

**LegCo Panel on Home Affairs
Village Representative Elections**

Purpose

This paper analyses the implications of the judgment of the Court of Final Appeal (CFA) on the rights of non-indigenous inhabitants in Village Representative (VR) elections and informs Members of the progress made on the review of VR elections conducted by the Administration.

Background

2. On 10 May 1999, Members were informed of the establishment of the Working Group on Rural Elections (the Working Group) under the Home Affairs Bureau to review the arrangements and procedures for VR elections (vide LC Paper No CB(2)1839/98-99(04)).

3. In the course of the review, two judicial review cases (i.e. "Chan Wah vs Hang Hau Rural Committee" and "Tse Kwan Sang vs Pat Heung Rural Committee") came up which challenged the decisions to exclude non-indigenous inhabitants to participate in VR elections as voters and candidates. Messrs. Chan Wah and Tse Kwan-sang were both born and brought up in two established villages in the New Territories, namely Po Toi O Village and Shek Wu Tong Village. However, since they cannot establish patrilineal descent from ancestors who were inhabitants of villages in the New Territories in 1898, they are not and cannot be recognised as indigenous inhabitants of the village concerned.^{Note} In the respective arrangements made in 1999 for the election of VR of the villages concerned, Mr Chan was excluded as a voter and Mr Tse was excluded from standing as a candidate on the ground that they are not indigenous inhabitants of the village concerned.

4. Messrs. Chan and Tse challenged the validity of those electoral arrangements by judicial review proceedings. The Court of First Instance ruled that the arrangements made by the Hang Hau Rural Committee and the Pat Heung Rural Committee for the VR elections of Po Toi O Village and Shek Wu

^{Note} "Indigenous inhabitants" is defined to mean a person who was in 1898 a resident of an established village in Hong Kong or who is descended through the male line from that person. "Established village" is defined to mean a village that was in existence in 1898 and which the Director of Lands has satisfied himself was then in existence.

Tong Village respectively were inconsistent with the Sex Discrimination Ordinance (SDO), the Basic Law (BL) and the International Covenant on Civil and Political Rights (ICCPR) as applied to HK. The Court of Appeal (COA) subsequently upheld the CFI judgement. In view of the substantial public interest involved and the wide implications of the COA's judgment, the Government, after careful consideration, lodged an appeal with the Court of Final Appeal (CFA) against the COA's judgment.

5. The CFA's judgment on the Po Toi O and Shek Wu Tong cases was handed down on 22 December 2000. In its judgment, the CFA declared that the Secretary for Home Affairs, in discharging his duty under the Heung Yee Kuk Ordinance (HYKO) (Cap. 1097), would be bound not to approve any person elected as VR of Po Toi O Village and Shek Wu Tong Village under the 1999 electoral arrangements therefor on the grounds that such arrangements are inconsistent with Article 21(a) of the Bill of Rights Ordinance (BORO) and/or with Section 35(3) of the SDO.

Analysis of the CFA Judgment

6. The main issues before the CFA were:-

- (a) whether the BORO is engaged and if so whether the electoral arrangements in question are consistent with the BORO;
- (b) whether the electoral arrangements for Po Toi O Village are inconsistent with the SDO; and
- (c) whether Article 40 of the Basic Law (BL 40) protects any right of indigenous inhabitants to vote and to stand as a candidate in VR elections to the exclusion of others.

(a) Hong Kong Bill of Rights Ordinance ("BORO")

7. The CFA ruled that the BORO, which binds the Government, a public authority or a person acting on behalf of either of them, is engaged in this appeal. Hence the Secretary for Home Affairs (SHA), as part of the Government, is bound by the BORO. In discharging his duty to decide whether to approve a person as a VR under the HYKO, SHA has to consider whether the person elected to represent a village was elected in accordance with electoral arrangements which are consistent with the BORO.

8. Article 21(a) of the BORO guarantees the right and opportunity of every permanent resident to take part in the conduct of public affairs directly or through freely chosen representatives without discrimination and unreasonable restrictions. The CFA pointed out that the statutory objects of the HYK as currently provided in the HYKO relate to the people in the New Territories and are not confined to its indigenous inhabitants. In this context, the CFA considered that, owing to the fact that non-indigenous inhabitants now make up a substantial part of the population of the two villages in question, the VR in discharging functions other than certification of indigenous status, would represent not only the indigenous inhabitants of a village but the village as a whole consisting of both indigenous and non-indigenous inhabitants. Having regard to the functions of the VR and his role beyond the village level, the CFA ruled that the VR should be regarded as engaged in the conduct of public affairs within Article 21(a) of the BORO.

(b) Sex Discrimination Ordinance (“SDO”)

9. In accordance with the SDO, the Government is bound not to approve a person as a VR where that person has been elected by a procedure in which men have not been able to participate on equal terms with women. The Government will adhere to the relevant provision of the SDO in approving the results of VR elections.

10. In the present case, the CFA is only concerned with the discrimination issue in the Po Toi O case (a point contested by the indigenous inhabitants but not the Government). Under the electoral arrangements for Po Toi O Village, non-indigenous women married to indigenous men had the right to vote; while non-indigenous men married to indigenous women were excluded from voting. The CFA found unlawful sex discrimination in this case in contravention of section 35(3) of the SDO.

(c) Article 40 of the Basic Law (“BL 40”)

11. According to the CFA, there is no doubt that the lawful traditional rights and interests of the indigenous inhabitants are protected by BL 40. It is not disputed that they include various property rights and interests such as exemption from government rent and rates in respect of certain properties held by indigenous inhabitants and benefits relating to land granted to male indigenous inhabitants under the small house policy. However, the CFA found that there is no justification for “deriving” the political rights to vote and stand as candidates in VR elections to the exclusion of others, from the rights and interests within BL 40 to ensure adequate protection.

Application of the CFA Judgment

12. In its judgment, the CFA indicated that the judgement is only concerned with the electoral arrangements for the position of VR in the two villages concerned. Nonetheless, the Administration would need to consider, in consultation with the relevant parties, how the VR elections should be reformed to ensure that they would be compatible with the CFA judgment, the relevant international obligations and domestic legislation, before the next round of regular VR elections takes place in late 2002.

VR Election Review

13. The court proceedings have a direct bearing on the work of the Working Group as due regard has to be given to the CFA judgment in fleshing out details of the reform proposals. We have all along been keeping in touch with HYK, but could intensify discussions only after the delivery of the CFA judgment in late December 2000. While the HYK leaders fully appreciate the need to work closely with the Government with a view to devising new electoral arrangements, they hold firm to the view that the lawful traditional rights and interests of indigenous inhabitants must be duly protected under any new system of VR elections. Specifically, they insist that indigenous matters should be handled by indigenous inhabitants only. These include, but not limited to, certification of indigenous status for the purpose of granting small houses, hillside burials and exemption from rent and rates payment. We will continue our discussions with the HYK and the rural community with a view to working out a mutually acceptable solution as soon as practicable.

14. It should be noted that the timetable for the VR Election Review is dictated by the need to hold the next round of regular VR elections in late 2002. Whether the timetable can be achieved in turn depends on (a) the time taken to fully consult the parties concerned; and (b) the lead time to complete the legislative and related processes, including the delineation of constituency boundaries and preparation of voter register for the VR elections. On (a), we hope to be able to work out a formulation which would on the one hand comply with the CFA judgment and, on the other, take account of the need to protect the lawful traditional rights and interests of indigenous inhabitants. On (b), we estimate that we will need at least 18 months to complete the legislative and related processes in view of the complexity and difficulties involved.

Way Forward

15. Now that the CFA has made its ruling, the Working Group will intensify its work and try to reach agreement with the parties concerned as soon as practicable. In view of the impact of the reform on the indigenous community, we will work closely with the HYK in developing our proposed electoral arrangements. We will be guided by the CFA judgment in devising proposals to ensure that the new arrangements for VR elections will not conflict with our international obligations and domestic legislation.

Advice Sought

16. Members are invited to note the content of this paper.

Home Affairs Bureau
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