

Legislative Council Panel on Constitutional Affairs

Judicial Review on Prisoners' Voting Right

INTRODUCTION

This paper informs Members of the latest developments of the three judicial review (“JR”) cases on prisoners’ voting right and the way forward.

BACKGROUND

(A) Legislative Council Ordinance (“LCO”) (Cap. 542)

2. Under section 31(1)(a)-(c) of the LCO, a natural person is disqualified from being registered as an elector for a constituency if the person—

- (a) has, in Hong Kong or any other place, been sentenced to death or imprisonment (by whatever name called) and has not either—
 - (i) served the sentence or undergone such other punishment as a competent authority may have substituted for the sentence; or
 - (ii) received a free pardon; or
- (b) on the date of application for registration, is serving a sentence of imprisonment; or
- (c) without limiting paragraph (a), where the election is to be held or is held within 3 years after the date of the person's conviction, is or has been convicted-
 - (i) of having engaged in corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554); or
 - (ii) of an offence against Part II of the Prevention of Bribery Ordinance (Cap. 201); or

(iii) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap. 541).

3. Section 53(5)(a)-(c) of the LCO provides that an elector is disqualified from voting if the elector—

- (a) has, in Hong Kong or any other place, been sentenced to death or imprisonment (by whatever name called) and has not either—
 - (i) served the sentence or undergone such other punishment as a competent authority may have substituted for the sentence; or
 - (ii) received a free pardon; or
- (b) on the date of the election, is serving a sentence of imprisonment; or
- (c) without limiting paragraph (a), where the election is to be held or is held within 3 years after the date of the person's conviction, is or has been convicted-
 - (i) of having engaged in corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554); or
 - (ii) of an offence against Part II of the Prevention of Bribery Ordinance (Cap. 201); or
 - (iii) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap. 541).

(B) Applications for JR

4. On 8 August 2008, Mr. Chan Kin-sum, Simon, a prisoner, applied for leave to apply for JR to challenge the constitutionality of section 31(1)(b) and 53(5)(b) of the LCO (case no. HCAL 79/2008). Chan also sought an order of Mandamus directing the Electoral Affairs Commission (“EAC”) to provide Hong Kong permanent residents who

are serving a custodial sentence access to polling stations for the Legislative Council (“LegCo”) Election to be held on 7 September 2008.

5. On 15 August 2008, Mr. Choi Chuen-sun, a prisoner and a registered elector, applied for leave to apply for JR, seeking relief in similar terms as sought by Chan as well as an order of Mandamus directing the EAC to change his address to the prison address in the electoral register (case no. HCAL 83/2008).

6. On 11 August 2008, the Hon Leung Kwok-hung lodged another JR application on similar grounds and sought similar relief as Chan’s application (case no. HCAL 82/2008). He also challenged the constitutionality of section 31(1)(a)(i) and 53(5)(a)(i) of the LCO and sought an order of Mandamus directing the EAC to provide convicted persons and remanded unconvicted persons access to polling stations and/or facilities on 7 September 2008.

7. The Court granted leave to the JR applications on 18 August 2008 and the substantive hearing was held on 10 to 13 November 2008.

THE COURT’S JUDGMENT

8. On 8 December 2008, the Court handed down its judgment on the three JR cases with details set out in paragraphs 9 to 12 below.

(A) Prisoners’ Voting Rights

9. The Court considers that the right to vote is without doubt the most important political right. The existing general, automatic, and indiscriminate restrictions on prisoners’ right to vote and the right to register as electors cannot be justified under the proportionality test (i.e. a restriction should be proportionate to the achievement of the legitimate aim that it seeks to achieve). The disqualification provisions under section 31(1)(a)-(b) and section 53(5)(a)-(b) contravene the right to vote constitutionally guaranteed under Article 26 of the Basic Law (“BL”)¹

¹ Article 26 of the BL provides that permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.

and Article 21 of the Hong Kong Bill of Rights (“HKBOR”)² specified under section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) so far as they affect prisoners and those convicted persons who have been sentenced to death or imprisonment, and who have not served the sentences or received a free pardon. Arrangements should be made to enable prisoners and those convicted persons to vote on the election day.

10. That said, it is strongly emphasised in the judgment that the Court is not suggesting that some form of restrictions on voting (or even registration) cannot be imposed by the legislature against those in jail (and others). The Court is not concerned with where the cut-off line should be drawn and how it should be drawn, which is a matter for the legislature.

(B) Arrangements for Remanded Unconvicted Persons

11. The Court also takes the view that the constitutional right to vote of remanded unconvicted persons is not affected by any law, and arrangements should be made to enable them to vote on the election day whilst being held in custody.

(C) Challenge against EAC’s Refusal to change the Registered Address

12. The Court considers that Mr. Choi’s challenge against the EAC’s refusal to change his registered address to his prison cell in Stanley in the register of electors is unfounded and should be dismissed.

RESULTS OF THE 2008 LEGCO ELECTION

13. Notwithstanding the Court’s judgment on the JR cases, the results of the 2008 LegCo Election are unaffected as the election was organised in accordance with the prevalent electoral legislation.

² Article 21 of the HKBOR 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.

WAY FORWARD

(A) Hearing on the Relief to be Granted

14. While the Court has handed down its judgment on the constitutionality of the relevant electoral provisions, another hearing is scheduled for 23 February 2009 during which the Court will hear the submissions made by the parties on the appropriate relief (i.e. form of remedies) to be granted.

(B) Formulation of Policy Options on Voting and Registration Rights

15. As the existing across-the-board disqualification of prisoners from registration and from voting has been ruled by the Court as unconstitutional, we will have to formulate policy options on the relaxation of the ban on prisoners' voting right. It is noteworthy that under section 31(1)(c) and section 53(5)(c) of the LCO, persons convicted of election-related or bribery offenses are disqualified from registering as electors and from voting within three years after such conviction. Such restrictions shall remain under the LCO. We need to consider whether further restrictions on prisoners' voting right should be imposed on top of section 31(1)(c) and section 53(5)(c) of the LCO.

16. We have studied the arrangements in overseas jurisdictions on prisoners' voting rights. In countries such as Austria, Sweden, Switzerland, Denmark, Ireland, Iceland, the Netherlands, Japan and Israel, there are no restrictions on prisoners' voting right.

17. For those countries which impose restrictions on prisoners' voting rights, the common types of restrictions are set out below-

(i) Explicit Disqualifying Order of the Sentencing Court

In some European countries such as Portugal, Luxembourg, France, Norway, Germany, and Poland, some prisoners can vote while others may be denied the voting right generally only by explicit order of the sentencing court as an additional aspect of their prison sentence.

Amongst these countries, some also specify that the disqualifying order can only apply to the conviction of specified

crimes. For example, in Norway, those persons convicted of crimes against the Constitution and Head of State (such as treason and electoral fraud) will be disqualified from voting. In Germany, the disqualification from voting can be handed out by the Court for political crimes such as treason, electoral fraud, and intimidation of voters. In France, the Court may disqualify from voting those persons convicted of crimes such as corruption, forgery or embezzlement.

(ii) Length of Sentence

In some countries, prisoners are disqualified from registering as electors or from voting if their sentences of imprisonment exceed a certain period. In Australia, a person serving a sentence of imprisonment for a term exceeding 36 months is not entitled to register as an elector. In Singapore, no person shall be entitled to have his name entered or retained in any register of electors if he is serving a sentence of imprisonment for an offence punishable with imprisonment for a term exceeding 12 months. In Belgium, a person serving a sentence of over four months is disqualified from voting for six years, and a person serving a sentence of three to five years is disqualified for 12 years. For criminal convictions with sentences of more than five years, the disqualification may be lifelong.

(C) Possible Options

18. We are currently considering various possible options for relaxing the disqualification provisions under the LCO. Some of the possible options are listed below-

- (a) One option is to remove the existing across-the-board disqualification of prisoners from registration and from voting. In other words, all eligible prisoners will be able to register and vote.
- (b) Another option is to retain disqualification for persons who are sentenced to imprisonment for a term exceeding a specified length. The idea is that offenders of serious crimes who are punished by way of a long custodial sentence shall not take part in electing our legislators who make laws in order to protect the integrity of the legislature. However, once the prisoners are

released from prison, they will be entitled to apply to be registered as electors and to vote.

- (c) The third option is to disqualify persons who are sentenced to imprisonment for a term exceeding a specified length but allow them to register as electors and to vote in the last few years of their term of their imprisonment. As present day thinking on imprisonment emphasizes rehabilitation, to enable prisoners to register and vote when they are approaching the end of the term of their imprisonment may enhance their civic-mindedness and facilitate their reintegration into the society.

We are exploring the feasibility and appropriateness of the options having regard to the overseas practices and the local situation.

(D) Registered Address of Eligible Prisoners as Electors

19. Under section 28(1) of the LCO, a person applying for registration must satisfy the Electoral Registration Officer, among other things, that the residential address notified in his application is the person's only or principal residence in Hong Kong. An elector may vote at an election in respect of the geographical constituency ("GC") within which his only or principal residence in Hong Kong as entered in the final register of GCs is located. According to section 28(3) of the LCO, a person's only or principal residence in Hong Kong refers to a dwelling-place in Hong Kong at which the person resides and which constitutes the person's sole or main home.

20. As the penal institutions where prisoners are serving their sentence of imprisonment are not a "dwelling place" which falls under section 28(3) of the LCO, we need to determine the address to which the prisoners should be registered, which would in turn determine the GCs to which the prisoners would be allocated. For prisoners who continue to maintain a home outside the prison, he may be registered to the address of his home. For those who no longer maintain any home outside the prison, one option is to amend the relevant provisions of the LCO so that the last dwelling-place in Hong Kong at which prisoners resided before serving their sentence of imprisonment is deemed as their only or principal residence in Hong Kong for the purpose of registering as electors. In other words, such a prisoner would be assigned to the GC within which his/her last dwelling place is located. We will explore this and other possible options.

(E) Practical Voting Arrangements

21. We also need to work out the practical arrangements under which prisoners may cast their votes at an election. For example, we need to consider at which polling station the prisoners shall cast their votes. One option is for the prisoners to cast their votes at the polling stations allocated for their registered address under the escort of the Correctional Services Department (“CSD”) staff. Such transfer of prisoners to and from different polling stations in different time slots during the polling day of the election will pose great concerns on public safety and security and will have very significant manpower resource implications on the CSD.

22. Another option is to set up polling stations inside prisons to enable prisoners to cast their votes. The admission and presence of a large number of outsiders (including polling staff, candidates and election/polling/counting agents designated by candidates) to the prisons will create significant security concerns. Moreover, the number of voters in some prisons may be rather small. In order to preserve confidentiality of votes, arrangements might need to be made to transfer the ballot papers to the relevant counting stations to be mixed with the other ballot papers before counting.

23. There are other options such as postal voting or voting by proxy. However, these voting arrangements give rise to concerns about voting confidentiality and vote buying. They are more susceptible to undue influence and fraud than ballots cast by electors in person inside a polling station. Hence, such absentee voting may not be appropriate for Hong Kong.

24. We would also need to work out the arrangements for candidates to canvass for votes from the registered electors in prisons before the election.

25. Apart from prisoners, it is also necessary to develop the arrangements to facilitate unconvicted remanded persons to vote on the election day.

26. The EAC in conjunction with the relevant Law Enforcement Agencies (“LEAs”) will have to consider the above issues carefully, develop necessary arrangements and put together a workable operational plan.

(F) Application for Temporary Suspension of the Court Order

27. The issue of whether and, if so, what reasonable restrictions should continue to apply to prisoners’ voting right is controversial and complex, and will affect all public elections. We see the need to consult the public on the policy options. We also need to work out the arrangements listed in paragraphs 19 to 26 above. Taking into account the outcome of the public consultation, we shall prepare and introduce the relevant legislative amendments. The LegCo will have to scrutinise the proposed amendments to the ordinances before enacting them and the related amendments to the subsidiary legislation will have to go through the negative vetting process. Altogether, we anticipate that it would take about ten months to complete the tasks. This is a very tight timetable, particularly bearing in mind the LegCo’s summer recess from mid July to early October.

28. While the next LegCo election is not to be due until September 2012, it is possible that a Member’s office during the current term of the LegCo may become vacant at any time for reasons such as resignation, death or disqualification specified under the LCO. Under these circumstances, a by-election will need to be held to fill the vacancy. If a by-election is to be held before the above-mentioned tasks are completed, the Administration will encounter substantial difficulties in implementing prisoners’ right to vote in such a by-election.

29. It is also noteworthy that there are similar disqualification provisions in the Chief Executive Election Ordinance (“CEEO”) (Cap.569), District Councils Ordinance (“DCO”) (Cap. 547), and the Village Representative Election Ordinance (“VREO”) (Cap. 576). By-elections for the District Councils (“DC”) and village representatives (“VR”) are not uncommon. In 2007 alone, there were four DC by-elections. A by-election of the Sha Tin DC Tai Wai Constituency will have to be held in the next few months. Moreover, the VR by-elections are held every six months. The coming VR by-election is scheduled for May 2009. Given the importance of maintaining consistency in the

electoral arrangements of public elections held in Hong Kong, the Court's judgment on the disqualification provisions under the LCO will have bearing on similar provisions under the CEEO, DCO and VREO. The relevant issues will need to be examined and the respective legislation will also require amendment.

30. In view of the above considerations, we have applied to the Court on 22 December 2008 for a ten-month suspension of any order to be made by the Court. This is to ensure that prisoners' right to vote will 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 may be held in the meantime. The Court will consider our application at the hearing on 23 February 2009.

TIMETABLE

31. The target timetable for the completion of the tasks mentioned in the foregoing paragraphs is as follows –

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|---|------------------|
| (a) Formulation of policy options on prisoners' voting rights; preparation for the consultation document; launching of public consultation and consideration of views gathered from the consultation | 3 months |
| (b) Drafting of the amendments to the LCO and other relevant ordinances; consulting the LegCo Constitutional Affairs Panel ("CA Panel") on the amendments and introduction of the amendments to the LegCo | 3 months |
| (c) Scrutiny and enactment of the legislative amendments by the LegCo | 2 months or more |
| (d) Enactment of the amendments to the relevant subsidiary legislation governing the electoral arrangements ³ after the passage of the amendments to the relevant ordinances. | 2 months |

³ The enactment schedule has taken into account the seven-week vetting of the subsidiary legislation by the LegCo.

ADVICE SOUGHT

32. Members are invited to express views on the way forward set out in the paper.

Constitutional and Mainland Affairs Bureau
January 2009