kong legislation, of the greatest assistance and should be given considerable weight.[24] The two cases examined below show that the Hong Kong courts have yet to adopt a consistent view as regards the position taken by the HRC on the UK reservation.

A 1995 decision was in line with the assessment of the HRC. In *Lee Miu Ling & Anor v. Attorney General (No 2),*[25] the colonial government tried to rely on the reservation to the right to vote in the challenge to the system of FCs. Keith J. found a *prima facie* violation of article 21 of the Bill of Rights Ordinance (the domestic counterpart of article 25 of the ICCPR) and held that once the Legislative Council was to be elected, the reservation regarding the *establishment* of an elected legislature would no longer be applicable.[26]

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[23] *Halsbury's Laws of Hong Kong* (Hong Kong: Butterworths), 2006 reissue, Vol. 14: Human Rights, ¶¶210.083-210.085.
[24] *R v Sin Yau-ming* [1991] 1 HKPLR 88 (Court of Appeal) at 107, per Silke VP.
[25] *Lee Miu Ling & Anor v Attorney General (No. 2)* [1995] 5 HKPLR 181 (High Court).
[26] Keith J. is of the view that: "Since the Letters Patent now require the establishment of an elected Legislative Council, *s13 of the Bill of Rights Ordinance (BORO)* [which incorporates the reservation to article 25 of the ICCPR] *is, to the extent that it relates to the Legislative Council, a dead letter*…(Emphasis added)" *ibid.*, at 197-8.
His reasoning was not disapproved on appeal, as the case in the Court of Appeal turned on the construction of the Letters Patent then in force. *See, Lee Miu Ling & Anor v Attorney General (No. 2)* [1995] 5 HKPLR 585 (Court of Appeal).

However, there is an indication of a contrary view in the Court of Appeal decision of *Chan Wah & Another v. Hang Hau Rural Committee & Others*.[27] In this case, two non-indigenous villagers sought declarations that the village representative election arrangements at their respective villages were unlawful and argued that, *inter alia*, the electoral arrangement contravened the right to vote.[28] In finding for the plaintiffs, the Court observed that article 21(b) of the Bill of Rights Ordinance covers public elections at the regional and local levels notwithstanding the reservation, since the reservation only applies to elections of the Legislative and the Executive Council but not other public elections.[29] It observed, in *obiter*, that "Article 21(b) … is subject to the reservation with regard to the Legislative Council and Executive Council…"[30] This appears to suggest that the reservation continues to apply, a view inconsistent with that of the HRC and Keith J. in *Lee Miu Ling*. However, the reason for making such a statement may be that the Court wished to assist the plaintiffs by finding the reservation not covering the village representative election, and the Court did not intend to make an authoritative and binding statement as to the scope of the reservation.

The conflicting views as to the status of the reservation to article 25(b), reflected in both the international and the domestic levels, highlight the need to analyse the validity and the scope of the reservation under the law of reservations to international treaties.

IV. Validity of Reservations

A. Reservations in International Law

To understand the rationale of the law of reservations, it is helpful to consider the underlying principle of allowing reservations in multilateral treaties in the first place. It is generally agreed that two competing interests are involved, namely the concerns for

[27] [2000] 1 HKLRD 411 (Court of Appeal).
[28] It is noted that the case went up to the Court of Final Appeal, but not on the issue regarding article 21(b) of the Bill of Rights Ordinance (counterpart of article 25(b) of the ICCPR). Rather, the appeal focused on the right to participate in public life, as provided in article 21(a) of the Bill of Rights Ordinance. *See*, *Secretary for Justice & Others v Chan Wah & Others* [2000] 3 HKLRD 641 (Court of Final Appeal).
[29] at 434, per Chan CJHC.
[30] The Court also cited *Lee Miu Ling* (discussed above) and found that functional constituency is permissible and is provided in the Basic Law and the Legislative Council Ordinance: at 434, per Chan CJHC. This comment remains *obiter* as the case was not about election to the Legislative Council or the Executive Council.

increasing the breadth of treaty participation and that for maintaining treaty integrity.[31] Allowing for reservations "permit[s] agreement on deeper commitments than would otherwise be possible."[32] At the same time, reservations also create fragmented treaty relations among the parties due to the principle of reciprocity. In the context of multilateral human rights treaties, a reservation is meant to be temporary, and its function is to provide "a brief space" in which to bring into line any laws then in force in a territory which does not yet sufficiently respect and protect the fundamental rights recognised therein.[33]

The idea of making reservations to multilateral human rights treaties raises "one of the most controversial subjects in contemporary international law",[34] and the question of the validity of reservations is one of the many complicated areas.

B. Standard for Evaluation of Validity

As a starting point, the HRC gives its view on the standard for determination of the validity of reservations to the ICCPR in its General Comment No. 24:

> "The Covenant neither prohibits reservations nor mentions any type of permitted reservation…The absence of a prohibition on reservations does not mean that any reservation is permitted…Article 19(3) of the Vienna Convention on the Law of Treaties provides relevant guidance. It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty…"[35]

It is submitted that the HRC's view that the validity of reservations to ICCPR depends on its compatibility with the object and purpose of the Covenant is widely supported.[36] This

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[31] *See*, Edward T. Swaine, "Reserving" (2006) 31 The Yale Journal of International Law 307 at 311, Glenn McGrory, "Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol" (2001) 23 Human Rights Quarterly 769 at 792.
[32] Edward T. Swaine, "Reserving", *supra*, at 311.
[33] *Belilos v. Switzerland*, 132 Eur.Ct.H.R. (ser. A) (1988) at 36.
[34] Jose Maria Ruda, *Reservations to Treaties*, 146 Recueil Des Cours 95, 95 (1975), cited in Glenn McGrory, "Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol", *supra*, at 773.
[35] *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), ¶¶5-6 [Hereinafter *General Comment No. 24*].
[36] *See*, for example, the view of the International Law Commission of the United Nations in its Tenth Report on Reservations to Treaties. Special Rapporteur, ILC, *Tenth Report on Reservations to Treaties, First Addendum*,

approach is first suggested by the International Court of Justice (ICJ) in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.[37] Notwithstanding the comment of the dissenting judges in the case that the object and purpose test is difficult to administer,[38] this position is later codified in the Vienna Convention on the Law of Treaties (VCLT).[39] The International Law Commission of the United Nations (ILC) is of the view that this criterion "reflects a rule of customary law which is unchallenged."[40]

Where human rights treaties are concerned, the ILC suggests three factors for consideration when employing the object and purpose test in its Draft Guidelines on Reservations to Treaties (Draft Guidelines).[41] They are namely, (i) the indivisibility of the rights set out in the treaty, (ii) the importance that the right which is the subject of the reservation has within the general architecture of the treaty, and (iii) the seriousness of the impact the reservation has upon it.[42]

UN Doc. A/CN.4/558/Add.1 (2005), online: Official Document System of the United Nations <http://daccessdds.un.org/doc/UNDOC/GEN/N05/387/06/PDF/N0538706.pdf?OpenElement> (last modified: 10 January 2007), especially ¶¶57, 66.

[37] The Court observed: "The object and purpose of the [Genocide] Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation." *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 1951 I.C.J. 15 (28 May), at 24. [Hereinafter *Genocide Convention* case.].

[38] *Ibid*., at 42.

[39] Article 19(c) provides that: "A State may…formulate a reservation unless…in cases not failing under subparagraphs (*a*) and (*b*) [which govern cases where the treaty expressly or impliedly prohibits the making of reservations], the reservation is incompatible with the object and purpose of the treaty." Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force on 27 January 1980).

[40] Special Rapporteur, ILC, *Tenth Report on Reservations to Treaties, First Addendum*, *supra*, ¶56.

[41] The International Law Commission is responsible for "the promotion of the progressive development of international law and its codification." In 1992, the Commission recommended to the General Assembly to include the law and practice relating to reservations to treaties in the programme of work of the Commission. This is endorsed by the General Assembly in 1993. The ILC has considered two options of the future form of its work, namely, in a form of draft protocols to the existing covenants or draft articles. It later decided to present its work "in the form of draft articles whose provisions would be accompanied by commentaries" and be followed by model clauses worded in such a way as "to minimize disputes in the future."

See, Article 1, paragraph 1, of the ILC Statute, quoted in *First Report of the Special Rapporteur* (47th session of the ILC (1995)), UN Doc. A/CN.4/470, online: Official Document System of the United Nations <http://daccessdds.un.org/doc/UNDOC/GEN/G95/615/72/PDF/G9561572.pdf?OpenElement> (last modified: 10 January 2007), p. 76. *See* also pp. 4-5, 77 of the same document, and *Second Report of the Special Rapporteur* (48th session of the ILC (1996)), UN Doc. A/CN.4/477, online: Official Document System of the United Nations <http://daccessdds.un.org/doc/UNDOC/GEN/N05/404/36/PDF/N0540436.pdf?OpenElement> (last modified: 10 January 2007) pp. 9-11.

[42] Draft Guideline 3.1.12, Special Rapporteur, ILC, *Tenth Report on Reservations to Treaties, First Addendum*, *supra*, ¶102.

It is submitted that although the work of the ILC on reservation law is still in progress, once adopted, they are very likely to provide the basis for future state practice and judicial and arbitral decisions.[43]

C. Role of State Practice

At first glance, instances of states reserving on article 25 would seem to suggest such practice is legal—indeed, an author has expressed his astonishment of "how few reservations or declarations to Article 25 have been made upon signature or ratification of the Covenant," given the widely differing political systems in the world.[44] Reservations to article 25(b) have been made by Kuwait, Mexico, Switzerland and Monaco.[45] Amongst these reservations, only that of Kuwait has been challenged by Finland and Sweden; but even so it was a specific challenge as to the discriminatory nature of the reservation as opposed to a general challenge to the validity of the act of reserving on article 25(b) *per se*.[46]

Together with the lack of objections to the UK reservation for Hong Kong on article 25(b), state practice would seem to suggest that such a reservation is not inconsistent with the object and purpose of the treaty. Nonetheless, it is submitted that for the reasons stated below, state practice is not conclusive on the determination of the validity of the UK reservation.

Firstly, it would be over-simplistic to suggest that since there are other states reserving on the same article, the UK reservation will be automatically valid for consistency with the object and purpose of the ICCPR. A closer look of the reservations reveals that they are very different, with varying degrees of derogation to the right to vote. At the lower end is

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[43] The present articles can be compared to the Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, which have already been cited by the ICJ. D.J. Harris, *Cases and Materials on International Law* (London: Sweet and Maxwell, 2004) at 505.
[44] Karl Josef Partsch, "Freedom of Conscience and Expression, and Political Freedoms", *supra*, at 241.
[45] *Declarations and Reservations to the ICCPR*, opt. cit.
[46] Finland and Sweden have objected to Kuwait's reservation, arguing the reservation is contrary to the object and purpose of the ICCPR. Finland also cites violations to the Convention on the Elimination of All Forms of Discrimination Against Women. Similarly, HRC in its Concluding Observations on Kuwait's report remarks that the reservation "raise[s] the serious issue of their compatibility with the object and purpose of the Covenant." (Note that it did not expressly state if the reservation is really incompatible with the object and purpose of the ICCPR.) *Objections to Declarations and Reservations to the ICCPR*, online: UN Office of the High Commissioner for Human Rights <http://www.ohchr.org/english/countries/ratification/4_2.htm> (last modified: 1 November 2006), and *Concluding observations of the Human Rights Committee: Kuwait*, UN Doc. CCPR/CO/69/KWT (2000), online: United Nations Treaty Body database <http://www.unhchr.ch/tbs/doc.nsf> (last modified: 10 January 2007), ¶5.

Switzerland's reservation which concerns the method of election within assemblies (allowing elections to be held by a means other than secret ballot); higher up is Monaco's reservation limiting the application of the article insofar it is contradictory to its constitutional rules and laws (that article 25 shall not impede its constitutional rules on the devolution of the Crown, a law on public employment and the constitutionally provided distinction in treatment between nationals and aliens). The reservations of Mexico and Kuwait are comparatively more intrusive, as they purport to deny the right to vote for a specific class of persons (ministers of religion in the case of Mexico, and females for Kuwait.)[47] Juxtaposed with these reservations, the UK reservation is much broader, as it purports to disapply the right to vote in its entirety but not just certain aspects of it, covering not a specified class but the whole population, and every election which is related to the formation of the legislature.[48] The fact that other states have also reserved on article 25 should not be used to support the contention that the UK reservation is valid; the UK reservation still has to be scrutinized in accordance with the object and purpose test.

Secondly, with regards to the lack of objections to the UK reservation, it is noted that the VCLT regime does provide for objections to reservations.[49] However, the legal effect of such an objection is limited to the treaty relations between the reserving and the objecting states.[50] Therefore, the lack of objections to the UK reservation is only significant so far as the treaty relationship *inter partes* is concerned, and should not have a bearing on the evaluation of the legal status of the said reservation.

Thirdly, states are said to be unreliable adjudicators of the validity of reservations. As early as in 1951, the ICJ has commented that the examples of objections made to reservations appear to be "too rare" in international practice to have given rise to any rules purporting that

[47] *Declarations and Reservations to the ICCPR, supra*.
[48] Further analysis of the nature and scope of the UK reservation is found in section IV. E. of this essay.
[49] Vienna Convention on the Law of Treaties (VCLT) article 20(4).
[50] *See*, *Genocide Convention* case and VCLT article 21, both discussed in Human Rights Committee's *General Comment No. 24*, ¶16. Similarly, Ghai observes that "the acceptance of these by other parties or their failure to object to them within a 12 month period will constitute the acceptance of the reservation *inter partes*." Yash Ghai, "Derogations and Limitations in the Hong Kong Bill of Rights" in Johannes Chan and Yash Ghai, eds., *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong, Singapore, Malaysia: Butterworths Asia, 1993) at 165.

the effect of a reservation should be determined solely by the express or tacit assent of all the contracting parties (rule of absolute integrity).[51] This view is echoed by the ILC.[52]

It is observed that the presence of political motives account for the lack of objections from states. States may refrain from objecting manifestly invalid reservations in fear of repercussions; this may also stem from a general dislike of states to make their legal stance very clear, which is believed to warrant unwanted political obligations.[53] States may even embrace another state's decision to formulate reservations as trade-off, such that the reserving state will not by the same token accuse its own reservations.[54] There have been cases in which two identical reservations are formulated, and yet only one of them was met with objections.[55] Since states object (or refrain from objecting) to reservations for non-legal reasons, it is mistaken to lay too much emphasis on the pattern of state objections to a state's reservations in assessing the legal question of validity of reservations.[56]

The fourth reason for not relying upon state practice is based on the perceived distinctiveness of human rights treaties as opposed to other international treaties. The ICJ observed that in human rights treaties, states parties do not have any interests of their own; instead, they have only the common interest of accomplishing "those high purposes which are the raison d'être of the convention."[57] This accounts for the lack of incentives for states to object to invalid reservations. Similarly, the HRC commented that the non-reciprocal character of human rights treaties meant that states were inadequate guardians against reservations.[58] Human rights treaties, according to the HRC, "are not a web of interstate exchanges of mutual obligations;" rather, they concern "the endowment of individuals with

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[51] The Court is of the view that "[t]he considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits one to state that such a rule exists, determining with sufficient precision the effect of objections made to reservations." *Genocide Convention* case, at 24-5.
[52] The Commission believes that "in practice, States infrequently object to reservations which are very possibly contrary to the object and purpose of the treaty to which they relate and that, as a consequence, the rule contained in article 19(c) is deprived of concrete effect." Special Rapporteur, ILC, *Tenth Report on Reservations to Treaties, Second Addendum*, UN Doc. A/CN.4/558/Add.2 (2005), online: Official Document System of the United Nations <http://daccessdds.un.org/doc/UNDOC/GEN/N05/404/36/PDF/N0540436.pdf?OpenElement> (last modified: 10 January 2007), ¶186.
[53] Edward T. Swaine, "Reserving", *supra*, at 343-4.
[54] *Ibid*.
[55] This concerns the identical reservations of Trinidad and Tobago and Guyana to First Optional Protocol of the ICCPR. For details, *see* Glenn McGrory, "Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol", *supra*, at 822.
[56] *Ibid*.
[57] *Genocide Convention* case, at 23.
[58] Human Rights Committee, *General Comment No. 24*, *supra*, ¶17. In the same document, the HRC explicitly rejected importation of VCLT regime directly in multilateral human rights treaties. It is particularly against the notion that reservations are to be judged only by states parties and only in respect of the objecting states' relations with the reserving state.

rights."[59] It thus concluded that "[t]he absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant."[60]

Finally, international law in its current state is unclear as to how to interpret the lack of objections by states to a certain reservation. The ILC takes note of the existence of two opposing views on this issue (the permissibility and the opposability schools) and believes no conclusion can for now be reached.[61] This highlights the difficulty and uncertainty involved should state practice be used as a benchmark for the evaluation of the question of validity.

To sum up, state practice has a limited role in the determination of the validity of a reservation. The ILC further suggests that if a reservation is invalid *per se*, the acceptance by some contracting parties would not change the intrinsic nullity of such.[62] Therefore, the fact that other states have entered into reservations to article 25 and that the UK reservation has not been objected to by states are not conclusive on the validity of the UK reservation.

D. Standard of Interpretation of Reservations

Before subjecting the UK reservation to the object and purpose test, the standard of interpreting reservations should be considered. This would assist the determination of the effect and scope of the UK reservation.

A proper starting point would be the VCLT.[63] Articles 31 and 32 of VCLT concern the interpretation of treaty provisions. Article 31(1) provides for a textual and teleological approach to treaty interpretation. It reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context

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[59] *Ibid*.
[60] *Ibid*.
[61] The permissibility school takes an objective approach and views that the objection of states is not required to make a reservation null and void. On the other hand, the opposability school takes a subjective approach and believes that validity of a reservation depends solely on the acceptance of the reservation by another contracting state. Special Rapporteur, ILC, *Tenth Report on Reservations to Treaties, Second Addendum*, *supra*, pp. 23-25
[62] *Ibid*., ¶¶201-2, stated clearly in guideline 3.3.3, in Annex to the *Tenth Report on Reservations to Treaties, Second Addendum*, opt.cit., p.32.

Note that "acceptance" is used interchangeably as the lack of objections. The ICL Draft Guideline 3.3.4 has a heading "Effect of collective *acceptance* of an invalid reservation"; whilst the section reads: "A reservation…may be formulated by a State…if none of the other contracting parties *objects* to it after having been expressly consulted by the depositary." *ibid*. ¶207.
[63] Entered into force on 27 January 1980.

and in the light of its object and purpose." The context of a treaty, according to paragraphs 2 and 3 of the same article, includes the preamble and annexes, accompanying agreements and instruments entered into by the parties, subsequent agreements and instruments, as well as subsequent practice. Article 32 stipulates that supplementary means of interpretation are only to be employed under two situations, namely when a textual approach (i) leaves the meaning ambiguous or obscure, or (ii) leads to a result which is manifestly absurd or unreasonable.

It is observed that the HRC adopts the same approach to the interpretation of reservations, where primacy is given to the text of the reservation. For instance, the HRC adopted a strict textual approach as it considered Australia's reservation to article 10 of the ICCPR (concerning the right of accused persons), which reads: "In relation to paragraph 2(a) the principle of segregation is accepted as an objective to be achieved progressively." Opining that the wording of the reservation is specific and transparent, and that its scope is clear, the HRC interpreted the word "segregation" according to its ordinary meaning without resorting to any supplementary means.[64]

The approach to interpretation of reservations to human rights treaties is elaborated at length in the Advisory Opinion of the Inter-American Court of Human Rights in the *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights* case.[65] The case concerned the effect and scope of Guatemala's reservation to the American Convention, that whether the reservation can be invoked in order to justify the application of the death penalty to common crimes connected with political crimes to which that penalty did not previously apply. The Court followed the approach laid down in the VCLT, and held that the interpretation of reservations must be guided by "the primacy of the text."[66] The Court also stated that reservations will have to be interpreted in a manner that is most consistent with the object and purpose of a treaty, and that "[t]he purpose of the [American] Convention imposes real limits on the effect that reservations attached to it can

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[64] Communication No 1020/2001: Australia, UN Doc. CCPR/C/78/D/1020/2001 (2003), online: United Nations Treaty Body database <http://www.unhchr.ch/tbs/doc.nsf> (last modified: 10 January 2007), ¶7.4 The HRC thus found that "the *segregation* of convicted and unconvicted persons and does not extend, as argued by the authors and not contested by the State party, to cover the *separate treatment* element of article 10, paragraph 2 (a) as it refers to these two categories of persons."

[65] Advisory Opinion OC-3/83, September 8, 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3 (1983).

[66] The Court gave the reason that should supplementary means of interpretation be employed lightly, this might ultimately lead to the conclusion that "the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation relates, including even all such matters which the State might subsequently declare that it intended the reservation to cover." *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights),* Advisory Opinion OC-3/83, September 8, 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3 (1983), ¶63-4 [Hereinafter *Death Penalty* case].

have."[67] The Court considered article 29(a) of the Convention and believed this "compels the conclusion that a reservation may not be interpreted so as to limit the enjoyment and exercise of the rights and liberties recognized in the Convention to a greater extent than is provided for in the reservation itself."[68] In this way, the Court held that reservations should be narrowly interpreted and that "a State reserves no more than what is contained in the text of the reservation itself."[69] Applying the principle of narrow interpretation of reservations, it concluded that Guatemala's reservation to article 4(4) of the Convention cannot be invoked to justify the application of the death penalty to common crimes connected with political crimes to which that penalty did not previously apply.[70]

A further point in the *Death Penalty* case is that the Court, in adopting a narrow approach to interpretation of reservations, suggested that in the absence of an express provision as such, reservations cannot be interpreted so broadly as to cover future contingencies.[71] This is consistent with the general conception of reservations, which "relate only to arrangements for implementation, without impairing the actual substance of the rights in question," and whose function is to provide states "a brief space" to bring into line any laws then in force in its territory which do not yet sufficiently respect and protect the rights recognized.[72] Reservations are by nature temporary and "are not aimed at preserving a state's freedom to manoeuvre on the question [of scope] in the future."[73]

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[67] *Ibid*., ¶¶61, 65.
[68] *Ibid*., ¶66. A similar provision is found in article 5 of the ICCPR.
[69] *Ibid*., ¶¶69, 74.
[70] The Court arrived at this conclusion by holding that Guatemala's reservation to article 4(4) cannot be taken to encompass article 4(2) and to cover new offences, since article 4(2) establishes an absolute prohibition on the extension of the death penalty in the future, and that the only subject reserved by Guatemala is the right to continue the application of the death penalty to political offences or related common crimes to which that penalty applied *previously*. Furthermore, the wording of the reservation is also interpreted narrowly. The reservation reads: "The Government of the Republic of Guatemala…[makes] a reservation with regard to Article 4, paragraph 4 …, *inasmuch as the Constitution of the Republic of Guatemala, in its Article 54*, only excludes from the application of the death penalty, political crimes, but not common crimes related to political crimes. [Emphasis added.]" It is held that the reference to Guatemala's constitution could only be taken to mean as a *description* of its domestic law (which does not prohibit death penalty), rather than a suggestion that the Constitution *requires* the application of death penalty. *See*, *ibid*., ¶¶67-73.
[71] *See* footnote 70.
[72] *Belilos v. Switzerland*, *supra*, at 36. *See* also, Yash Ghai, "Derogations and Limitations in the Hong Kong Bill of Rights", *supra*, at 167, footnote 18, where the author observes: "It is not uncommon for a state to enter a reservation to specific parts of a treaty if its domestic law is incompatible with them but to later withdraw the reservation as it enacts the necessary legislation."
[73] William A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?" (1995) 21 *BKNJIL* 277 at 304.

E. Application of Object and Purpose Test

First and foremost, the object and purpose of the ICCPR should be considered. According to the HRC:

> "The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken."[74]

Furthermore, the ILC Draft Guide 3.1.5 provides that:

> "For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitute its raison d'être."[75]

In other words, reservations to the "essential" clauses, and only to such clauses, are rejected, and it is the "fundamental core" of a treaty that is to be preserved.[76]

1. Can article 25 ever be reserved upon?

It should be recalled that the ILC suggests three factors in assessing the compatibility of a reservation to the object and purpose of human rights treaties. An examination of two of the factors, namely the importance of article 25(b) to the ICCPR as a whole and the indivisibility of rights, seems to suggest that article 25 can never be reserved upon.

It can be argued that article 25 providing for the right to vote constitutes an essential clause of the ICCPR, and thus *any* reservations to this provision would violate the object and purpose of the Covenant and would be invalid. Ghai suggests "[t]he disapplication of the rights to franchise and an elected legislature and executive *strikes at the roots* of the Covenant, for it negates the very basis of democracy on which other rights may be said to exist. [Emphasis added.]"[77] Nowak also believes the right to vote is "without doubt the most important political right" and that the effectiveness of human rights enforcement hinges on

[74] Human Rights Committee, *General Comment No. 24*, *supra*, ¶7.
[75] In Annex to the *Tenth Report on Reservations to Treaties, Second Addendum*, *supra*, p. 30.
[76] *See*, Special Rapporteur, ILC, *Tenth Report on Reservations to Treaties, First Addendum*, *supra*, ¶¶88-9.
[77] Yash Ghai, "Derogations and Limitations in the Hong Kong Bill of Rights", opt.cit., at 166.

primarily two factors, namely the power of a democratically elected parliament vis-à-vis the executive branch and the power of an independent judiciary vis-à-vis both the executive and the legislative branch.[78] Similarly, McLachlin J., then the Chief Justice of the British Columbia Supreme Court (now the Chief Justice of Canada), acknowledged the importance of the right to vote in the context of section 3 of the Canadian *Charter*:

> "[T]he right to vote and participate in the democratic election of one's government is one of the most fundamental of the *Charter* rights. For without the right to vote in free and fair elections all other rights would be in jeopardy. The *Charter* reflects this. Section 3 cannot be overridden under s. 33(1); it is, in this sense, a preferred right."[79]

These statements suggest article 25 is an essential clause which could never be reserved upon. A member of the HRC, as he commented on the reservation to article 25(b) of Kuwait, expressed the view that:

> "…given the Committee's general comment on reservations, and the clear requirements of articles 2, 3, 4 and 26 of the Covenant, *any* reservation in respect of article 25 was not compatible with the object and purpose of the Covenant. [Emphasis added.]"[80]

Furthermore, where the indivisibility of rights is concerned, the first preambular paragraph of the ICCPR explicitly states that the Covenant recognizes "the inherent dignity and of the *equal and inalienable rights* of all members of the human family. [Emphasis added.]" This seems to add further support to the contention that reservations to article 25 are invalid.

Nevertheless, the position that any reservations to article 25 will fail the object and purpose test is open to criticism, especially given actual state practice. Although it is argued above that the state practice of reserving on article 25 and the lack of objections to the UK reservation does not *per se* make the UK reservation valid, it would be too far-fetched to say state practice does not have any weight in the determination of validity. The ILC recognizes the complementarity among the various methods of verification, including the respective monitoring roles of the treaty bodies and that of the contracting states:

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[78] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, *supra*, at 443, and Manfred Nowak, "Interpreting the Hong Kong Bill of Rights: Techniques and Principles" in Johannes Chan and Yash Ghai, eds., *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong, Singapore, Malaysia: Butterworths Asia, 1993) 146 at 148.
[79] *Dixon v British Columbia (A.G.)* (1989), 35 B.C.L.R. (2d) 273, at 284.
[80] *Summary record of the 1852nd meeting: Kuwait*, UN Doc. CCPR/C/SR.1852 (2000), ¶27.

> "[I]t is essential that, in assessing the validity of a reservation, the monitoring bodies…should take fully into account the positions taken by the contracting parties through acceptances or objections. Conversely, States, which are required to abide by the decisions taken by monitoring bodies when they have given those bodies decision-making power, should pay serious attention to the well-thought-out and reasoned positions of those bodies, even though the bodies cannot take legally binding decisions."[81]

In this respect, given that a number of other states have also reserved on article 25, it is submitted that each reservation should be evaluated on a case-by-case basis and reservations to article 25 should not automatically be held incompatible with the object and purpose of the ICCPR. On this, it is worth noting that even the HRC itself has not gone as far as challenging the validity of the UK reservation on the ground that no reservations could ever be made to article 25.

Concerning the notion that human rights are indivisible in nature and thus no reservations could be made to any particular provision of the ICCPR, it is again submitted that the position would be too radical. Although the ILC names this as a factor for evaluation of the validity of a reservation, it has also stated clearly that this does not mean that, by its very nature, a general reservation bearing on one of the protected rights would be invalid.[82] Further, state practice also suggests otherwise. So far, states parties have not systematically formulated objections to general reservations bearing on any one of the rights protected by the Covenant.[83] In this regard, the requirement of indivisibility seems more to be one of the factors of concern than a rigid criterion to be met before a reservation could be considered valid.

2. Impact of a reservation upon the general architecture of the treaty

The third factor suggested in the ILC Draft Guideline, namely, the seriousness of the impact the UK reservation has upon the general architecture of the ICCPR, will now be considered.

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[81] Special Rapporteur, ILC, *Tenth Report on Reservations to Treaties, Second Addendum, supra*, ¶165.
[82] Special Rapporteur, ILC, *Tenth Report on Reservations to Treaties, First Addendum, supra*, ¶100.
[83] The HRC itself also does not go that far, as evidenced in the paragraphs following its statement of the object and purpose principle. There, the HRC sets out in greater detail the criteria it uses to assess whether reservations are compatible with the object and purpose of the Covenant. *ibid*. Cf. Human Rights Committee, *General Comment No. 24, supra*, ¶¶8-10.

An examination of the jurisprudence and the general comments of the HRC sheds light on what reservations would create a serious impact upon the architecture of the whole Covenant. The Committee has commented that if a reservation purports to reject the monitoring role of the HRC, it would be against the object and purpose of ICCPR and is thus invalid.[84] In its General Comment No. 24, it also lists that reservations to article 1 (denying peoples the right to determine their own political status and to pursue their economic, social and cultural development), article 2(1) (to respect and ensure the rights and to do so on a non-discriminatory basis), article 2(2) (to take necessary steps at the domestic level to give effect to the rights of ICCPR) would be incompatible to the object and purpose of ICCPR.[85] In the case of *Rawle Kennedy v Trinidad and Tobago*,[86] the HRC held that the act of excluding the competence of the HRC for one particular group of complainants (namely the prisoners under sentence of death) constitutes discrimination; this runs counter to some of the basic principles embodied in the Covenant and its Protocols, and is thus incompatible with the object and purpose of the Protocol.[87]

Moreover, it should be noted that there seems to be a general reluctance of the Inter-American Court of Human Rights to find incompatibility and invalidity of a reservation. In its Advisory Opinion on the *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)* case, the Court opined that a reservation which was designed to enable a state to suspend any of the non-derogable fundamental rights, which includes the right to life, must be deemed to be incompatible with the object and purpose of the Convention. However, it held that "[t]he situation would be different if the reservation sought *merely to restrict certain aspects* of a non-derogable right without depriving the right as a whole of its basic purpose. [Emphasis added.]"[88] On the facts, the Court held Guatemala's reservation valid, as it did "not appear to be of a type that is *designed to deny* the right to life as such. [Emphasis added.]"[89] From this judgment, it would appear that only in extreme cases, where there involves an outright and encompassing denial of a fundamental right, would a Court find a reservation invalid. Even for cases of a non-derogable right,

[84] Human Rights Committee, *General Comment No. 24*, *supra*, ¶11.
[85] *Ibid*., ¶9.
[86] Communication No. 845/1999, UN Doc. CCPR/C/67/D/845/1999 (1999), online: United Nations Treaty Body database <http://www.unhchr.ch/tbs/doc.nsf> (last modified: 10 January 2007).
[87] *Ibid*., ¶6.7.
[88] *Death Penalty* case, ¶61.
[89] *Ibid*.

reservations can be valid if it only seeks to restrict certain aspects but not the whole of the right.

It is submitted that such a reluctance of finding invalidity may be rooted in the Inter-American Court's sensitivity to the consent principle behind the formulation of reservations. In the *Interhandel Case*, Sir Hersch Lauterpacht concluded that it is not open to the Court to disregard that reservation and at the same time to hold the accepting state bound by the treaty, since a reservation is "an essential *condition* of the acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation. [Emphasis added.]"[90]

The principle of consent is one major ground of the objection of the USA to the HRC's view regarding the consequence of an invalid reservation. Opposing the HRC's view that should a reservation be held invalid, the reservation will be severed and the treaty will be operative for the reserving state without the benefit of the reservation,[91] the USA observed that:

> "The general view of the academic literature is that reservations are an essential part of the State's consent to be bound. They cannot simply be erased. This reflects the fundamental principle of the law of treaties: obligation is based on consent…A State which expressly withholds its consent from a provision cannot be presumed, on the basis of some legal fiction, to be bound by it."[92]

It is thus submitted that the operation of the consent principle is likely to influence the courts and make them less ready to find a reservation invalid on the ground that it is incompatible with the object and purpose of a treaty.

3. Impact of the UK reservation on the general architecture of the ICCPR

To evaluate the seriousness of the impact of the UK reservation on the general architecture of the ICCPR, first we should decide upon the effect and scope of the reservation.

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[90] *Interhandel (Switzerland v U.S.)*, 1959 I.C.J. 6, *117, cited in Glenn McGrory, "Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol", *supra*, at 814.
[91] Human Rights Committee, *General Comment No. 24*, *supra*, ¶18.
[92] (1996) 3 I.H.R.R. 265, (1996) 16 H.R.L.J. 244, cited in D.J. Harris, *Cases and Materials on International Law*, *supra*, at 823.

Earlier in the paper the UK reservation was compared to other reservations to the right to vote, and it was suggested that, on the face of it, the UK reservation is a broad one, as it purports to disapply the right to vote in its entirety, and covers the whole population of Hong Kong and every election which is related to the formation of the legislature.

However, given the principles of interpretation of reservations discussed above, it can be seen that the HRC has applied established principles in interpreting the UK reservation, and thus has narrowed the scope of the reservation. First, a textual approach was followed, where the word "establishment", which is clear and unambiguous, is given a strict literal meaning. Second, the HRC's finding that once an elected Legislative Council is established, its election must conform to article 25 of the Covenant is also consistent with the principle of narrow interpretation of reservations. In the *Death Penalty* case, the Inter-American Court of Human Rights held that the reservation to article 4(4) of the Convention could not be interpreted to cover article 4(2), nor vice versa.[93] By the same token, the UK reservation to article 25(b) could not be taken to shield the Hong Kong government from its obligations of non-discrimination under articles 2 and 26, which is also found by the HRC to be violated.

Further, employing the principle that a reservation should not be interpreted to extend its coverage to future situations, the UK reservation which addressed the situation in 1976 (where there was no elected legislature) should not be interpreted to apply to the present situation where there is a partially elected legislature. In this respect, Keith J. has suggested that the Hong Kong government can only rely on the reservation if it is worded in the following manner: "In the event of the Legislative or Executive Council in Hong Kong *being elected or partly-elected*, art 21 [of s8 of the Bill of Rights Ordinance, which incorporates article 25 of the ICCPR] does not apply to such elections. [Emphasis added.]"[94]

With such effect and scope as interpreted by the HRC, it would seem that the UK reservation does not share a comparable degree of seriousness with the list of reservations which are deemed invalid by the HRC. Nowhere does the UK reservation purport to reject the monitoring role of the HRC (neither with respect to the whole population nor discriminatorily for a particular group), nor does it constitute a complete denial of the rights guaranteed under articles 1 and 2 (on self-determination and non-discrimination) of the ICCPR. Moreover, it is observed that courts, influenced by the consent principle, are

[93] *Death Penalty* case, ¶70.
[94] *Lee Miu Ling* [1995] 5 HKPLR 181 (High Court), at 197.

generally reluctant to find a reservation invalid, except for extreme cases. Further, the right to vote is a derogable right (as opposed to non-derogable rights such as the right to life, as examined in the *Death Penalty* case).[95] Therefore, it is unlikely that the UK reservation, with a scope as narrowly interpreted by the HRC, would be found to have reached a comparable level of severity which would trigger such a drastic reaction as the declaration of invalidity.

For the reasons given above, it is submitted that the UK reservation has been a valid one; however, given that elections have already taken place, the reservation cannot cover the current situation in Hong Kong.

V. "Withdraw-and-Reaccede" Scenario

A. The Scenario

In the preceding sections it is shown that although the UK reservation may not be invalid, its scope is unlikely to cover the current situation of Hong Kong. This section considers a hypothetical scenario following from the above analysis.

Suppose Beijing is dissatisfied with the evaluation of the HRC, it proceeds to denounce the treaty on behalf of Hong Kong, and then reaccedes to it with a modified reservation. The reservation could be worded as follows: "In the event of the Legislative or Executive Council in Hong Kong being elected and members being returned by functional constituencies and geographical constituencies, article 25(b) does not apply to such elections." On the face of it, such wording is clear and unambiguous and has a definite scope; it also reflects the intention of Beijing. This section will examine whether such acts would be lawful under international law.

B. Modalities of Application of ICCPR to Hong Kong

Before proceeding to the substantive analysis, it is useful to first consider the modalities of application of the ICCPR in respect of Hong Kong. As far as succession of the

[95] Article 4 of the ICCPR provides that in time of public emergency, the States Parties may take measures derogating from their obligations, but no derogation shall be allowed in respect of Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18.

ICCPR is concerned, Hong Kong is quite a unique case. It involves not just the complication of a third country as the new sovereign, with its own treaty regime, but also the fact that Hong Kong is given a high degree of autonomy.[96] As Hong Kong is not a sovereign state, it lacks the competence to becoming a party, of its own motion, to the ICCPR. Chan looks into the wording of article 48(1) of the Covenant and believes that only states can be a party to the ICCPR.[97] Although the PRC has yet to ratify the ICCPR, it is suggested that there are at least two ways enabling the continued application of the ICCPR to Hong Kong. The position seems to be that after 1997, the ICCPR obligations have become treaty obligations of the PRC applicable specifically to Hong Kong, and that China is a party to the ICCPR in relation to the territory of Hong Kong[98] and Macao.

Firstly, it is suggested that the continued application of the ICCPR is specifically guaranteed in the Sino-British Joint Declaration.[99] It is believed that despite the designation of the Sino-British accord as a "Declaration," this does not detract from its status as a legally binding instrument.[100] Members of the HRC have expressed a similar view.[101]

However, such a mode of application of the ICCPR to Hong Kong is not without limitations. First, obligations under the Joint Declaration are owed only to the United Kingdom; people of Hong Kong will have no remedy at all under international law.[102] Second, the Joint Declaration itself does not provide an effective means of redress.[103] Further, under Chinese domestic law, whether an international treaty would be automatically binding

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[96] Yash Ghai, *Hong Kong's New Constitutional Order*, *supra*, at 481.
[97] Johannes Chan, "State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights" (1996) 45 *International and Comparative Law Quarterly* 928 at 941-2. This view is also supported by Crawford. James Crawford, *Rights in One Country: Hong Kong and China* (Hong Kong: Faculty of Law, HKU, 2005) at 28-9.
[98] James Crawford, *Rights in One Country: Hong Kong and China*, *supra*, at 28-9, quoting the HRC as it referred to "the continuity of the reporting obligation in relation to Hong Kong" in its Fifth Report.
[99] Annex I, Article XIII of the Joint Declaration provides that ICCPR as applied to HK shall remain in force. *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong* (entered into force 27 May 1985) [Hereinafter *Joint Declaration*].
[100] Roda Mushkat, *One Country, Two International Legal Personalities*: *The Case of Hong Kong* (Hong Kong: HKUP, 1997) at 140-1. James Crawford, *Rights in One Country: Hong Kong and China*, *supra*, at 3.
[101] E.g., a member observed that "China had voluntarily accepted the obligation that the provisions of the Covenant, as they applied to Hong Kong, in other words subject to the reservations made by the United Kingdom, would remain in force. That obligation derived from a binding international treaty, the Sino-British Joint Declaration and its annexes, which had been ratified by both parties and registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter." *Summary record of the 1535th meeting (Hong Kong) : United Kingdom of Great Britain and Northern Ireland*, CCPR/C/SR.1535 (14 January 1997), ¶25.
[102] Yash Ghai, *Hong Kong's New Constitutional Order*, *supra*, at 71.
[103] *Ibid*.

is not entirely clear.[104] Therefore, despite the binding nature of the Joint Declaration, it is unlikely to be the basis of an effective action in the case of its breach.[105]

For this reason, we may look into the second mode of extending the ICCPR to Hong Kong, which are the international rules governing state succession.[106] There are three theories under this heading, namely that the Covenant obligations run with the government, the land, and the people.[107] The first two theories may not help much in our present analysis, given that Hong Kong has not gained full independence.[108] The HRC has relied on the third principle in relation to the situation of Hong Kong and asserted that:

> "Once the people living in a territory enjoy the protection of the rights under the International Covenant on Civil and Political Rights, such protection cannot be denied to them merely by virtue of dismemberment of that territory or its coming under the sovereignty of another State or of more than one State."[109]

It is noted that Ghai doubts the applicability of such a principle to the case of Hong Kong, as Hong Kong is not an independent state and the new sovereign, China, has not acceded to the ICCPR.[110] Chan also argues that there is no rule of automatic succession in international law in its current state.[111] Instead, Chan argues for a "presumption of

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[104] Tieya Wang "The Status of Treaties in the Chinese Legal System" (1995) 1 *Journal of Chinese and Comparative Law* 1-18, cited *ibid*. at 70-1.
[105] *Ibid*., p. 72.
[106] Mushkat believes that "[d]espite China's contention that no transfer of sovereignty is to take place, since it will merely 'resume' the exercise of sovereignty over Hong Kong, the situation falls within the definition of 'state succession' given that the responsibility for the foreign relations of the territory is passed from one sovereign to another." Roda Mushkat, *One Country, Two International Legal Personalities*: *The Case of Hong Kong*, *supra*, at 27, footnote 151.
[107] Johannes Chan, "State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights", *supra*, at 929.
[108] The theories are termed the "clean state theory" and the "moving treaties frontier rule" respectively. Their applicability to the Hong Kong SAR is doubted, given that the SAR has neither gained full independence nor being completely submerged or integrated with another state. *See*, Peter K. Yu, "Succession by Estoppel: Hong Kong's Succession to the ICCPR" (1999) 27 *Pepp. L. Rev.* 53 at .81-5. Roda Mushkat, *One Country, Two International Legal Personalities*: *The Case of Hong Kong*, opt.cit. , at 28.
[109] *Concluding Observations of the Human Rights Committee (Hong Kong): United Kingdom of Great Britain and Northern Ireland*, CCPR/C/79/Add.69 (18 November 1996), *supra*, ¶4. The Committee has stated its views on the same matter more generally in General Comment No. 26. Human Rights Committee, *General Comment No. 26*, CCPR/C/21/Rev.1/Add.8 (18 December 1997), annexed in Evatt, Elizabeth, "Democratic People's Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of Self-Defence" (1999) *AJHR* 8.
[110] Yash Ghai, *Hong Kong's New Constitutional Order*, *supra*, p. 419.
[111] Chan observes that although HRC appears to adopt this principle with regards continuation of obligations in successor states to the former Yugoslavia and former Soviet Union, it is unclear whether the statement of the HRC adopting this principle is intended to be *lex lata* or *lex ferenda*. He believes the statement relied on the previous practice of the HRC relating to the obligations of the successor States to the former Yugoslavia and "to that extent may be self-serving." Johannes Chan,, "State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights", *supra*, at 929-934.

continuity" of human rights treaty obligations upon State succession and states that "[i]n the absence of an explicit and unequivocal refusal to honour such obligations, the successor State may be presumed to be ready and willing to accept any human rights obligations previously applicable to its predecessor State."[112] This position is endorsed by Mushkat.[113]

Therefore, in the absence of an explicit and unequivocal refusal to honour the obligations imposed by the ICCPR, Beijing is presumed to be ready and willing to accept the continued application of the ICCPR in Hong Kong. In this way, China can be considered a party to the ICCPR, but only in relation to the territory of Hong Kong.

C. Can a State Withdraw from the ICCPR after Ratification?

Proceeding on the basis that China is a party to the ICCPR in relation to Hong Kong, the first question is whether a state can ever withdraw from the ICCPR after it has already become a party to it. It is noted that there was an attempt by North Korea in 1997 to do so. However, its withdrawal was not accepted by the United Nations, which still regarded North Korea as a party to the Covenant.[114] In response to the attempt by North Korea, the HRC prepared General Comment No. 26 to deal with withdrawals from the ICCPR.[115] It observed that the ICCPR does not make provision for withdrawal or denunciation. Thus, we have to fall back on the rules of customary international law, reflected in VCLT, which provides two possible ways to withdraw where the treaty is silent on the matter, namely (i) the parties have intended to admit the possibility of denunciation; or (ii) a right of denunciation is implied by the nature of the treaty.[116]

Concerning the first limb, the HRC found that the ICCPR contains a provision, article 41(2), which allows states parties to withdraw its acceptance of competence of the HRC to examine inter-state communications, and that article 12 of the First Optional Protocol to the ICCPR also contains an express provision for denunciation. The HRC concluded that the

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[112] *Ibid*., p. 937.
[113] Roda Mushkat,, *One Country, Two International Legal Personalities*: *The Case of Hong Kong*, *supra*, at 29.
[114] North Korea has since submitted a further periodic report. D.J. Harris, *Cases and Materials on International Law*, *supra*, at 678, Elizabeth Evatt, "Democratic People's Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of Self-Defence" (1999) *AJHR* 8.
[115] Human Rights Committee, *General Comment No. 26*, CCPR/C/21/Rev.1/Add.8 (18 December 1997), *supra*.
[116] At ¶1; VCLT article 56(1).

absence of any such provision relating to the ICCPR as a whole suggests that the states parties did not intend that there should be any possibility of denunciation or withdrawal.[117]

Regarding the second limb which is the possibility that a right of denunciation can be implied by the nature of the treaty, the HRC opined that the ICCPR was not that type of treaty. It observed that the ICCPR codifies universal human rights enshrined in the Universal Declaration of Human Rights and possesses the status of an "International Bill of Rights". Therefore, it believed "the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect."[118] For these two reasons, the HRC concluded that once ratified, a state party can no longer withdraw from the Covenant.

Even if we accept that a state party cannot denounce the ICCPR after it has become a party to it, the analysis does not end here. The case of North Korea is arguably different from our scenario: China is going to reaccede to the Covenant and unlike North Korea, it does not seek to withdraw from it forever.

D. Procedural Concerns

To evaluate the legality of the acts of the PRC in our scenario, both the procedural and substantive (i.e. subjecting the new reservation to the object and purpose test) aspects will be considered. This section looks into the possible procedural constraints faced by the PRC.

1. Procedures for formulating late reservations

As discussed, PRC can be considered a party to the ICCPR in relation to Hong Kong. The previous section also suggests Beijing may not need to withdraw from the ICCPR at all (since this is prohibited). Instead, it may just formulate a new reservation on behalf of Hong

[117] At ¶2. Jamaica, Trinidad and Tobago, and other Caribbean states have availed themselves of article 12 of the First Optional Protocol. Glenn McGrory, "Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol", *supra*, at 771.
[118] At ¶3.

Kong. This raises the question of whether procedurally such a reservation would be allowed. On this, it would be instructive to consult Draft Guideline 2.3.1 of the ILC[119], which reads:

> "Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other contracting Parties objects to the late formulation of the reservation."[120]

This rule stems from the definition of reservation, provided in VCLT article 2(1)(d), which suggests a reservation is "a unilateral statement…made by a State, *when signing, ratifying, accepting, approving or acceding to a treaty*, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. [Emphasis added.]" This suggests reservations could not be made upon reaccession.

The ILC also comments that the general rule stated above is subjected to an "exception." In the event of a *unanimous* acceptance by all other contracting parties, late reservations may be formed.[121] Thus, it would appear that late formulation of reservations is *prima facie* unlawful.[122]

The rationale behind this rule is linked to the principle of *pacta sunt servanda*. Article 26 of VCLT codifies the rule that every treaty must be performed in good faith.[123] The fact that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question undermines the principle of *pacta sunt servada*.[124] Moreover, the ILC also recognizes the importance to include a time limit in the definition of reservations

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[119] For a background of the Draft Guidelines, *see* footnote 41. The Draft Guidelines are relied upon in the present analysis, since once adopted, they are very likely to provide the basis for further state practice and judicial and arbitral decisions, as in the case of the Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts. *See* text accompanying footnote 43.

[120] *Report of the International Law Commission* (53rd session of the ILC (2001)), A/56/10, p. 477.

[121] *Ibid*., p. 481.

[122] *See*, comments of the ILC: "[T]he principle is, and must remain, that the late formulation of a reservation is not lawful; it may become so, in the most exceptional cases, only if none of the other Contracting Parties objects." *Ibid*.

[123] The ILC observes that there is much authority in the jurisprudence of international tribunals for the proposition that the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*. ILC Commentary, Y.B.I.L.C., 1966, II, P. 211, cited in D.J. Harris, *Cases and Materials on International Law*, *supra*, p. 828.

[124] *Official Records of the General Assembly*, 53rd Session, Supplement No. 10, A/53/10, ¶3, cited *Report of the International Law Commission* (53rd session of the ILC (2001)), A/56/10, pp. 481-2. A similar position is found in Konstantin Korkelia, "New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights", *supra*, where the author discusses the case of *Rawle Kennedy v Trinidad and Tobago* and argues that the HRC would have justified its position of ignoring the intention of Trinidad and Tobago by employing the principle of *pacta sunt servada*. *ibid*, at 474-5.

itself. If parties are allowed to formulate a reservation at any moment, the stability of legal relations would be greatly hindered.[125]

2. Partial withdrawal of reservation

Alternatively, China may argue that it is not in fact formulating a new reservation; rather, it is modifying or partially withdrawing the original UK reservation. This argument may be relied upon by the PRC since the procedural requirements for formulating partial withdrawals to reservations are less stringent.

For our purposes we may need to first distinguish between "modification" and "partial withdrawal" of reservations, due to the distinctive sets of rules which go with the classification. The Secretary-General of the United Nations refers to withdrawals which enlarge the scope of reservations as "modifications" and to those which reduce that scope as "partial withdrawals."[126] Another author expresses that partial withdrawals of reservations are instances in which "reserving states purport to narrow, without relinquishing, reservations they have previously formulated."[127]

Given that it widens the scope of the existing reservation, modifications involve the same procedural requirement as late reservations.[128] On the other hand, partial withdrawals of reservations are not (or should not be) subject to the cumbersome procedure required for the late formulation of reservations. The rule on the formulation of partial withdrawal is the same as that of total withdrawal.[129] The mechanism is simple: consent of other contracting states is normally not required; the only requirements appear to be that the withdrawal must be in writing, and be formulated by someone who is competent.[130] The reason for a set of simpler procedures is straightforward: "there is no valid reason for preventing a State from *limiting* the scope of a previous reservation by withdrawing it, if only in part."[131] Rather, this procedure "achieves a more complete application of the provisions of the treaty, or of the

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[125] *Official Records of the General Assembly*, 53rd Session, Supplement No. 10, A/53/10, ¶3, cited *ibid*.
[126] *Report of the International Law Commission* (58th session of the ILC (2003)), A/58/10, p. 255.
[127] Edward T. Swaine, "Reserving", *supra*, at 356.
[128] *Report of the International Law Commission* (58th session of the ILC (2003)), A/58/10, ¶336.
[129] Draft Guideline 2.5.10, cited *Report of the International Law Commission* (58th session of the ILC (2003)), A/58/10, p. 244. Note that VCLT is silent on this. The possibility of partial withdrawals was vetted during the drafting of VCLT, but it appears to have been dropped without explanation. *ibid*, pp. 246-247.
[130] Cf. Guideline 2.5.1, 2.5.2, 2.5.4, cited *ibid*, pp. 183-5.
[131] *Ibid*., p. 251.

treaty as a whole, to the withdrawing State."[132] The European Commission of Human Rights also supports this position and adds that partial withdrawal does not contradict the temporal rule on formulation of reservations at all.[133] The Swiss Federal Court holds a similar position.[134]

3. Application

It is argued that the new reservation in our scenario, which reads "In the event of the Legislative or Executive Council in Hong Kong being elected and members being returned by functional constituencies and geographical constituencies, article 25(b) does not apply to such elections", would amount to a modification rather than a partial withdrawal to the original UK reservation, since the new reservation enlarges the scope of the original reservation. It should be recalled that the principle for the interpretation of reservations is that primacy should be given to the text and reservations should be interpreted narrowly. A narrow interpretation of the original UK reservation results in the finding that the reservation is inapplicable in the case where an elected legislature has been established. Adopting the same approach in interpreting the reservation in our scenario, it is submitted that given the wording is clear and unambiguous, the meaning of the new reservation should be that the right to vote is disapplied where the legislature of Hong Kong is being elected or partially elected. In this regard, the scope of the new reservation is broader than the original one, since it covers not just the situation where the Legislative Council is not returned by elections or partial elections, but also when the body is elected or partially-elected.

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[132] *Ibid*., p. 244.

[133] *See*, reports of the ILC in the cases of *Association X c. Autriche* (req. No. 473/59), *Ann*. 2, p. 405, cited *ibid*., p. 247-8. The Commission held that "a modification of the law protected by the reservation, even if it entails a modification of the reservation, does not undermine the time requirement of article 64. According to the Commission, despite the explicit terms of article 64…to the extent that a law *then in force* in its territory is not in conformity…the reservation signed by Austria…covers…the law of 5 July 1962, which did not have the result of enlarging, a posteriori, the area removed from the control of the Commission."

[134] In this case of *Elisabeth B v. Council of State of Thurgau Canton*, the Court held: "While the 1988 declaration merely constitutes an explanation of and restriction on the 1974 reservation, there is no reason why this procedure should not be followed…it would appear that, as a rule, the reformulation of an existing reservation should be possible *if its purpose is to attenuate an existing reservation*. This procedure does not limit the relevant State's commitment vis-à-vis other States; rather, it increases it in accordance with the [European Convention on Human Rights]. [Emphasis added.]" Cited *ibid*., pp. 250-1.

As the new reservation constitutes a modification of the original reservation, the applicable procedural rules for the present case would be that of late reservations, as opposed to partial withdrawal to reservations.

As the ICCPR itself is silent on the formulation of late reservations, the approach suggested in ILC Draft Guideline 2.3.1 should be followed. China would not be allowed to formulate reservations "after expressing its consent to be bound by the treaty." As discussed, although it has yet to ratify the ICCPR, China could be viewed as a party to the Covenant in relation to the HKSAR. Further evidence that it has expressed its consent to be bound could be found in its notification to the HRC in early 1998 that HKSAR was prepared to submit its first reports.[135] It is submitted that there would be no reporting obligation unless a State has consented to be bound by the ICCPR, as article 40(1) imposes such an obligation only on "States Parties" to the Covenant. In this way, the conduct of the PRC amounts to the requisite consent to be bound by the ICCPR in relation to the territory of the HKSAR.

Therefore, should China seek to formulate a new reservation on article 25(b) for Hong Kong, such an act would be *prima facie* unlawful unless there is no objection by all other states parties.

Nonetheless, it is not entirely unrealistic to expect the lack of objection by all other states parties, such that the effect would be that the new PRC reservation is procedurally lawful. The reason is that, as discussed, states are unreliable adjudicators of validity of reservations, and that the presence of political motives may influence their actions.[136]

E. Substantive concerns

The previous section demonstrates that the PRC in the scenario may be able to satisfy the procedural constraints for late reservations, as it is possible that no states will object to such acts. Nevertheless, even if such acts are procedurally acceptable, the new reservation still has to be scrutinized in accordance with the object and purpose test in order to determine its substantive validity under international law.

[135] *First Report of the HKSAR of the PRC in the light of the ICCPR* (January 1999), Preface, ¶¶2-3.
[136] In section IV. C. of this essay.

The three factors suggested by the ILC are to be considered. Again, the issue turns on the seriousness of the impact of the new reservation on the general architecture of the ICCPR. For the three reasons given below, it is submitted that the new reservation is likely to be deemed incompatible with the object and purpose of the ICCPR, and is thus invalid.

Firstly, as discussed, when the new reservation is compared to the original UK one, it is found that the new reservation has a much broader scope. It is recalled that the original UK reservation has been saved by the HRC's narrow interpretation focusing on the word "establishment." For the new reservation, even if it is interpreted with the established rules for interpretation of reservations, it has the effect of disapplying the right to vote even when there is an elected or partially elected legislature. In other words, there is a total denial of the right to vote by universal and equal suffrage, and unlike the original reservation, this effect is not limited to the establishment of an elected legislature; rather, it covers the current situation where the legislature is partially elected. The wide scope of the reservation has a serious impact on the general architecture of the ICCPR, and for this reason the new reservation is likely to be deemed inconsistent with object and purpose of the ICCPR.

Secondly, it is recalled that the jurisprudence of the HRC points strongly to the contention that if a reservation has discriminatory effect, it is likely to violate the object and purpose of the ICCPR. In particular, the HRC is of the view that reservations to the non-discrimination provisions in the ICCPR (articles 2(1) and 2(2)) will be incompatible with the object and purpose of the treaty.[137] It has also held that a reservation with a discriminatory impact runs counter to some of the basic principles embodied in the ICCPR and is thus incompatible with the object and purpose of the treaty.[138]

The modified reservation will endorse the imbalance of voting power between those who are eligible to vote in the FCs and those who can only vote in the geographical constituencies. This will have the effect of reinforcing the status quo which the HRC has criticized for discriminatory impact.[139] For this reason, the new reservation is unlikely to pass the object and purpose test.

Lastly, we shall take into account the object and purpose of the ICCPR, which is "to create legally binding standards for human rights by defining certain civil and political rights

[137] Human Rights Committee, *General Comment No. 24*, *supra*, ¶9.
[138] *See*, *Rawle Kennedy v Trinidad and Tobago*, at footnote 86.
[139] *See*, text accompanying footnote 10.

and placing them in a framework of *obligations which are legally binding*. [Emphasis added.]"[140] It is submitted that while it would be too far-fetched to suggest this means any reservation to the ICCPR would be invalid, should we bear in mind the general function of reservations, the logical conclusion would be that reservations are allowed only to the extent to which it provides a "brief space" in which to bring into line any laws then in force which does not yet sufficiently respect and protect the rights recognized therein.[141] The argument that a reservation is made for transitory purposes may be applicable to the original UK reservation, which is entered into as the UK ratified the ICCPR in relation to Hong Kong in 1976; but it is doubtful whether the new reservation can be saved by the same argument. The act of entering into a reservation with a broader scope some 30 years later suggests the state party is finding ways to evade the obligations by which it has agreed at the time of the handover to be legally bound.[142] The act of using a reservation as a shield against the performance of treaty obligations will make the reservation incompatible with the object and purpose of the ICCPR, which is the creation of legally binding obligations for states parties.

VI. Conclusion

This paper seeks to address the current uncertainties regarding the status of the reservation to the right to vote in Hong Kong under international law. It is observed that neither the colonial and the SAR governments of Hong Kong, nor the HRC have provided thorough legal analysis to this question; the Hong Kong courts have also failed to provide a clear view as to the validity and scope of the reservation.

Under this backdrop, this paper considers the rules in international law concerning the validity of reservations. It is submitted that the object and purpose test should form the basis of evaluation, and that the three factors suggested by the ILC (indivisibility of rights, importance of the reserved right to the treaty and severity of impact on the architecture of the treaty) provides a useful framework for the analysis. It is noted that there exists a line of arguments which suggest the reservation is invalid. Such argument focuses on the indivisible nature of rights and the importance of article 25 to the ICCPR. However, it is contended that

[140] Human Rights Committee, *General Comment No. 24*, *supra*, ¶7.
[141] *See*, text accompanying footnote 33.
[142] For the application of the ICCPR to Hong Kong by tacit consent of the PRC, *see* text accompanying footnotes 105-106.

the view that reservations to article 25 is never acceptable is too radical, and is inconsistent with actual state practice. Interpreting the scope of the UK reservation in accordance with the established principles of interpretation, it is found that the scope of the reservation is significantly narrowed such that it applies only in the case where an elected legislature or executive is yet to be established. Noting also that international courts are generally reluctant to find reservations invalid, it is submitted that the reservation in Hong Kong does not possess the similar degree of seriousness as cases where reservations have been deemed incompatible with the object and purpose of the ICCPR. Therefore, the UK reservation has been valid, but its scope would not be broad enough to cover the current situation in Hong Kong, given that elections have already taken place.

Lastly, to clarify the procedural rules on the formulation of reservations, a hypothetical scenario is considered. This involves the PRC withdrawing the ICCPR for Hong Kong and reacceding to it with a modified reservation which explicitly provides for the system of functional constituencies. It is first discussed that China is found to be a party to the ICCPR in relation to the territory of Hong Kong. Thus, although it is yet to ratify the ICCPR, it can no longer withdraw the Covenant for Hong Kong. The scenario is evaluated in both procedural and substantive aspects, and it is found that where procedurally the acts may be legal, substantively the new reservation would have failed the object and purpose test. The reasons are that the reservation amounts to a total denial of the right to vote and extends beyond the situation where an elected legislature is yet to be established; that the reservation endorses the existing discriminatory electoral arrangement; and that it enables the PRC to evade its binding treaty obligations.

To conclude, it is submitted that the SAR government should cease invoking the 1976 reservation as justification for the lack of progress towards universal suffrage, since it does not form part of the actual situation of Hong Kong. Further, the act of formulating a new reservation explicitly providing for the system of FCs is not a viable alternative. In the end, it is submitted that the SAR government may realize more political advantage in withdrawing the reservation than to continue to rely upon it.

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