

立法會
Legislative Council

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**Paper for the House Committee Meeting
on 7 June 2013**

Issues relating to Article 79(6) of the Basic Law

At the meeting of the House Committee on 31 May 2013, Members requested for Legal Adviser's views on the application of Article 79(6) of the Basic Law (BL) to a sentence of imprisonment of one month or more for a criminal offence that is suspended by the Court in the light of the diverse views expressed by Members.

Disqualification of Membership

2. BL 79(6) provides that –

"Article 79 The President of the Legislative Council of the Hong Kong Special Administrative Region shall declare that a member of the Council is no longer qualified for the office under any of the following circumstances...

(6) When he or she is convicted and sentenced to imprisonment for one month or more for a criminal offence committed within or outside the Region and is relieved of his or her duties by a motion passed by two-thirds of the members of the Legislative Council present...".

3. Rule 49B was added to the Rules of Procedure (RoP) to deal with disqualification of Member from office pursuant to BL 79(6) by a motion moved and agreed to by the Council on 9 September 1998¹. When the proposal to add the rule was deliberated at the Committee on Rules of Procedure (CRoP), the issue was raised as to whether a motion

¹ It was gazetted as L.N. 311 of 1998 published on 11 September 1998.

to relieve a Member of his or her duties as a Member could be amended if the Member had lodged an appeal or the relevant sentence was suspended. CRoP decided against allowing any such amendment on the ground that the motion if amended, might give rise to uncertainty over whether or not the requirements under BL 79(6) have been fulfilled. CRoP was aware that there might be situations where Members might not be in a position to decide, e.g. when an appeal was in the pipeline or owing to the lack of the full details of the conviction or sentence if the offence took place outside Hong Kong. Nevertheless, a Member might move to adjourn the debate without notice under Rule 40(1) (Adjournment of Debate or of proceedings of a Committee of the Whole Council). The debate so adjourned might be resumed at a subsequent meeting of the Council provided that the Member who moved the motion had given notice of his or her intention to resume the debate in accordance with RoP.²

4. Rule 49B as subsequently made by the Council is now in the following terms –

"49B. Disqualification of Member from Office

(1) A motion to relieve a Member of his duties as a Member under Article 79(6) of the Basic Law shall be moved in the following form:

"That whereas (name of Member) was convicted on (date) in (court) in (place) of a criminal offence (s) and was sentenced on (date) by (court) to imprisonment for one month or more (as particularized in the Schedule to this motion), this Council relieves (name of Member) of his/her duties as a Member of the Legislative Council....."

(2) No amendment may be moved to a motion moved under subrule (1) or (1A).....".

Suspended sentence

5. A sentence of imprisonment may be suspended under section 109B(1) (at **Annex I**) of the Criminal Procedure Ordinance (Cap. 221) (CPO), which provides that –

² See paragraphs 3.6 to 3.8 of the [Report on the Procedural Arrangements for Implementing Article 79\(6\) of the Basic Law](#), which contains the deliberations of CRoP that led to Council's making of Rule 49B. The Report was tabled in the Council on 9 September 1998,

"A court which passes a sentence of imprisonment for a term of not more than 2 years for an offence, other than an excepted offence³, may order that the sentence shall not take effect unless, during a period specified in the order, being not less than 1 year nor more than 3 years from the date of the order, the offender commits in Hong Kong another offence punishable with imprisonment and thereafter a court having power to do so orders under section 109C that the original sentence shall take effect."

6. In *Attorney General v. Wu Chi-sing*, the Court of Appeal explained that –

"There appears, however, to be a common misconception that... people get away scot-free when a sentence of imprisonment is imposed but is then suspended.... It however should be made absolutely clear that if a suspended sentence of imprisonment is imposed it is a sentence of imprisonment..."⁴.

7. According to case law, in deciding whether a term of imprisonment should be suspended, the test for the courts is whether there are exceptional circumstances that justify the making of an order of suspension. These circumstances need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely or normally encountered. The court is entitled to take into account all the relevant circumstances surrounding the offence, the offender and the background. Recognised exceptional circumstances include delay in prosecution and serious health problems.⁵

8. Under section 109C(1) of CPO (at **Annex II**), if an offender is convicted of an offence punishable with imprisonment during the operational period of a suspended sentence, the court may deal with the offender by one of the four ways provided in that subsection. These include ordering that the suspended sentence shall take effect with the original term unaltered unless the court is of the opinion that it would be unjust to do so.

³ "Excepted offence" is defined in section 109G of CPO as an offence listed in Schedule 3, such as manslaughter, possession of offensive weapon, etc.

⁴ [1989] 2 HKC 76 at 79, lines D to E. Also cited in chapter 45 (on suspended sentence) of *Sentencing in Hong Kong*, Sixth Edition, 2011, by I.G. Cross, S.C. and Patrick WS CHEUNG.

⁵ Paragraph 5-100, *Hong Kong Archbold* 2012.

9. The relevant law and legal principles as set out above may be summarized as follows –

- (a) the imposition of a "suspended sentence" as described in the statutory provisions is an order of imprisonment;
- (b) an order of imprisonment may only be suspended if the court considers that there are exceptional circumstances; and
- (c) the offender may be required to serve the term of imprisonment under suspension if he is convicted subsequently of an offence punishable with imprisonment within the period of suspension.

Section 109B(5)(a) of the Criminal Procedure Ordinance

10. Section 109B of CPO sets out how an order of suspended sentence interacts with other provisions. In particular, section 109B(5)(a) provides that –

"(5) Subject to any provision to the contrary contained in this or any other Ordinance –

- (a) a suspended sentence which has not taken effect under section 109C shall be treated as a sentence of imprisonment for the purposes of all Ordinances except any Ordinance⁶ which provides for disqualification for or loss of office⁷, or forfeiture of pensions, of persons sentenced to imprisonment...".

11. In relation to the concern about whether section 109B(5)(a) is applicable to BL 79(6), it is clear that it does not as this provision applies to ordinances only. Judicial support of this view may be found in the judgment of Mr Justice Cheung (as he then was) given in 2008 in the case of *CHAN Kin-sum v. Secretary for Justice*⁸, which concerns the

⁶ "Ordinances" is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), as any Ordinances enacted by LegCo, any Ordinances adopted by virtue of BL 160 as a law of Hong Kong, any subsidiary legislation made under any such Ordinances except any such subsidiary legislation which has pursuant to BL 160 been declared to be in contravention of BL, and any provision or provisions of any such Ordinance or subsidiary legislation.

⁷ "Loss of office" and "office" are not defined in CPO nor the Interpretation and General Clauses Ordinance, therefore, the expressions should bear their natural and ordinary meaning respectively.

⁸ [2009] 2 HKLRD 166.

constitutionality of legislation that disqualifies prisoners from registering as an elector in, and voting at LegCo elections.

Judicial considerations of BL 79(6)

12. Before referring to how the application of BL 79(6) has been considered by the court, it is useful in the first instance to recapitulate the proper approach of interpreting BL as pronounced by the Court of Final Appeal (CFA).

13. According to CFA, the courts should, when interpreting BL, consider the purpose of BL and its relevant provisions as well as the language of its text in the light of the context. The context of a particular provision is to be found in BL itself as well as from extrinsic materials such as the Joint Declaration.⁹ In interpreting BL, the courts are bound to apply the common law and the courts' role is to construe the language in order to ascertain the legislative intent as expressed in the language, rather than to ascertain the intent of the lawmaker on its own. While the courts must avoid a literal, technical, narrow or rigid approach, they could not give the language a meaning which it could not bear.¹⁰

14. BL 79(6), in particular the expression "convicted and sentenced", was considered by the Court of First Instance in 1998 in *CHIM Pui-chung v. The President of the Legislative Council*¹¹, an application for leave to review the President's decision to allow a motion to disqualify the Applicant as a LegCo Member be placed on the agenda of a Council meeting. It was argued by the Applicant that the President's power to declare that a Member is no longer qualified for office under BL 79(6) was not triggered until all avenues of appeal from the original conviction and sentence had been exhausted and had failed. The Court rejects that argument, holding that there is nothing in the language of BL 79(6) to justify that construction. In their natural and ordinary meaning, the words "convicted" and "sentenced" relate to a defendant having been convicted and sentenced by a court of first instance exercising an original jurisdiction.¹²

⁹ *Ng Ka-ling & others v. Director of Immigration* (1999) 2 HKCFAR 4.

¹⁰ *Director of Immigration v. CHONG Fung-yuen* (2001) 4 HKCFAR 211.

¹¹ [1998] 2 HKLRD 552. The Member was convicted on 1 August 1998 and was sentenced to three years imprisonment on 3 August 1998. On 27 August 1998, the President decided that a motion to disqualify the Member under BL 79(6) be placed on the agenda for debate at the meeting of LegCo on 9 September 1998. The Member filed the application for leave to review the President's decision on 7 September 1998. The application was dismissed on 8 September 1998.

¹² *Ibid* 554, lines F to I, per Keith J.

15. The Court further observes that conviction and sentence do not automatically result in removal from office but that two-thirds of the members present have to vote for a Member's removal reflects the desirability of leaving the ultimate decision as to whether a Member's conviction and sentence should result in his removal from office to the good sense of LegCo Members. Thus, it is open to LegCo Members to defer the question of a Member's removal under BL 79(6) until the Member's appeal has been heard, for example, because the appeal is due to be heard shortly, or the Member is on bail pending appeal and therefore able to look after the interests of his constituents in the meantime, or for any other reason which commends itself to the Members of LegCo.¹³

16. In *CHAN Kin-sum v. Secretary for Justice*, although the main issue and arguments in that case concern whether a prisoner has the right to register as an elector and to vote under Article 21 of the Hong Kong Bill of Rights and BL 26 rather than the disqualification of a Member under BL 79(6), the Court has made similar observations as those in the *CHIM Pui-chung* case. The Court observes that the thinking behind requiring a motion passed by two-thirds of the LegCo Members present to relieve a convicted Member from his duties is meant to ensure that a serving Member does not lose his seat for relatively minor offences, and Members need to examine carefully the nature and gravity of the offence and consider whether and to what extent it reflects on the Member's person, character, integrity and ability to continue serving as a Member. The examination is intended by the BL drafters to be a serious one because a two-thirds majority is required.¹⁴

Conclusion

17. Where a sentence of imprisonment for a month or more has been imposed on a Member, an order for suspension made under section 109B(1) of CPO should not prevent a motion from being moved under Rule 49B(1). The grounds in support of this view are as follows –

- (a) The purpose of BL 79(6) is to subject a Member who has been convicted of a criminal offence of a particular gravity to the judgment of other Members on whether he or she should

¹³ Ibid, at 555, lines D to H. This is also in line with the observations of CROp as set out in paragraph 3 above.

¹⁴ Note 8, at paragraph 136 at page 213.

be disqualified for the office. A sentence to imprisonment for a specific duration reflects the gravity of the offence of which the Member is convicted, regardless of whether the sentence is suspended or not;

- (b) at common law, a suspended sentence of imprisonment is a sentence of imprisonment and the statutory exception in section 109B(5)(a) of CPO has no effect on BL79(6); and
- (c) there is nothing in the language of the BL article to justify a construction of the expression, "convicted and sentenced to one month or more", different from its natural and ordinary meaning.

18. The above conclusion seeks to address the concern of Members over the application of BL 79(6) to an order of imprisonment of one month or more suspended by the court.

19. Members will note that under the BL 79(6) as interpreted and implemented by the RoP, the relevant motion to relieve a Member of his or her duties is not allowed to make any reference to extraneous matters such as the sentence being suspended, and it is ultimately for Members to exercise their good sense, examining carefully the nature and gravity of the offence as particularised in a motion moved under Rule 49B(1) and considering whether and to what extent it reflects on the Member's person, character, integrity and ability, in deciding whether the Member who is subject of a motion moved under Rule 49B(1) could continue serving as a LegCo Member.

20. In the context of considering a motion moved under Rule 49B(1), it is for Members to consider the relevance, if any, of the various possible scenarios that may arise in relation to the suspended sentence as set out in the written information provided by a Member to the House Committee at its meeting on 31 May 2013.

Encl.

Prepared by

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Section 109B Suspended sentences of imprisonment

(1) A court which passes a sentence of imprisonment for a term of not more than 2 years for an offence, other than an excepted offence, may order that the sentence shall not take effect unless, during a period specified in the order, being not less than 1 year nor more than 3 years from the date of the order, the offender commits in Hong Kong another offence punishable with imprisonment and thereafter a court having power to do so orders under section 109C that the original sentence shall take effect. (Amended 39 of 1999 s. 3)

(2) A court which passes a suspended sentence on any person for an offence shall not make a probation order in his case in respect of another offence of which he is convicted by or before the court or for which he is dealt with by the court.

(3) On passing a suspended sentence the court –

- (a) may impose such conditions as it thinks fit;
- (b) shall explain to the offender in ordinary language his liability under section 109C if during the operational period he commits an offence punishable with imprisonment or breaks any condition imposed under paragraph (a).

(4) If a court has passed a suspended sentence on any person, and that person is subsequently sentenced to detention in a training centre, he shall cease to be liable to be dealt with in respect of the suspended sentence unless the subsequent sentence or any conviction or finding on which it was passed is quashed on appeal.

(5) Subject to any provision to the contrary contained in this or any other Ordinance –

- (a) a suspended sentence which has not taken effect under section 109C shall be treated as a sentence of imprisonment for the purposes of all Ordinances except any Ordinance which provides for disqualification for or loss of office, or forfeiture of pensions, of persons sentenced to imprisonment; and

- (b) where a suspended sentence has taken effect under section 109C, the offender shall be treated for the purposes of the said excepted Ordinances as having been convicted on the ordinary date on which the period allowed for making an appeal against an order under section 109C expires or, if such an appeal is made, the date on which it is finally disposed of or abandoned or fails for non-prosecution.

(Added 5 of 1971 s. 11)
[cf. 1967 c. 80 s. 39 U.K.]

Section 109C Power of court on conviction of further offence to deal with suspended sentence

(1) If an offender is convicted of an offence punishable with imprisonment committed during the operational period of a suspended sentence or if, during such period, he breaks a condition imposed under section 109B(3)(a) and either he is so convicted by or before a court having power under section 109D to deal with him in respect of the suspended sentence or he subsequently appears or is brought before such a court, then, unless the sentence has already taken effect, that court shall consider his case and deal with him by one of the following methods –

- (a) the court may order that the suspended sentence shall take effect with the original term unaltered;
- (b) it may order that the sentence shall take effect with the substitution of a greater or lesser term for the original term;
- (c) it may by order vary the original order under section 109B(1) by substituting for the period specified therein a period expiring not later than 3 years from the date of the variation;
or
- (d) it may make no order with respect to the suspended sentence,

and a court shall make an order under paragraph (a) of this subsection unless the court is of opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent offence, and where it is of that opinion the court shall state its reasons.

(2) Where a court orders that a suspended sentence shall take effect, with or without any variation of the original term, the term of such sentence shall commence on the expiration of another term of imprisonment passed on the offender by that or another court, unless the court is of opinion that, by reason of special circumstances, the sentence should take effect immediately.

(3) In proceedings for dealing with an offender in respect of a suspended sentence which take place before the Court of First Instance any question whether the offender has been convicted of an offence punishable with imprisonment committed during the operational period of the suspended sentence shall be determined by the court and not by the verdict of a jury. (Amended 25 of 1998 s. 2)

(4) Where a court deals with an offender under this section in respect of a suspended sentence the clerk of the court shall notify the clerk of the court which passed the sentence of the method adopted.

(5) Where on consideration of the case of an offender a court makes no order with respect to a suspended sentence, the clerk of the court shall record that fact.

(6) For the purposes of any Ordinance conferring rights of appeal in criminal cases any such order made by a court shall be treated as a sentence passed on the offender by that court for the offence for which the suspended sentence was passed.

(Added 5 of 1971 s. 11)
[cf. 1967 c. 80 s. 40 U.K.]