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Panel on Constitutional Affairs

Updated background brief prepared by the Legislative Council Secretariat for the meeting on 20 April 2009

Voting rights of prisoners

Purpose

This paper provides background information on the voting rights of prisoners and gives a brief account of the relevant discussions held by the Panel on Constitutional Affairs (the Panel) since the first Legislative Council (LegCo), including members' discussion on the policy options on the relaxation of the ban on prisoners' voting right at the meeting on 16 February 2009 as summarized in paragraphs 22 to 29.

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) (LCO) 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 negatived.

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. 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.

12. 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.

13. 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.

High Court's judgment in December 2008

14. 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.

15. 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.

16. The Administration briefed the Panel on 19 January 2009 on the latest developments of the three judicial review cases on prisoners' voting rights, three possible options for relaxing the disqualification provisions under LCO and the target timetable for the completion of the tasks of formulating policy options and the relevant legislative process. These three possible options were as follows -

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

17. Members also considered the Information Note on "Voting right of prisoners" prepared by the Research and Library Services Division (IN04/08-09).

18. Some members expressed 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

² paragraph 203 of the judgment

³ paragraph 11 of the judgment

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.

19. The Administration informed the Panel that 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. A public consultation document was being prepared which would set out the various policy options and the practices in overseas jurisdictions. The Administration further assured members that restrictions, if any, imposed on prisoners' voting rights would be stipulated in law.

20. The Panel noted that the Administration had applied to the Court for a 10-month suspension of the relevant Court Order. Some members considered the Administration's action inappropriate and unnecessary. 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. 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 LCO. 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. Members may wish to note that the temporary suspension order has subsequently been granted by the High Court.

21. 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. 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.

Discussion on policy options on prisoners' voting right on 16 February 2009

22. At the Panel meeting on 16 February 2009, members were briefed on the Consultation Document on Prisoners' Voting Right (the Consultation Document) published in February 2009. Taking into account the voting arrangements for prisoners adopted overseas and the circumstances in Hong Kong, the Administration proposed the following policy options on the relaxation of the ban on prisoners' voting right -

- (a) Option One was to remove the existing disqualification provisions in section 53(5)(a)-(b) of LCO which had been ruled by the Court as unconstitutional. The disqualification of persons convicted of election-related or bribery offences under section 53(5)(c) of LCO would remain.
- (b) Option Two was to disqualify prisoners from voting if they were serving a sentence of imprisonment for a sufficiently long period (for example, 10 years or over). The length of sentence was used as a criterion to distinguish serious offences from less serious ones.
- (c) Option Three was to disqualify prisoners from voting if they were serving a sentence of imprisonment for a sufficiently long period (for example, 10 years or over) while enabling them to resume the right to vote when they were serving the last few years of imprisonment (for example, during the last five years).

23. Some members were of the view that the restrictions on prisoners' right to vote should be removed in entirety, including the disqualification of persons convicted of election-related or bribery offences under section 53(5)(c) of LCO because prisoners' right to vote was provided in Articles 25, 26 and 39 of the Basic Law, and there was no reason to impose additional penalty by depriving the right to vote of prisoners who were already serving their sentences for the unlawful acts.

24. The Administration responded that while the Court had ruled that the existing across-the-board disqualification of prisoners from registration and from voting were unconstitutional, it had not suggested that some form of restrictions on voting could not be imposed on prisoners. It was for the Executive and the Legislature to decide on reasonable restrictions, if any. As the issue was about human rights, the Administration had proposed three policy options for public consultation and it had no preference over any one of these options. The Administration, however, held the view that the disqualification of persons stipulated under section 53(5)(c) of LCO should remain because it helped protect the integrity of the Legislature. In addition, the provision was not covered by the three judicial review cases.

25. Some other members took the view that reasonable restrictions on prisoners' right to vote could be imposed provided that the Administration was able to give ample justifications. They considered that persons convicted of election-related or bribery offences should be disqualified from voting within three years after such conviction so as to protect the integrity of the electoral system. The Administration, however, must ensure that the justifications for imposing any restriction should not be abstract and could stand the test of judicial review, if any. A member suggested that the disqualification should preferably be based on specific crimes, rather than the length of imprisonment.

26. The Administration explained that when introducing the amendment bill into LegCo, the Administration would spell out clearly the justifications for imposing the restrictions. In the event that judicial reviews were sought against these restrictions, the Administration would be able to provide strong justifications accordingly. As

regards the severity of an offence which warranted a convicted person to be disqualified from voting, the Administration had not come up with any proposal after studying overseas practices. The policy options proposed for Hong Kong were by international standard the most lenient. The length of sentence was used as a criterion to distinguish serious offences from less serious ones.

27. Some members expressed the view that in deciding whether restrictions should be removed for prisoners' voting right, it would be useful for members to understand relevant overseas practices as they were developed on the basis of the experiences as well as social and historical developments of the relevant countries. They also considered that more information should be collected on the practices adopted in Asian countries, and the justifications for the United Kingdom and the United States of America to deprive prisoners of the right to vote.

28. Some members enquired about the security and voting arrangements for prisoners and remanded unconvicted persons to exercise their voting right in the future. The Administration explained that the Registration and Electoral Office (REO) had been discussing with the relevant law enforcement agencies on the practical arrangements under which prisoners and remanded unconvicted persons might cast their votes in an election. Irrespective of whether a mobile polling station would be arranged to visit a prison or polling stations would be set up inside prisons, REO would ensure that candidates and election agents would be able to observe the poll and the counting. To protect secrecy of voting, prisoners who were eligible electors would cast their votes in a confined compartment. Consideration would be given to transferring the ballot papers to the relevant counting stations and mixing with other ballot papers before counting.

29. In response to members' concerns about the duration of the consultation period which ended on 23 March 2009 and the consultation with prisoners, the Administration responded that the Correctional Services Department had distributed the Consultation Document to prisoners and the Administration had also invited views from organizations which represented the interest of prisoners or ex-prisoners. The Administration subsequently informed the Panel that a public forum was held on 6 March 2009 to listen to public's views and another forum would be also held. To further gauge the public's views, the Administration would conduct an opinion poll on the issue.

Relevant papers

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

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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>
		<p>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></p>
	16 February 2009	<p>Consultation Document on Prisoners' Voting Right</p> <p>Administration's paper on "Consultation document on prisoners' voting right" [LC Paper No. CB(2)829/08-09(05)]</p> <p>Background brief on "Voting rights of prisoners" prepared by the Legislative Council Secretariat [LC Paper No. CB(2)829/08-09(06)]</p> <p>Letter dated 9 March 2009 from the Secretary for Constitutional and Mainland Affairs informing the Panel of the latest development of the consultation on prisoners' voting right [LC Paper No. CB(2)1062/08-09(01)]</p> <p>Submission from a member of the public [LC Paper No. CB(2)1110/08-09(01)] <i>(English version only)</i></p> <p>Submission from Civic Party [LC Paper No. CB(2)1110/08-09(02)]</p>