

立法會 *Legislative Council*

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Panel on Constitutional Affairs

Updated background brief prepared by the Legislative Council Secretariat for the meeting on 16 February 2009

Voting rights of prisoners

Purpose

This paper provides background information on the voting rights of prisoners and summarizes the discussions held by the Panel on Constitutional Affairs (the Panel) since the first Legislative Council (LegCo).

Background

Current statutory provisions relevant to the voting rights of prisoners

2. Article 21 of the Hong Kong Bill of Rights (Cap. 383) which was enacted in 1991 provides that -

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

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

Article 1(1) referred to in Article 21 provides that -

"The rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

3. Article 26 of the Basic Law provides that permanent residents of the Hong Kong Special Administrative Region (HKSAR) shall have the right to vote and the right to stand for election in accordance with law.

4. Under sections 31 and 53 of the Legislative Council Ordinance (Cap. 542) and section 30 of the District Councils Ordinance (Cap. 547), a person who is serving a sentence of imprisonment or a person who has been sentenced to death or imprisonment but has not served the sentence or received a free pardon is disqualified from being registered as an elector, and from voting in LegCo and District Council (DC) elections. Members may wish to note that similar disqualification provisions are included under sections 14 and 16 of the Village Representative Election Ordinance (Cap. 576). A member of the Election Committee is also disqualified from voting at the poll of a Chief Executive election under section 26 of the Chief Executive Election Ordinance (Cap. 569) if he is serving a sentence of imprisonment on that polling date.

Legislative history of the relevant electoral law

5. The Electoral Provisions Ordinance (Cap. 367) which was enacted in 1981 provided for the election of members of the former Urban Council and of the former District Boards. Section 11 of this Ordinance disqualified a person from being registered as an elector or from voting at the relevant elections if he had been sentenced in Hong Kong or any other territory or country to death or imprisonment for a term exceeding six months and he has not served the sentence or received a free pardon. Similar disqualification provisions were included in the Legislative Council (Electoral Provisions) Ordinance (Cap. 381) which was enacted in 1985 to cater for the first LegCo election held in that year to return members from functional constituencies. In 1990, the Electoral Provisions Ordinance was amended to cover LegCo geographical constituency elections.

6. Members may wish to note that LegCo appointed a Select Committee on 29 January 1992 "to review the arrangements for the 1991 Legislative Council elections and to report its recommendations on the arrangements for future Legislative Council elections" (the Select Committee on LegCo Elections). The Select Committee recommended that the disqualification of registration of persons who were serving sentences of imprisonment under section 11 of the Electoral Provisions Ordinance should be repealed, although the disqualification of voting should stay¹.

7. In 1995, Mr Andrew WONG presented a private Member's Bill, i.e. the Electoral Provisions (Amendment) Bill 1995 which sought to remove certain restrictions on registration as an elector, voting or nomination as a candidate at an election and holding office as an elected Member of LegCo, the two former Municipal Councils and the former District Boards, as contained in the Electoral Provisions Ordinance and the Legislative Council (Electoral Provisions) Ordinance, including the disqualification provisions applicable to prisoners. The Bill was voted down at the Council sitting held on 28 July 1995.

¹ paragraph 5.17 of the Report of the Select Committee on LegCo Elections

8. The Electoral Provisions Ordinance and the Legislative Council (Electoral Provisions) Ordinance were not adopted as the law of HKSAR upon its establishment on 1 July 1997. The Administration presented in that year the LegCo Bill to the Provisional LegCo. The Bill provided for the constitution of LegCo and related matters including the election of LegCo Members. The disqualification provisions applicable to prisoners in the Bill were identical to those in the Electoral Provisions Ordinance and the Legislative Council (Electoral Provisions) Ordinance, but the limitation of imprisonment exceeding six months was removed.

9. When the Bill resumed its Second Reading debate at the Council meeting on 27 September 1997, Mr Andrew WONG moved an amendment at the Committee Stage of the Bill which provided that only prisoners and escaped convicts sentenced to death or imprisonment for a term exceeding six months and who had not served their sentence in full would be disqualified from voting in Hong Kong. The amendment was negated.

10. The District Council Ordinance which was enacted on 10 March 1999 provides for the establishment, composition and functions of DCs and the election of their members. The disqualification provisions applicable to DC electors are similar to those for LegCo electors.

Concerns previously raised by members and the Administration's position in 2005

11. In February 2005, Duty Roster Members (DRM) received views from the Society for Community Organization concerning, inter alia, voting rights of prisoners. On the instruction of DRM, the issue was referred to the Panel for follow-up.

12. At its meeting held on 30 May 2005, the Panel discussed the voting rights of prisoners with the Administration. The Administration's position at that time was that -

- (a) international human rights conventions and the Hong Kong Bill of Rights Ordinance permit reasonable restrictions on the right to vote; and
- (b) it was generally accepted in Hong Kong that when a person had been convicted of an offence and sentenced to imprisonment, he could be deprived of certain rights.

13. Some members expressed the view that prisoners should not be deprived of the opportunity to vote as it was a basic civil right. They considered that the society was changing and different restrictions could be introduced on prisoners' right to vote on the basis of the length of the sentence. These members requested that the Administration should launch a review on the issue. There was, however, another view that a change of policy was not warranted because international human rights conventions permitted reasonable restrictions on the right to vote.

14. The Administration's response was that it did not intend to launch a review on the issue at that stage. Different places had adopted different policies on prisoners' right to vote, having regard to their own circumstances. The Administration considered that the community had not called for such a review. However, if the proposal of allowing prisoners to vote were to be explored, consideration should be given to a range of issues including security arrangement, casting of vote by post, electioneering arrangement, etc.

Latest developments

High Court's judgment in December 2008

15. On 8 December 2008, the Hon Mr Justice Andrew CHEUNG handed down a High Court judgment on three applications for judicial review relating to a prisoner's voting rights in LegCo elections (HCAL 79/2008, HCAL 82/2008 and HCAL 83/2008). According to the judgment, the provisions disqualifying any prisoner across-the-board from registration as an elector and from voting in LegCo elections contravene the right to vote guaranteed under Article 26 of the Basic Law and Article 21 of the Hong Kong Bill of Rights. It would be a matter for the Legislature and the Executive to determine how the voting right of prisoners could be restricted in a reasonable fashion. Hon Mr Justice CHEUNG also takes the view that the constitutional right to vote of remanded persons (i.e. persons who are remanded in custody awaiting trial) is not affected by any law, and arrangements should be made to enable them to vote on election days whilst being held in custody².

16. According to the statistics as at 5 September 2008 quoted in the judgment³, there were 4 239 prisoners (who were Hong Kong permanent residents and aged 18 or above) serving fixed terms of imprisonment in Hong Kong. 626 of them were serving a term of six months or less. 2 313 were serving a term from six months to three years. 1 300 were serving a term of more than three years. There were another 211 prisoners who were Hong Kong permanent residents and aged 18 or above serving life sentences in Hong Kong.

Panel discussion on 19 January 2009

17. At the Panel meeting on 19 January 2009, members were briefed of the latest developments of the three judicial review cases on prisoners' voting rights. Members' views were sought on three possible options for relaxing the disqualification provisions under the Legislative Council Ordinance as follows -

- (a) to remove the existing across-the-board disqualification of prisoners from registration and from voting;

² paragraph 203 of the judgment

³ paragraph 11 of the judgment

- (b) to retain the disqualification for persons who are sentenced to imprisonment for a term exceeding a specified length; or
- (c) to disqualify persons who are sentenced to imprisonment for a term exceeding a specified length but to allow them to register as electors and to vote in the last few years of their term of imprisonment.

18. Members also considered the Information Note on "Voting right of prisoners" prepared by the Research and Library Services Division (IN04/08-09). The main concerns raised by members are set out below.

Possible options for relaxing the disqualification provisions

19. Members discussed whether restrictions should be imposed on prisoners' right to register as electors and the right to vote and if so, where a cut-off line should be drawn and how it should be drawn. Some members held the view that there should not be any restriction on prisoners' voting rights and such rights should be given to them as soon as possible. They considered that if restrictions were to be imposed, say for example disqualifying a prisoner from registration as an elector and from voting as a result of an imprisonment exceeding a specified period, the Administration should provide ample justification for imposing the restrictions as well as for specifying such a period of time and not otherwise. These members also stressed that for the sake of safeguarding judicial independence, all the restrictions should be clearly stipulated in the law and not to be decided by the Court. Some other members cautioned that if restrictions were to be imposed, the Administration had to ensure that the cut-off line so drawn would not be subject to legal challenge.

20. The Administration advised that since the existing across-the-board disqualification of prisoners from registration and from voting had been ruled by the Court as unconstitutional, it was necessary to formulate policy options on the relaxation of the ban on prisoners' voting rights. There were divergent views in the community as to whether restrictions on prisoners' voting rights should be abolished in entirety or whether reasonable restrictions should be imposed. At present, the Administration had not formed any view. A public consultation document was being prepared which would set out the various policy options and the practices in overseas jurisdictions. The public consultation exercise to be commenced in February 2009 would last for about two months. Taking into account the outcome of the public consultation, the Administration would prepare and introduce the relevant legislative amendments. The Administration further assured members that restrictions, if any, imposed on prisoners' voting rights would be stipulated in law.

21. At members' requests, the Administration undertook to provide in the consultation document background information on the justification of the existing across-the-board disqualification of prisoners from registration and from voting as well as a table setting out overseas practices on prisoners' voting rights under different legal systems.

Temporary suspension of the Court Order

22. Some members considered that the Administration's application to the Court for a 10-month suspension of the Court Order was inappropriate and unnecessary. The Administration explained that while the next LegCo election was not due until September 2012, it was possible that a Member's office during the current term of LegCo might become vacant at any time for reasons such as resignation, death or disqualification specified under the Legislative Council Ordinance. Under these circumstances, a by-election would need to be held to fill the vacancy. As it would take about 10 months to complete the tasks of conducting public consultation, working out the practical registration and voting arrangements and all relevant legislative work, the Administration had applied to the Court for a 10-month suspension of any order to be made by the Court. The Court would consider the application at the hearing on 23 February 2009.

23. These members maintained their view that as the Administration had decided not to appeal against the Court ruling, it meant that the Administration accepted the ruling. With due respect to the Court, the Administration should proceed with the necessary work immediately to implement the Court ruling. They considered that the Administration should have applied to the Court for more time to comply with the ruling instead of applying for temporary suspension of the Court Order.

24. The Administration reiterated that the application for a 10-month suspension was to ensure that prisoners' voting rights would be implemented under an amended legislative framework with appropriate polling and security arrangements, and to ensure the integrity and finality of any LegCo by-elections which might be held in the meantime. As to whether an application for more time to comply with the ruling should be made, the Administration would defer to the advice of the Department of Justice.

Legislative timetable

25. Members expressed concern that a time span of 10 months to complete the legislative process was too long. They urged the Administration to expedite the process so that prisoners could enjoy their long lost rights.

26. The Administration advised that the proposed amendments to relevant ordinances would be introduced into LegCo for scrutiny in mid 2009 and hopefully, to be enacted before the end of the current LegCo session. The relevant amendments to the subsidiary legislation in relation to practical electoral arrangements would be introduced into LegCo thereafter. The legislative process would be completed in fall 2009. The timetable was tight, bearing in mind the LegCo's summer recess from mid July to early October.

27. As regards members' concerns about the practical arrangements under which prisoners might cast their votes at an election, the Administration advised that the Electoral Affairs Commission in conjunction with the relevant law enforcement agencies would have to consider the various issues carefully, develop necessary

arrangements and put together a workable operational plan. The Panel would be consulted on the proposed practical electoral arrangements in due course.

Relevant papers

28. A list of relevant papers which are available on the LegCo website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
10 February 2009

Voting right of prisoners

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
Constitutional Affairs Panel	30 May 2005	<p>Case referred by the Complaints Division concerning voting rights of prisoners [LC Paper No. CB(2)1143/04-05(01)] <i>(Chinese version only)</i></p> <p>Administration's paper on "Voting Right of Prisoners" [LC Paper No. CB(2)1670/04-05(03)]</p> <p>Minutes of meeting [LC Paper No. CB(2)2452/04-05]</p>
	19 January 2009	<p>Administration's paper on "Judicial review on prisoners' voting right" [LC Paper No. CB(2)660/08-09(03)]</p> <p>Background brief on "Voting right of prisoners" prepared by the LegCo Secretariat [LC Paper No. CB(2)660/08-09(04)]</p> <p>Information Note on "Voting right of prisoners" prepared by the Research and Library Services Division [IN04/08-09]</p> <p>Letter dated 10 December 2008 from the Society for Community Organization regarding the High Court judgment on the voting right of prisoners [LC Paper No. CB(2)490/08-09(01)] <i>(Chinese version only)</i></p> <p>Submission on "Judicial review on prisoners' voting right" from the Society for Community Organization [LC Paper No. CB(2)714/08-09(01)] <i>(Chinese version only)</i></p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
		Letter from the Society for Community Organization dated 16 January 2009 enclosing a letter and a submission from Mr CHAN Kin-sum, a prisoner who had applied for judicial review on prisoners' voting right [LC Paper No. CB(2)714/08-09(02)] <i>(Chinese version only)</i>

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