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HCAL 79/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 79 OF 2008

———————

BETWEEN

CHAN KIN SUM Applicant

and

SECRETARY FOR JUSTICE 1st Respondent

ELECTORAL AFFAIRS COMMISSION 2nd Respondent

———————

AND

HCAL 82/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 82 OF 2008

———————

BETWEEN

LEUNG KWOK HUNG Applicant

and

SECRETARY FOR JUSTICE 1st Respondent

ELECTORAL AFFAIRS COMMISSION 2nd Respondent

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AND

HCAL 83/2008

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 83 OF 2008

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BETWEEN

CHOI CHUEN SUN Applicant

and

SECRETARY FOR JUSTICE 1st Respondent

ELECTORAL AFFAIRS COMMISSION 2nd Respondent

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(Heard Together)

Before: Hon A Cheung J in Court

Dates of hearing: 10-13 November 2008

Date of judgment: 8 December 2008

J U D G M E N T

INTRODUCTION

Applicants

1. The applicant in HCAL 79/2008, Mr Chan, is a Hong Kong permanent resident. He is 32 years old. On 4 October 2002, he was convicted in the High Court of one count of robbery and was sentenced to imprisonment for 12 years. He is currently serving his sentence in Stanley Prison and his date of expected release is 18 March 2010.

2. The applicant in HCAL 83/2008, Mr Choi, is also a Hong Kong permanent resident. He is 45 years old. On 22 January 2008, he was convicted in the District Court of one count of robbery and was sentenced to imprisonment for 54 months. He is also currently serving his sentence in Stanley Prison. His date of expected release is 8 August 2010. Unlike Mr Chan, Mr Choi had registered himself as an elector for Kowloon West geographical constituency before he was sentenced to imprisonment.

3. Both Mr Chan and Mr Choi are represented by Mr Hectar Pun and Mr Earl Deng in their respective applications for judicial review.

4. Hon Leung Kwok Hung (Mr Leung), also widely known as 'Long Hair', is a political activist as well as an elected member of the Legislative Council (LegCo), representing New Territories East geographical constituency. He first won in the 2004 LegCo elections and successfully defended his seat in the 2008 LegCo elections, which were held on 7 September 2008.

5. He is represented by Mr Martin Lee SC, Ms Jocelyn Leung with him, in his application for judicial review.

Applications for judicial review

6. These three applications for judicial review, all heard together, raise important questions as to a prisoner's right to vote in LegCo elections. They also raise a similar, although less acute, question of a remanded – yet unconvicted – person's right in law and perhaps more importantly, in practice, to vote in such elections. Such a person, who is remanded in custody awaiting trial, will, for the sake of convenience, be referred to simply as a 'remanded person' in the rest of this judgment.

7. These applications arose in the run up to the 2008 LegCo elections. Mr Chan and Mr Choi both complained that they could not vote in the then forthcoming elections because they were legally disqualified to do so, pursuant to s 53(5)(b) of the Legislative Council Ordinance (Cap 542), as they would be serving a sentence of imprisonment on election day. This was to be so even though Mr Choi had registered as an elector. In the case of Mr Chan, his legal inability to vote was also due to the fact that as a person serving a sentence of imprisonment, he was not

entitled to register as an elector by reason of s 31(1)(b) of the Ordinance, and not being registered as an elector, Mr Chan was not entitled to vote in the elections: s 48(1) of the Ordinance.

8. Mr Leung, on the other hand, is and was not at any material times a prisoner serving a sentence of imprisonment. Nor was he a remanded person. However, he claimed that as a LegCo member, he had been approached by interested parties who had complained to him of their lack of right to vote as a prisoner serving a sentence, as a convicted person sentenced to imprisonment but released on bail pending appeal, or as a remanded person. Mr Leung therefore took it upon himself to launch HCAL 82/2008 to challenge the relevant provisions in the Ordinance in respect of prisoners', convicted persons' and remanded persons' rights to vote in the then forthcoming elections, after some inconclusive correspondence with the Electoral Affairs Commission (EAC), which is charged with various functions in relation to, amongst other things, LegCo elections, pursuant to the Electoral Affairs Commission Ordinance (Cap 541) (the EAC Ordinance).

9. Since all three applications were taken out very late in the day, so although leave was granted in each case, Hartmann J (as he then was) took the view that they could not be disposed of before election day. His Lordship directed, instead, that all three applications be dealt with at an expedited substantial hearing after the elections. As mentioned, Mr Leung has successfully defended his LegCo seat in the elections. Mr Chan and Mr Choi are still serving their sentences in Stanley Prison.

2008 LegCo elections and beyond

10. The questions raised in these applications were directed originally at the 2008 LegCo elections. However, unless the law is changed in the meantime, these questions will remain in respect of future LegCo elections, including any by-elections. The number of persons affected by the provisions under challenge is not insubstantial.

11. As at 5 September 2008, shortly before the 2008 LegCo elections, there were 4,239 prisoners serving fixed terms of imprisonment in Hong Kong. 626 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. Apart from the 4,239 prisoners serving fixed terms of imprisonment, there were another 211 prisoners serving life sentences in Hong Kong. These statistics only included those who were Hong Kong permanent residents and aged 18 or above as at 5 September 2008.

12. As regards remanded persons – those who were remanded in custody awaiting trial, there were 938 remanded persons who were Hong Kong permanent residents and aged 18 or above as at 5 September 2008.

LegCo Ordinance

13. The relevant provisions in the LegCo Ordinance are as follows:

> "31.(1) 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); or

(d) is found under the Mental Health Ordinance (Cap 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs; or

(e) is a member of the armed forces of the Central People's Government or any other country or territory.

…

53. …

(5) An elector is also disqualified from voting at an election 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); or

(d) is found under the Mental Health Ordinance (Cap 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs; or

(e) is a member of the armed forces of the Central People's Government or any other country or territory."

Persons affected

14. Only s 31(1)(a) and (b) and s 53(5)(a) and (b) are challenged. In other words, in respect of those who have been sentenced to a term of imprisonment which has not been served or fully served and who have not received a free pardon, two matters are under challenge: (1) their inability to register as an elector; (2) their inability to vote even if they have been registered as an elector prior to sentencing. By imprisonment, I am

including, for the sake of convenience only, those who have been sentenced to death. Moreover, according to the provisions, the sentence can be imposed either in Hong Kong or elsewhere.

15. However, it is not at all clear whether imprisonment, in this context, includes those sentenced to or detained in detention centres, training centres, drug addiction treatment centres, rehabilitation centres and Siu Lam Psychiatric Centre. Mr Lee has suggested in submission, without citing any authority, that all these convicted persons and detainees are included. Mr Michael Thomas SC (Mr Simon Young with him), appearing for the respondents, has maintained in submission that they are not, thereby suggesting that these convicted persons and detainees are not disqualified from registration as an elector or from voting, despite their sentences or detention.

16. In view of Mr Thomas' position, I do not propose to consider the position of these convicted persons and detainees further in this judgment.

17. In any event, in respect of the class of persons who have been sentenced to imprisonment (or death), it is further sub-divided into two sub-groups, namely, (1) those who have neither served the full sentence (or undergone such other punishment as a competent authority – say, a higher court sitting on appeal – may have substituted for the sentence, nor received a free pardon); and (2) those who are actually serving a sentence of imprisonment on the date of application for registration, or as the case may be, on election day.

18. It should be noted that those who have received a suspended sentence in Hong Kong which has not been activated shall be treated, during its operational period, as having been sentenced to imprisonment for the purposes of the LegCo Ordinance and all other Ordinances in Hong Kong: s 109B(5)(a) of the Criminal Procedure Ordinance (Cap 221). In other words, a person who has been given a suspended sentence in Hong Kong which has not been activated is disqualified from registration as an elector and from voting in LegCo elections during the operational period of the suspended sentence.

19. Likewise, a prisoner given a conditional release pursuant to the provisions of the Long-term Prison Sentences Review Ordinance (Cap 524) falls, it would seem, within the first sub-group, as a person who has not served his full sentence or has received a free pardon.

Remanded persons

20. So far as those on remand awaiting trial are concerned, it should be immediately noted that the extracted provisions in the LegCo Ordinance do not refer to them at all. And in fact, nowhere else in the Ordinance can one find provisions to disqualify remanded persons from registering as an elector or from voting in LegCo elections.

21. It will become apparent that their difficulties, particularly in relation to voting, lie in the fact that since they are detained, they cannot personally attend a polling station for voting (assuming that they have been registered as an elector before). Our electoral law, it should be

remembered, does not allow any other form of voting, such as postal voting, advance voting or voting by proxy.

Minor issue

22. A relatively minor issue, also raised by Mr Choi, is whether he was entitled to change his registered address as an elector in Kowloon West to his prison cell in Stanley.

PRISONERS' RIGHTS TO VOTE

Prisoners

23. I propose first to focus on the right of prisoners to vote. By that, I am referring to those who are permanent residents of Hong Kong and aged 18 years or more. This is because those who are not permanent residents of Hong Kong and those who have not reached 18 years of age are not qualified to register as electors: ss 27 and 29 of the LegCo Ordinance. No challenge is made against those provisions. By 'prisoners', I am, for the sake of convenience (and unless the context indicates otherwise), referring to all those convicted persons who have been sentenced to death or imprisonment, and who have not (fully) served the sentence or received a free pardon, regardless of whether they are actually serving the sentence for the time being.

History of electoral law in Hong Kong

24. It is necessary to trace the history of electoral law in Hong Kong. Reproduced collectively as an Annex to this judgment are various tables prepared by those instructing Mr Thomas and handed up to the

Court as an *aide memoire* during counsel's submission which conveniently set out the disenfranchisement provisions in Hong Kong throughout the years.

25. Briefly, the electoral law in Hong Kong can be traced to the Urban Council elections in 1953. S 3 of the then Urban Council Ordinance (Cap 101) disqualified a person from registering as an elector who had in any part of Her Majesty's Dominions or in any territory under Her Majesty's Protectorate or in any territory in which Her Majesty had from time to time jurisdiction been sentenced to death or imprisonment for a term exceeding six months.

26. S 16 of the Urban Council Ordinance 1955 provided similarly, except that the disqualification was extended from registration as an elector to actual voting at the election of any ordinary member of the Urban Council.

27. In 1973, the relevant disenfranchisement provisions were moved from the main body of the Urban Council Ordinance to para 4 of the First Schedule of the Ordinance.

28. In June 1980, the then Hong Kong Government published a green paper entitled 'A Pattern of Administration in Hong Kong'. It was followed by a white paper entitled 'District Administration in Hong Kong' issued in January 1981. Para 37 of the White Paper said:

> "The Government believes that these disqualifications for Urban Council electors are broadly correct and it will seek to introduce

> essentially the same disqualifications for District Board electors."

29. In 1981, the legislature enacted the Electoral Provisions Ordinance (Cap 367) providing for the election of members of the Urban Council and of District Boards. S 11 of the new Ordinance disqualified a person from being registered as an elector or, even if registered, from voting at an Urban Council or District Board election 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 had not served the sentence or received a free pardon. A person would likewise be disqualified if, on the date he applied for registration or on election day, he was serving a sentence of imprisonment – notably, the Ordinance did not say that the sentence that he was serving had to be exceeding six months.

30. Similar disqualification provisions were included in the Legislative Council (Electoral Provisions) Ordinance (Cap 381), which was enacted specifically in 1985 to cater for the first LegCo elections held in that year to return members from functional constituencies. In 1990, the Electoral Provisions Ordinance was amended to cover Legislative Council geographical constituency elections as well, while the Legislative Council (Electoral Provisions) Ordinance continued to cover functional constituency elections. The disqualification provisions under the two Ordinances were identical.

31. In 1991, the Hong Kong Bill of Rights Ordinance (Cap 383) was enacted. Art 21 of the Hong Kong Bill of Rights provides as follows:

> " 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."

32. Art 1(1), referred to in Art 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."

33. S 13 of the Hong Kong Bill of Rights Ordinance provides that art 21 of the Hong Kong Bill of Rights does not require the establishment of an elected Executive or Legislative Council in Hong Kong.

34. In January 1992, the LegCo appointed a select committee on LegCo elections to review the arrangements for the 1991 LegCo elections and to report its recommendations on the arrangements for future LegCo elections. Qualification and disqualification of voters and election arrangements such as absentee voting were examined by the Select Committee. In a paper submitted to the Select Committee, the then Constitutional Affairs Branch stated in para 6 of the paper:

> "The existing disqualification of prisoners from registration during imprisonment means that in effect they are deprived of

> the right to vote even upon release. We believe that this disqualification is unduly harsh and should be removed. We do not, however, propose to remove the current restriction which prohibits prisoners from voting while they are still serving their sentences as such restriction is justified by their loss of freedom due to imprisonment. Nor do we expect there will be much public support for such a relaxation in Hong Kong."

35. At a meeting of the Select Committee held on 20 June 1992, members noted a case law in Canada which upheld the right to vote for prisoners. Probably, this was either a reference to the judgment of the Ontario Court of Appeal in *Sauvé v Canada (Attorney General)* (1992) 7 OR (3d) 481 or a reference to the judgment of the Federal Court of Appeal in Canada in *Belczowski v The Queen* 90 DLR (4^{th}) 330, in both of which the Courts struck down a blanket disenfranchisement of prisoners undergoing punishment as an inmate in any penal institution for the commission of any offence as being invalid under the Canadian Charter of Rights and Freedoms – the disenfranchisement was not restricted to any period of imprisonment. (The Supreme Court of Canada subsequently heard the appeals from these two cases together and in a short oral judgment, dismissed both appeals: [1993] 2 SCR 438.) After discussion, members of the Select Committee 'agreed that the Administration should be asked to review the relevant provisions in Hong Kong in view of the Bill of Rights Ordinance'. Members also expressed the view that 'prisoners serving sentence of imprisonment should only be disqualified from voting and not from registration'. For the sake of completeness, I should also mention that in the meeting, members further noted that 'the rights to vote for persons on remand should be reviewed by the Administration to take into account provisions in the Bill of Rights Ordinance'. Furthermore, one of the members, Hon Peter Wong,

proposed an amendment to give the right to vote to prisoners in general, which was, however, not successful.

36. It is clear from the minutes of the meetings of the Select Committee that the question of prisoners' right to vote and the implications of the Bill of Rights had been discussed by members of the Select Committee with input from Government officials. By and large, the Government's position was that there was no binding precedent on these questions at the time; the Government would need to look at matters again from the angle of the Bill of Rights when the position should become clearer and would also need to take into account views of the public and the practical implications. In the Select Committee's report (July 1992), para 5.17 read:

> "As regards the existing disqualification of those who are serving sentences of imprisonment, we recommend that the disqualification of registration should be repealed, although the disqualification of voting should stay."

Again, for the sake of completeness, para 6.32 said:

> "We note that persons serving a sentence of imprisonment are not eligible to vote. Given the practical difficulties involved, we do not support any form of absentee voting for those on remand either, subject to any requirements provided for in the Bill of Rights Ordinance."

37. But no amendment was made regarding disqualification of prisoners from registration as electors.

38. In 1995, Hon Andrew Wong tabled in the LegCo a private member's bill entitled Electoral Provisions (Amendment) Bill 1995.

Amongst other things, the Bill sought to repeal the provisions in the Electoral Provisions Ordinance and Legislative Council (Electoral Provisions) Ordinance disqualifying persons who had not yet served their sentences of imprisonment and prison inmates from being registered as electors or from voting. The Government was 'firmly against the Bill'. A main reason was that the then forthcoming LegCo elections were 'not even two months away'. The then Secretary for Constitutional Affairs said:

> "But I hardly need to remind this Council that all responsible administrations, and this includes those in the more liberal jurisdictions, have legislated to exclude various categories of persons from the electoral process. And Hong Kong is of no exception. The disqualification provisions are necessary to protect the integrity not only of the elections, but also of the representative institutions to which the candidates are to be returned.
>
> Most of the disqualification provisions which Mr WONG tries to remove have been in the statute book for many years. All were drawn up after extensive public discussion, including a Green Paper consultation exercise in 1981. They are well accepted by the public, and there are no known implementation difficulties. It is, therefore, most astonishing that Mr WONG should seek to introduce fundamental changes over-night. Indeed, to do so would be wrong in public policy terms:
>
> Firstly, it goes against our proven approach to constitutional development: gradual, measured evolution rather than radical, headlong, rush.
>
> Secondly, it goes against the established practice in Hong Kong that any proposal for major changes are preceded by, and subject to, comprehensive public consultation. Are the public ready for the radicalism embodied in the Bill? …
>
> Thirdly, it completely ignores the impact on the September elections. Mr WONG's proposals will create unacceptable disruption to our preparation for the elections …
>
> All the above does not mean that the existing legislative provisions are sacrosanct. But the Administration does firmly believe that any fundamental change to the electoral system

should be made with extreme care, after detailed study, and thorough consultation. The appropriate time for a comprehensive review, if the public consider one necessary, should be after the September Legislative Council elections."

39. In his speech, Hon Andrew Wong replied:

" The Secretary for Constitutional Affairs is correct in stating that voters and candidates are likewise subject to qualification restrictions in all other countries. But the question is whether these restrictions are reasonable and whether they unreasonably limit the basic rights of the citizen. A convicted criminal is a citizen no less. If it is argued that a convicted criminal is no longer a citizen and should be divested of his political rights, I would say such concept has found no currency in Hong Kong. …

… There are no such restrictions in Canada or Australia. As a matter of fact, according to Canada's Charter of Rights, even a prisoner has his basic rights which include the right to vote. As regards convicted prisoners serving a term of more than six months, my original package proposes that the provision disqualifying them from voting be wholly repealed.

At present, all prisoners are disqualified from voting no matter whether they are about to serve or are already serving their terms and no matter whether the offences of which they are convicted are serious or otherwise. I propose that this provision be amended in two aspects. One aspect is that, in respect of the sentence, a line of distinction be drawn at five years instead of the present six months. This is the case with the State of Southern Australia (one of the states in the Federal Union of Australia) where a prisoner convicted of serious offences who has not served out his term is disqualified from voting. Where a prisoner convicted of a less serious offence is serving a term of six months, one year, two years, three years or even four years, he should not be unreasonably deprived of his right to vote."

40. The Bill was defeated by 32 votes to 22.

41. The Basic Law, promulgated on 4 April 1990, came into effect on 1 July 1997. Chapter III is entitled 'Fundamental Rights and

Duties of the Residents'. Art 24, the first article in Chapter III, defines Hong Kong residents as including permanent residents and non-permanent residents. Art 25 provides that all Hong Kong residents shall be equal before the law. The next article, art 26, provides:

> "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."

Arts 27 to 38 go on to provide for other rights enjoyed by Hong Kong residents.

42. Art 39(1) provides for the constitutional entrenchment of, amongst other things, the International Covenant on Civil and Political Rights (ICCPR), on which, as we all know, our Hong Kong Bill of Rights is modelled. The second paragraph of art 39 goes on to read:

> "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this article [which entrenches, amongst other things, the ICCPR]."

Arts 40 to 42 go on to provide for other rights and the duty of Hong Kong residents and other persons in Hong Kong to abide by the laws in force in Hong Kong.

43. The pre-1997 Electoral Provisions Ordinance and Legislative Council (Electoral Provisions) Ordinance did not survive the resumption of the exercise of sovereignty over Hong Kong. They were not adopted as the laws of the Hong Kong Special Administrative Region. Thus, there was a need for a new electoral law. The Legislative Council Bill was

introduced by the SAR Government in August/September 1997. So far as disqualification from registration and voting was concerned, the Bill was identical to the previous law save in one important aspect, the previous limitation of imprisonment exceeding six months was removed. In other words, any unserved and unpardoned sentence of imprisonment for whatever length would entail disqualification from registration and voting. Serving a sentence (of whatever length) at the time of application for registration or on election day would also be a ground for disqualification.

44. The Bill was criticised by Hon Andrew Wong as a 'retrograde step'. He unsuccessfully moved for an amendment to restore the previous six months' limitation. His motion was defeated in the Provisional Legislative Council by 37 votes to 14 and the Bill was duly passed into law. During debate, the then Secretary for Constitutional Affairs said:

> "Mr Andrew Wong's amendment will fundamentally change the provisions long applied to the participation and eligibility of voters. These changes have not been subject to full discussion in the community and in meetings of the Legislative Council. We do not think that the amendment is accepted by the majority of people. Therefore, it is not the right time to make Mr Wong's amendment to the Bill. We object to this amendment."

45. Following a complaint lodged by the Society for Community Organisation to the LegCo Secretariat about the disenfranchisement of prisoners, the Administration issued a paper entitled 'Voting Right of Prisoners' for discussion by the LegCo Panel on Constitutional Affairs on 23 May 2005. It was a short paper comprising two pages. It stated the Administration's position as follows:

"4. International human rights conventions and the Hong Kong Bill of Rights Ordinance permit reasonable restrictions on the right to vote and to be elected in elections. It is generally accepted in Hong Kong that when a person has been convicted of an offence and sentenced to imprisonment, he may be deprived of certain rights. There are current statutory provisions which bar prisoners from voting.

5. Records show that since at least the 1985 LegCo election, prisoners have been prohibited from voting. The suggestion of extending the right to vote to prisoners was debated at LegCo in 1995, in the context of a Member's Bill to relax the eligibility criteria of voters, and was voted down by a majority of LegCo Members. The issue has since been raised again in a number of legislative amendment exercises prior to public elections. On each occasion, LegCo Members agreed that the bar on prisoner voting should be maintained.

6. As to overseas practices, different places have different policies and regulations on prisoners' right to vote, having regard to their own circumstances. A number of countries including the United Kingdom, Luxembourg, Hungary, Czech Republic, Russia, Singapore, Malaysia, Japan and most states of the United States of America impose total ban on prisoner voting. Other countries such as France and Germany have different restrictions on prisoners' right to vote, based on the court's determination on whether and for how long the convicted person's right to vote should be forfeited. In Australia, prisoners serving a sentence of three yeas or more and convicts of treason are barred from voting in federal elections. It is noteworthy that the sentence threshold of this restriction used to be five years but has been tightened up recently, such that prisoners serving a term between three to five years are also disqualified from voting under the revised policy. A number of European countries have no restrictions on prisoners' right to vote.

7. The Administration does not intend to launch a review on prisoners' right to vote at this stage. Nevertheless, we are prepared to consider the subject again if there is clear indication from the community that there should be a review. If the proposal of allowing prisoners to vote were to be further explored, consideration will also need to be given to a range of issues including inter alia the extent of relaxation, how prisoners should be allocated to the appropriate constituencies, electioneering and polling arrangements, security arrangements, and possible read-across implications on other restrictions of prisoners' rights."

46. I have gone into in some detail not only the legislative history of our electoral law but also the relevant LegCo discussion and debates for a number of reasons. One reason that I can mention immediately is that in the evidence filed in these judicial review proceedings, one cannot find any clear statement from a responsible minister or official on the Government's reasons relied on to justify the relevant restrictions on voting rights. The evidence filed merely sets out what has happened in the past and what has happened elsewhere. It also refers to the practical difficulties of allowing prisoners and those on remand to vote. It describes how prisoners are generally treated. Evidence from the EAC describes the functions and work of the Commission and the practical difficulties it might face if voting rights were accorded to those behind bars.

47. I will return to all this later on in this judgment. But the absence of a clear statement of the reasons relied on by the Government makes it all the more important to look at what the Government has, historically, said in relation to these matters, not forgetting for a moment that the statutory provisions under challenge have been enacted by the legislature, rather than made by the executive as such.

48. It should also be remembered that the present provisions have their genesis in a Bill introduced by the SAR Government shortly after the establishment of the SAR in July 1997. So the Government's position and reasons for these provisions do matter. Again in due course, I will refer to what Mr Thomas has said from the bar table are the Government's reasons for maintaining the provisions under challenge.

Constitutional right to vote

49. The applicants have relied on a number of overseas cases in support of their challenges. They include a case from the Grand Chamber of the European Court of Human Rights relating to voting restrictions in the United Kingdom, as well as decisions by the Supreme Court in Canada, the Constitutional Court in South Africa and the High Court of Australia. It is trite, however, that none of them are binding authorities in Hong Kong. More importantly, these cases were decided by reference to their own constitutional instruments. They are persuasive according to both the quality of their reasoning and their relevance to circumstances and conditions in Hong Kong (*HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, 597, para 37). I will refer to these authorities in due course. But the starting point for our purposes must be the Basic Law and the Hong Kong Bill of Rights.

50. The right to vote is the second substantive right set out in Chapter III of the Basic Law, entitled 'Fundamental Rights and Duties of the Residents'. It is, beyond argument, a 'fundamental' right of the permanent residents of the SAR, as the caption of Chapter III clearly states.

'In accordance with law'

51. Art 26 simply says that all permanent residents shall have the right to vote (and the right to stand for election) 'in accordance with law'.

52. The term 'in accordance with law' is, of course, required because a voting right, as Mr Thomas submits, cannot exist in vacuum. There must be legal provisions governing elections and voting.

53. Moreover, the term, in my view, requires those legal provisions to be both certain and accessible. As Tang VP has pointed out in *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752, 760-761 (para 16), the expressions 'prescribed by law', 'established by law', 'according to law' or similar expressions mandate the principle of legal certainty and the requirement of accessibility, citing the well-known discussion of Sir Anthony Mason NPJ in *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, 401-403 (paras 60-65) on this topic as authority in support.

54. In other words, voting laws must be certain and accessible.

Not an absolute right

55. Art 26 of the Basic Law does not, it must be noted, contain any other built-in requirement or restriction. This is unlike art 21 of the Bill of Rights, which provides that every permanent resident shall have the right and the opportunity, 'without unreasonable restrictions', to vote.

56. In my view, Mr Thomas is correct in his submission that art 26 of the Basic Law must be read together with art 21 of the Bill of Rights in this regard.

57. As has been pointed out by the Court of Final Appeal in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 28-29, what Chapter III of the Basic Law sets out, after the definition of class, are the constitutional guarantees for the freedoms that lie at the heart of Hong Kong's separate system. The courts should give a generous interpretation to the provisions in Chapter III that contain these constitutional guarantees in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed. The same approach is to be adopted to the provisions of the Bill of Rights as the object of those provisions is to guarantee the fundamental rights and freedoms of the residents of the HKSAR: *Shum Kwok Sher*, *supra*, at p 401 (para 58).

58. On the other hand, restrictions on such a fundamental right must be narrowly interpreted. Plainly, the burden is on the Government to justify any restriction: *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, 248 (para 16).

59. It happens not infrequently that a fundamental right guaranteed in the Basic Law is expressed in absolute terms without any apparent exception, whereas a corresponding right is found in the Hong Kong Bill of Rights which contains exceptions. The present case is an example – art 26 of the Basic Law is expressed in apparently absolute terms, whereas art 21 of the Bill of Rights allows restrictions so long as they are not 'unreasonable'.

60. The proper approach is illustrated in the Court of Final Appeal's decision in *Leung Kwok Hung*, *supra*, at pp 248-249 (paras 16 to 21). That case concerned the freedom of peaceful assembly. Art 27 of

the Basic Law provides, apparently in absolute terms, that Hong Kong residents shall have freedom of assembly. No exception is stated. The right of peaceful assembly is, however, also guaranteed under art 17 of the Hong Kong Bill of Rights which allows restrictions that are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. The Court of Final Appeal noted, as regards the right of peaceful assembly under the Basic Law, that art 39(2) of the Basic Law provides that the rights and freedoms enjoyed by Hong Kong residents, including the right of peaceful assembly under the Basic Law, shall not be restricted unless as prescribed by law and such restrictions shall not contravene art 39(1). The Court interpreted that last requirement to mean that such restrictions must not contravene the ICCPR as applied to Hong Kong, which has been implemented by the Hong Kong Bill of Rights Ordinance. In other words, in relation to the right of peaceful assembly provided under art 27 of the Basic Law, it can be restricted in accordance with the 'necessary' requirement laid down in art 17 of the Hong Kong Bill of Rights. See *Leung Kwok Hung* at p 249 (para 19). The Court therefore concluded (at para 20) that there is no difference between the right of peaceful assembly guaranteed by the Basic Law and that provided for in the Bill of Rights.

61. The same approach is applicable here. The right to vote, couched in apparently absolute terms, under art 26 of the Basic Law, may be restricted if (1) the restriction is 'prescribed by law' (which is not in issue) and (2) such restriction does not contravene art 21 of the Bill of Rights, in accordance with art 39(2) of the Basic Law.

62. And since art 21 of the Bill of Rights allows restrictions that are not 'unreasonable', the right to vote guaranteed under art 26 of the Basic Law is subject to such restrictions. There is therefore no difference between the two rights to vote guaranteed under the respective instruments.

Permissible restrictions – the correct test to apply

63. This brings me to a closer analysis of the right to vote guaranteed under art 21 of the Bill of Rights, and the restrictions that may be allowed.

64. Art 21 of the Hong Kong Bill of Rights is, of course, based on art 25 of the ICCPR. Mr Thomas submits that under art 21, the test for examining any restriction on the right to vote is whether the restriction is 'unreasonable'. He categorically rejects any test based on proportionality or necessity. He goes so far as to submit that 'unreasonableness' in the context means what in domestic English and Hong Kong law is known as *Wednesbury* unreasonableness – which, in its classic formulation, means something that is 'so unreasonable that no reasonable authority could ever come to it': *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 229-230. In recent years, the test is being increasingly rephrased to a decision which is 'within the range of reasonable responses': Woolf, Jowell and Le Sueur, *de Smith's Judicial Review* (6th ed), para 11-024 and footnote 72.

65. No authority, whether local or overseas, is cited in support of leading counsel's proposition, other than the Court of Final Appeal

decision in *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459, a case on art 21(a) of the Hong Kong Bill of Rights in the context of a non-indigenous villager's right to vote in the election of a village representative. In that case, in deciding whether unreasonable restrictions had been imposed, Li CJ said (at p 474C/D to G):

> " The question whether restrictions are reasonable or unreasonable has to be considered objectively. One must have regard to the nature of the public affairs the conduct of which is involved and the nature of the restrictions on the right and the opportunity to participate and any reason for such restrictions. What may be considered reasonable or unreasonable restrictions in one era may be different from those in quite a different era.
>
> Mr Chan and Mr Tse have lived in their respective villages all their lives and can plainly be properly regarded as villagers of each village. But they have respectively been excluded from voting and from standing as a candidate on the ground that they are not indigenous, that is, they are not descendants by patrilineal descent of ancestors who in 1898 were residents of villages in the New Territories. But bearing in mind that the village representative by statute is to and in fact does represent the village as a whole (comprising both the indigenous and the non-indigenous villagers) and further has a role to play beyond the village level, the restriction on the ground of not being indigenous cannot be considered a reasonable restriction."

66. With respect to learned counsel, I am unable to discern from the quoted passages any suggestion that 'unreasonable restrictions' means, in the context, restrictions that are *Wednesbury* unreasonable as we know it.

67. But perhaps more importantly, art 21 of the Bill of Rights has been considered in at least two other local cases, as Mr Pun has reminded the Court, where the proportionality test, instead of any *Wednesbury* unreasonable test, has been applied.

68. In *Lee Miu Ling v Attorney General* [1996] 1 HKC 124, the Court of Appeal was dealing with inequality of voting power in different functional constituencies due to the different sizes of the constituencies. Art 21 of the Bill of Rights was relied on and Bokhary JA (as he then was) applied the proportionality test first enunciated by his Lordship in *R v Man Wai Keung (No 2)* [1992] 2 HKCLR 207, 217 to determine whether there was a breach of art 21: see pp 130-131. However, on a closer reading, that case actually turned on the requirement of '*equal* suffrage' in art 21(b) and was concerned with whether a departure from identical treatment could be justified (and thus the proportionality test).

69. However, the first instance decision of Cheung J (as he then was) in *Lau San Ching v Liu, Apollonia* (1995) 5 HKPLR 23 is more to the point. In that case, the Court was asked to decide whether a 10-year residential requirement preceding the date of nomination for election was an unreasonable restriction on the right to be elected in a District Board election, in contravention of art 21(b) of the Bill of Rights. Although the position regarding the right test to use was agreed by the parties, the Court referred to extensively overseas materials when accepting and applying the test on whether an unreasonable restriction had been imposed. On p 50A/B to D, Cheung J set out the test as follows:

> "(a) What objectives the restrictions are to be achieved (legitimate objectives);
>
> (b) Whether there is a rational connection between the objectives to be achieved and the means or restrictions employed (rationality test); and
>
> (c) Whether the restrictions are proportionate responses to the achievement of the legitimate objectives (proportionality test), see : *M Nowak, UN Covenant on Civil and Political Rights : CPPR Commentary (Kehl : Engel, 1993*), p 455,

> paras 40-41; and *Pietraroia v Uruguay*, Human Rights Committee, Communication 44/1979, *Selected Decisions under the Optional Protocol, Vol 1*, p 76 at 79, para 16)."

70. On p 61F/G to I, the learned judge clearly showed his appreciation that what he was dealing with was based on art 25 of the ICCPR, rather than art 3 of Protocol No 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (which I will return to), and the wording was not the same, when he nonetheless decided to adopt the principle of proportionality in deciding whether a restriction was reasonable or not:

> "Mr Marshall submitted that the primary source of the proportionate requirement is *Mathieu-Mohin* where the wording of the Protocol is not 'without unreasonable restrictions' but :
>
> > Conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.
>
> The respondent had equated the test set out in *Mathieu-Mohin* with the concept of 'reasonable restrictions'. However, given the different wording of the Protocol as against ICCPR, a different test of 'whether restrictions are reasonable' may be appropriate. *Nowak* at para 41 says that 'reasonable [falls] to be evaluated on a case by case basis by drawing on the principle of proportionality and taking into account the overall political situation of the State concerned.'"

His Lordship reiterated the applicable test on p 64G/H to H/I:

> " Article 21 of the Bill of Rights gives every permanent resident in Hong Kong the right to vote and to stand as candidates. It is for the Crown to justify that the ten year prior ordinary residence is reasonable. To do so, the Crown must show that there is an legitimate objective by imposing the restrictions, and that the rationality and proportionality tests must be satisfied."

71. Manfred Nowak, *UN Covenant on Civil and Political Rights : CCPR Commentary* (2nd revised ed, 2005) 577-578 & 592-593 (paras 25-26 & 48-49), gives a good historical account of the 'without unreasonable restrictions' expression in art 25 of the ICCPR (ie art 21 of our Bill of Rights):

> "25 The introductory sentence prohibits 'unreasonable restrictions' ('restrictions déraisonnables') on political rights. It is clear from the historical background that this limitations clause was to refer primarily to the issue of eligibility to vote. Whether, pursuant to the current understanding of democracy, *voting conditions and grounds for exclusion* are (still) permissible within the scope of the relative principle of universal suffrage or, instead, violate this principle depends on the interpretation of the word 'reasonable'. Even though a detailed distinction between reasonable and unreasonable restrictions is difficult, certain indications can be drawn from the purpose of this provision and from the *travaux préparatoires*. From a historical standpoint, the reason for voting conditions lay in the conviction that democratic participation called for a certain proximity to the State (citizenship) and a minimum degree of personal maturity in order to assume responsibility for the State. However, this reasoning was used to deny suffrage not only to aliens, children and the mentally ill but also to criminals, alcoholics, prodigals, beggars, illiterates, prostitutes, Jews, servants or, more generally, women and persons of low social status.
>
> 26 The majority of voting restrictions are no longer compatible with the prohibition of discrimination in Arts. 2(1) and 25 or with the present-day understanding of democracy. It was for this reason that the Soviet Union proposed not only a comprehensive prohibition of discrimination but also the prohibition of voting restrictions attached to property, education or similar qualities. Although agreement was ultimately reached on the more general formulation 'unreasonable restrictions', there are no indications in the historical background that the voting restrictions mentioned in the Soviet proposal were not to be unreasonable. In fact, the Committee in its General Comment on Art. 25 explicitly mentioned the criteria of the Soviet draft: 'It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. On the contrary, 'positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty or impediments to freedom

> of movement which prevent persons entitled to vote from exercising their right effectively. Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice.' The only examples of permissible exclusion mentioned in the HRComm and the GA were *minors* and *the mentally ill*. In view of the practice in most States, it is, moreover, to be assumed that certain *residency requirements* and the exclusion of persons who have been *finally and conclusively convicted in court* of certain crimes are to be deemed reasonable restrictions. However, farther-reaching restrictions on the *right to vote* are no longer reasonable, such as the exclusion of illiterates, military personnel, civil servants, pre-trial detainees, members of the opposition, or such 'dishonourable' persons as prostitutes, prodigals, alcoholics and drug addicts.
>
> …
>
> 48 The formulation that political rights are to be guaranteed '*without unreasonable restrictions*' ('sans restrictions déraisonnables') can be traced to the Yugoslav-French proposal. This draft was submitted after the USSR's proposed prohibition of voting conditions based on property, education and similar qualifications had been rejected as too specific. In various *individual communications against Uruguay*, the Committee developed general criteria on the interpretation of this undefined limitations clause. Referring to ***the principle of proportionality***, it emphasized that greater restrictions on political rights require a specific justification. It specifically held that it was no longer reasonable when persons who had campaigned for a leftist party prior to the military coup were deprived by law of all political rights for a period of 15 years. …
>
> 49 … In other words, whether specific restrictions on various political rights are reasonable may only be evaluated on a case-by-case basis by drawing on ***the principle of proportionality*** and taking into account the overall political situation of the State concerned." (bolded italicised words are my emphasis)

72. Pausing here, it is quite plain that in interpreting 'without unreasonable restrictions', there is no place for applying the *Wednesbury* unreasonableness test.

73. Secondly, in determining whether a restriction is an unreasonable one or not, it is appropriate to apply the proportionality test or something similar (for the sake of convenience, I will simply refer to such a test as the 'proportionality test' in the rest of this judgment). Both *Lau San Ching* and *Nowak* are authorities for that proposition. Furthermore, for a right as fundamental as the right to vote, a restriction that is not proportionate to the achievement of the (legitimate) aim that it seeks to achieve and that goes beyond what is necessary to achieve that aim can hardly be said to be a 'reasonable' one. And what is more, even in the context of *Wednesbury* unreasonableness, there is overlap between proportionality and unreasonableness. Proportionality in the sense of achieving a 'fair balance' has always been an aspect of unreasonableness: *de Smith* at paras 11-010 and 11-084.

74. Yet a further reason to say that the proportionality test or something similar is the right test to apply in the art 21 context is that where the restriction involves drawing a distinction of status, and therefore inequality of treatment, it must be justified – in which case the proportionality test or 'justification test' would be the right test to apply. It must be remembered that art 21 says that the permanent residents' rights and opportunities to vote must be 'without any of the distinctions mentioned in art 1(1)', namely, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth 'or other status'. If the restriction involves drawing a distinction in terms of any such status, then it would infringe art 21 unless such inequality in treatment can be justified. And in this regard, the justification test, rather than any test of *Wednesbury* unreasonableness, must be the test to apply. In *Secretary of Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335, the Court

of Final Appeal had to deal with the article immediately preceding art 26 of the Basic Law which we are dealing with, namely, art 25 which provides that 'all Hong Kong residents shall be equal before the law'. The Court recognised that the right conferred by art 25 is not absolute. Differences in legal treatment may be justified for good reason. This is what Li CJ said (at p 349):

> " 20. However, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment may be justified for good reason. In order for differential treatment to be justified, it must be shown that:
>
> (1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.
>
> (2) The difference in treatment must be rationally connected to the legitimate aim.
>
> (3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim.
>
> The above test will be referred to as 'the justification test'. In the present case, the Court has had the benefit of submissions on its appropriate formulation. There is no material difference between the justification test and the test stated in *R v Man Wai Keung (No. 2)* [1992] 2 HKCLR 207 at 217 which was used by the Court in *So Wai Lun v HKSAR* (2006) 9 HKCFAR 530 at para. 20.
>
> 21. The burden is on the Government to satisfy the court that the justification test is satisfied. Where one is concerned with differential treatment based on grounds such as race, sex or sexual orientation, the court will scrutinize with intensity whether the difference in treatment is justified. See *Ghaidan v Godin-Mendoza* at 568G (Lord Nicholls)."

For a formulation of the proportionality test in the context of art 17 of the Hong Kong Bill of Rights (right of peaceful assembly), see *Leung Kwok Hung, supra*, at pp 252-254, paras 33-38. Indeed, in *Leung v Secretary for Justice* (2006) 4 HKLRD 2, a case on art 25 of the Basic Law (as well

as arts 1, 14 and 22 of the Bill of Rights), concerning rights to privacy and equality, the Court of Appeal applied the proportionality test propounded in *Leung Kwok Hung* to determine whether the legislation in question was unconstitutional in the sense of whether the infringement of the right protected could be 'justified': see paras 43 and 44 at pp 234-235.

75. In this regard, it is highly arguable that being a prisoner is a 'status'. This is apparently recognised in the leading case of *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 849, a decision which I will examine more closely in the subsequent part of this judgment. For my immediate purpose, it should be noted that in para 70 of the majority judgment in that case, which was decided by the Grand Chamber of the European Court of Human Rights, a prisoner was recognised as having the 'status' of 'a person detained following conviction'. See also *R (on the application of RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 (22 October 2008), where the House of Lords recognised homelessness as a status within art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms for the purposes of protection against discrimination (art 14 contains provisions similar to art 1 of our Bill of Rights). But *cf* the earlier case of *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484 concerning the status, if any, of prisoners serving long-term determinate sentences.

76. If this be right, this is yet another reason for saying that the test to apply must be the proportionality or justification test, rather than any *Wednesbury* unreasonableness test, or any *unstructured* 'unreasonable' restrictions test, as both arts 1 and 21 are engaged.

77. Insofar as Mr Thomas seeks to say that the 'unreasonable restrictions' test needs to be applied with a 'wide margin of appreciation', I will return to the topic of margin of appreciation in due course.

78. Having thus clarified the test to apply, I will now move on to apply the test to the facts of the present case.

Right to vote interfered with – justification required

79. The provisions under challenge quite plainly interfere with a prisoner's right to vote, by not allowing him to register as an elector whilst he is imprisoned, and by not allowing him to vote in any event on election day if he is being jailed on that day.

80. Likewise, the right of a convicted person who has not served his sentence or received a free pardon is equally interfered with.

81. Since a fundamental constitutional right is involved, the Court must give such a right a generous interpretation so as to give individuals its full measures, and restrictions on such a right must be narrowly interpreted. Plainly, the burden is on the Government to justify any restriction. In a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must vigorously examine any restriction that may be placed on them. *Leung Kwok Hung, supra,* at para 16 (p 248).

What are the legitimate aims?

~ Government's position ~

82. At this first hurdle, the Government's position runs into some difficulties. As already touched on earlier, the Government has not stated clearly, if at all, what the legitimate aims of the provisions under challenge are in the evidence filed in these proceedings. For instance, no minister or official has gone on oath to tell the Court, at least from the executive's point of view, what legitimate aims these provisions seek to achieve. What the Government has done is to go through the legislative history of the electoral law in Hong Kong and to exhibit the relevant materials, most of which are legislative materials. The Court is told in the evidence filed that various and different views have been expressed in the LegCo over the years, and in the evidence there is no attempt to summarise, at least for the Court's benefit, the legitimate aims, or the perceived legitimate aims, the legislature has sought to achieve by these provisions, according to the understanding of the Government. In particular, the Government has not filed any evidence on any internal discussions within the Government on the implications of the overseas authorities dealing with similar questions, and the Government's views on the justifications in Hong Kong for imposing or retaining the registration and voting restrictions – particularly when the Legislative Council Bill was prepared by the Government itself.

83. It may be remembered, however, that in the account of the legislative history of the relevant laws given in the earlier part of this judgment, statements were made from time to time by Government officials, particularly during the 1997 debate of the Legislative Council Bill and in 2005 when the Government submitted a paper on voting right

of prisoners to the LegCo, which set out the Administration's position. I have already described the points made on behalf of the Government. I shall not repeat myself here.

84. During the hearing, Mr Thomas was asked by the Court to set out in writing what the Government's justifications for the restrictions are. In reply, Mr Thomas told the Court from the bar table that the justifications the Government relies on have been fully set out in paras 30 to 34 of counsel's skeleton argument:

> "30. The most obvious ones (accepted as legitimate in Hirst at para. 74 and in Roach at paras.11-2, 19) were 'to prevent crime by sanctioning the conduct of convicted prisoners, to give an incentive to citizen-like conduct, and to enhance civic responsibility and respect for the rule of law'. Responsible citizenship is logically related to whether or not a person engages in serious criminal activity; Sauve v. Canada at para. 70. These reasons are likely to have weighed heavily with HK's legislators as HK progressed towards democratic institutions.
>
> 31. Punishment consists of at least two constituent elements: (1) the censure or blaming element; and (2) the deprivation or hard treatment element. Disenfranchisement serves primarily the aim of censure, while physical imprisonment serves the aim of deprivation. Disenfranchisement is a form of disapprobation that conveys society's disapproval of the offender's criminal conduct.
>
> 32. That those who commit serious crimes should forfeit societal rights and privileges is an idea with ancient origins, taken up by John Stuart Mill and Jean-Jacques Rousseau as legitimate consequences of violating the social contract. It is reported that many states in the USA, for all its commitment to democracy and freedom, bar convicts and ex-convicts (not just prisoners) from voting, and that most states bar prisoners.
>
> 33. It is entirely rational that disenfranchisement should depend upon imprisonment and not conviction for particular offences. In HK there are many non-custodial

> sentencing options (e.g. binding over orders, suspended sentences, community service orders, fines, and others) that can be imposed for minor offences or minor offending. Imprisonment is a disposition of last resort, and serves as a general indication that the offending and resulting harm to society is to be regarded as serious enough to warrant censure by a judicial order that separates the offender from the rest of society for a limited period of time. Disenfranchisement, like the degree of censure warranted by the circumstances of the case, is proportionate to the length of the sentence.
>
> 34. Equally, since a right to vote in geographical constituencies cannot be enjoyed in the abstract, but must depend upon a prior process for registering the names and home addresses of those applying to be registered on the electoral roll, it is logical to deny the right to apply for registration to those who are disqualified from voting."

85. Leading counsel has been most careful in his submission in not asserting that the matters set out in those paragraphs are the aims the Government (or for that matter, the legislature) seeks to achieve through the provisions under challenge. He cannot do so because obviously he cannot give evidence from the bar table. In so far as those matters asserted in his skeleton go beyond what can be gleaned or reasonably inferred from the evidence filed (including the legislative materials exhibited to the affirmations filed), Mr Thomas submits that they are 'objective' justifications that the Government can, in defending these applications for judicial review, refer to in order to sustain the restrictions under challenge. What is implied in that submission is that regardless of whether the justifications now relied on are or were actually the aims that the Government seeks or sought to achieve through the restrictions, so long as they are good justifications, the restrictions may be upheld on that footing.

86. I have serious reservations with that approach. But in order not to lengthen this long judgment, I am prepared to look at the matters relied on first and see whether they can constitute valid justifications.

87. But before I do so: since Mr Thomas has relied solely on the matters set out in paras 30 to 34 of his skeleton as justifications, I do not propose to go back to the materials, particularly legislative materials, that have been put in evidence which also contain references to reasons that the Government or the legislature has relied on, from time to time, to justify the restrictions. Insofar as these reasons do not feature in paras 30 to 34 of Mr Thomas' skeleton, I have to assume that they have been abandoned by Mr Thomas as valid and legitimate justifications.

~ *Prevention of crime, incentive to citizen-like conduct and enhancing civil responsibility and respect for the rule of law as legitimate aims* ~

88. Legitimate aims, in the present context, are not limited to any particular subject matters, unlike, for instance, the case of the right of peaceful assembly guaranteed under art 17 of the Bill of Rights. I am prepared to accept that the aims set out in para 30 of Mr Thomas' skeleton are or can be legitimate aims to pursue, namely, 'to prevent crime by sanctioning the conduct of convicted prisoners, to give an incentive to citizen-like conduct, and to enhance civic responsibility and respect for the rule of law'. They are taken from the leading case of *Hirst, supra*, at para 74 and a case decided by the High Court of Australia, *Roach v Electoral Commissioner* (2007) 81 ALJR 1830, 1835-1837 (paras 11, 12 and 19).

~ Additional punishment in the form of forfeiture of rights as legitimate aim ~

89. In para 31 of Mr Thomas' skeleton, he refers to punishment and the aim of censure. He submits that disenfranchisement is a form of disapprobation that conveys society's disapproval of the offender's criminal conduct. Para 32 refers to forfeiture of societal rights and privileges as legitimate consequences of violating the social contract. That is just another way of describing disenfranchisement as a form of (additional) punishment for breaking the law.

90. As regards the notion that imprisonment after conviction by itself involves the forfeiture of rights beyond the right to liberty, this was firmly rejected by the majority of the European Court in *Hirst*, *supra*, at para 75, a case which I will shortly discuss in some detail. The reason for this has been explained (para 69):

> "In this case, the Court would begin by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Art.5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Art.3 of the Convention; they continue to enjoy the right to respect for family life, the right to freedom of expression, the right to practice their religion, the right of effective access to a lawyer or to court for the purposes of Art.6, the right to respect for correspondence and the right to marry. Any restrictions on these other rights require to be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment (see, for example, *Silver*, where broad restrictions on the right of prisoners to correspond fell foul of Art.8 but stopping of specific letters, containing threats or other objectionable references were justifiable in the interests of the prevention of disorder or crime)."

91. A similar point was forcefully made by McLachlin CJ in the Canadian Supreme Court decision of *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 RCS 519, also known as *Sauvé (No 2)*, at p 550:

> "46 The argument, stripped of rhetoric, proposes that it is open to Parliament to add a new tool to its arsenal of punitive implements – denial of constitutional rights. I find this notion problematic. I do not doubt that Parliament may limit constitutional rights in the name of punishment, provided that it can justify the limitation. But it is another thing to say that a particular class of people for a particular period of time will completely lose a particular constitutional right. This is tantamount to saying that the affected class is outside the full protection of the *Charter*. It is doubtful that such an unmodulated deprivation, particularly of a right as basic as the right to vote, is capable of justification under s.1. Could Parliament justifiably pass a law removing the right of all penitentiary prisoners to be protected from cruel and unusual punishment? I think not. What of freedom of expression or religion? Why, one asks, is the right to vote different? The government offers no credible theory about why it should be allowed to deny this fundamental democratic right as a form of state punishment."

92. In *August v Electoral Commission* 1999 (3) SA 1, a case which I will return to in due course, the Constitutional Court in South Africa put the position this way (at pp 10-11):

> "[18] It is well-established principle of our common law, predating the era of constitutionalism, that prisoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have been placed. Of course, the inroads which incarceration necessarily makes upon prisoners' personal rights and liberties are very considerable. They no longer have freedom of movement and have no choice regarding the place of their imprisonment. Their contact with the outside world is limited and regulated. They must submit to the discipline of prison life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in prison. Nevertheless, there is a substantial residue of basic rights which they may not be denied; and, if they

> are denied them, then they are entitled to legal redress. In *Minister of Justice v Hofmeyr* Hoexter JA emphasised the need to
>
> > '… negate the parsimonious and misconceived notion that upon his admission to gaol a prisoner is stripped, as it were, of all his personal rights; and that thereafter, and for so long as his detention lasts, he is able to assert only those rights for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations …(T)he extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common-law rights.'"

93. It seems to me that *prima facie*, imprisonment does not go beyond forfeiture of the right to liberty guaranteed under art 28 of the Basic Law and art 5 of the Hong Kong Bill of Rights. The rights of a person deprived of his liberty are specifically protected in art 6 of the Bill of Rights. Imprisonment *per se*, therefore, does not involve deprivation of any other constitutional rights of the convicted person save where those other rights or their exercise or enjoyment is *necessarily* inconsistent with the person's imprisonment. Thus, for instance, the prisoner's liberty of movement, including his freedom to leave Hong Kong, guaranteed under art 8(1) and (2) of the Hong Kong Bill of Rights are, by *necessary* implication, curtailed when the person's right to liberty is forfeited upon imprisonment.

94. But beyond that, the prisoner's other constitutional rights remain, *prima facie*, intact; that is to say, they remain intact unless they are by law restricted *constitutionally*. In other words, any such restriction must be constitutionally justifiable. And in this regard, I take the view that different constitutional rights may admit of different constitutional

justifications for their restriction and there are probably some which can never be justifiably restricted or deprived. In relation to the latter, I have in mind, for instance, the right to be free from torture and to cruel, inhuman or degrading treatment or punishment guaranteed by art 3 of the Bill of Rights which is generally considered to be an absolute right.

95. I do not consider the right to vote, though no doubt a highly important right, belongs to such a category of rights. As described, it is not an absolute right and can be restricted. And if punishment can justify the deprivation of a convicted person's right to liberty, I see no logic or reason to say that (additional) punishment can *never* be a constitutional justification for restricting the right to vote of a prisoner.

96. Of course, since a highly important constitutional right is involved, the courts must vigorously scrutinise the supposed justification based on additional punishment (and indeed any other ground). But in my view, the possible existence of extreme, difficult or borderline cases does not require a total ban against any form of restriction or deprivation that is based on additional punishment as justification even when they could otherwise be justified under the proportionality test. I do not believe that the passages extracted above from *Hirst* and *Sauvé (No 2)*, when properly read, go that far.

97. For those reasons, I am prepared to proceed on the basis that additional punishment/censure in the form of forfeiture of the right to vote is or can be a legitimate aim.

Rational connection and proportionality

98. Secondly, rational connection between the restrictions and the aim and the question of proportionality, which can be conveniently taken together. This is where the Government's arguments run into great difficulties.

~ Hirst ~

99. *Hirst*, *supra*, concerned art 3 of Protocol No 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. It provides that:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

100. Although it does not expressly mention the right to vote, the Grand Chamber of the European Court of Human Rights had no difficulty in construing art 3 to mean 'that it guarantees individual rights, including the right to vote and to stand for election' (para 57 of the majority judgment). The unique phrasing of art 3 is intended, according to the Grand Chamber, 'to give greater solemnity to the Contracting States' commitment and to emphasise that this [is] an area where they [are] required to take positive measures as opposed to merely refraining from interference' (para 57).

101. The Grand Chamber recognised that the rights bestowed by art 3 are not absolute. There is room for implied limitations and Contracting States must be given a margin of appreciation in this sphere

(para 60). However, the Human Rights Court stressed that there are limits to those restrictions (para 62 of the majority judgment):

> "It is, however, for the Court to determine in the last resort whether the requirements of Art 3 of the Protocol No 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of people through universal suffrage. For example, the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Art 3 of Protocol No 1."

102. Pausing here, given the way the European Court has interpreted art 3, in my view, despite the different phrasing, there is practically no difference between the right to vote guaranteed in art 3 and the right to vote bestowed in art 26 of the Basic Law and art 21 of the Bill of Rights. In fact, in the majority judgment, references were made to the relevant provisions of the ICCPR (paras 26 and 27).

103. The United Kingdom Government relied on a number of matters as the legitimate aims of the restrictions imposed to disenfranchise all convicted persons held behind bars. They were, in substance, the same as those relied on by Mr Thomas in paras 30 to 32 of his skeleton.

Or rather, it is not unfair to say that Mr Thomas has borrowed those justifications from the United Kingdom Government in *Hirst*.

104. The majority in *Hirst* was prepared to accept that these were legitimate aims (paras 74-75) but concluded that they failed the proportionality test (paras 77-82):

> "77 … The fact remains that it is a significant figure and it cannot be claimed that the bar is negligible in its effects. Secondly, while it is true that there are categories of detained persons unaffected by the bar, it nonetheless includes a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. Further, the Court observes that, even in the case of offenders whose offences are sufficiently serious to attract an immediate custodial sentence, whether the offender is in fact deprived of the right to vote will depend on whether the sentencing judge imposes such a sentence or elects for some other form of disposal, such as a community sentence. In this regard, it may be noted that in sentencing the criminal courts in England and Wales make no reference to disenfranchisement and it is not apparent, beyond the fact that a court considered it appropriate to impose a sentence of imprisonment, that there is any direct link between the facts of any individual case and the removal of the right to vote.
>
> 78 The width of the margin of appreciation has been emphasised by the Government which argued that where the legislature and domestic courts have considered the matter and there is no clear consensus in Contracting States, it must be within the range of possible approaches to remove the vote from any person whose conduct was so serious as to merit imprisonment.
>
> 79 As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. It is true that the question was considered by the multi-party Speaker's Conference on Electoral Law in 1968 which unanimously recommended that a convicted prisoner should not be entitled to vote. It is also true that the Working Party, which recommended the amendment to the law to allow unconvicted

prisoners to vote, recorded that successive Governments had taken the view that convicted prisoners had lost the moral authority to vote and did not therefore argue for a change in the legislation. It may perhaps be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day panel policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.

80 It is also evident from the judgment of the Divisional Court that the nature of the restrictions, if any, to be imposed on the right of a convicted prisoner to vote was in general seen as a matter of Parliament and not for the national courts. The court did not therefore undertake any assessment of proportionality of the measure itself. It may also be noted that the court found support in the decision of the Federal Court of Appeal in *Sauvé No.2*, which was later overturned by the Canadian Supreme Court.

81 As regards the existence or not of any consensus among Contracting States, the Court would note that, although there is some disagreement about the state of the law in certain states, it is undisputed that the United Kingdom is not alone among Convention countries in depriving all convicted prisoners of the right to vote. It may also be said that the law in the United Kingdom is less far-reaching than in certain other states. Not only are exceptions made for persons committed to prison for contempt of court or for default in paying fines, but unlike the position in some countries, the legal incapacity to vote is removed as soon as the person ceases to be detained. However the fact remains that it is a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote. Even on the Government's own figures the number of such states does not exceed 13. Moreover, and even if no common European approach to the problem can be discerned, this cannot of itself be determinative of the issue.

82 Therefore, while the Court reiterates that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the Act of 2000 which for the first time granted the vote to persons detained or remand, s.3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it

> does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin must be, and as being incompatible with Art.3 of Protocol No.1."

~ Local context ~

105. Mr Thomas seeks to distinguish *Hirst* and other similar overseas cases on the basis that the relevant constitutional instruments are differently worded and that in Hong Kong, we have our own peculiar political, social, cultural and historical background; democracy, universal suffrage and the right to vote, whether in theory or in practice, are not necessarily the same as that in western democratic societies.

106. The Court fully bears all this in mind. But that does not detract from the fact that the right to vote is a fundamental right in Hong Kong – by its inclusion in Chapter III of the Basic Law which contains the 'fundamental rights' of Hong Kong residents. Moreover, art 21(b) of the Hong Kong Bill of Rights specifically requires that elections 'shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors'. It is of course true that art 21 does not require the establishment of an elected Executive or Legislative Council in Hong Kong (s 13 of the Hong Kong Bill of Rights Ordinance), and the constitutional development of our legislature into a fully directly-elected one is to be achieved gradually in accordance with the Basic Law and the ultimate aim is the election of all LegCo members by universal suffrage (art 68 of the Basic Law). But that

does not mean, in my view, that *to the extent that a certain proportion of the members of the LegCo (currently, 50%) is elected by universal suffrage*, 'universal suffrage' should bear a lesser meaning than what that expression requires in western democratic societies. In other words, in so far as universal suffrage is already allowed in the election of LegCo members for geographical constituencies, the presumption must be in favour of inclusion and the aim must be directed at identifying the will of people through universal suffrage. One could indeed argue that, where only 50% of the LegCo members are elected by universal suffrage, that makes the right to vote doubly important and precious.

107. Moreover, whilst different people may have different ideas about democracy, in the context of constitutional rights in Hong Kong, it has been observed by the Court of Final Appeal in *Leung Kwok Hung, supra*, at p 252 that:

> "32 The Siracusa Principles on the limitation and derogation provisions in the ICCPR agreed to in 1984 by a group of experts ("the Siracusa Principles") state that, while there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting the definition of a democratic society. This view is consistent with that of the European Court of Human Rights that the hallmarks of a democratic society include pluralism, tolerance and broadmindedness. *Handyside v United Kingdom (A/24)* (1979-1980) 1 EHRR 737 at para.49; *Smith & Another v United Kingdom (33985 and 33986/96)* (1999) 29 EHRR 493 at para.87."

No doubt, based on such a definition, Hong Kong is indeed a democratic society.

108. In those circumstances, what the majority of the European Court has said in *Hirst* is, in my view, quite applicable to Hong Kong at p 867:

> "70 There is, therefore, no question that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion."

~ Modern trend ~

109. Mr Thomas has pointed to many countries where similar or even more stringent disenfranchisement provisions are in place, notably in the United States. He argues that therefore there is no universally accepted standard or practice here.

110. I accept that the matter must be viewed in the relevant political, social, cultural and historical background and context. However, the fact there are still many countries and places which have similar or even more stringent disenfranchisement provisions does not answer the applicants' point that the modern trend is against disenfranchisement. The true comparison, so far as the *trend* is concerned, is between the position today and the position, say, 100 years ago. A century ago, one could say with confidence that almost all nations and places on earth had stringent disenfranchisement provisions in place. However, the past 20 or 30 years have seen many jurisdictions moving away from that position towards more liberal treatment of prisoners in terms of voting rights. That is not surprising giving the contents of the ICCPR, which was

adopted in 1966 and entered into force on 23 March 1976 (*per* art 49 of the ICCPR). That there are many countries and places which still retain the old disenfranchisement arrangements does not detract from the applicants' point that the modern trend is against over-stringent disenfranchisement provisions. For a quick summary of the modern trend on a global basis, see American Civil Liberties Union, *Out of Step with the World: An Analysis of Felony Disenfranchisement in the US and other Democracies* (May 2006) 11 to 18, which covers the positions in Canada, South Africa, the United Kingdom and Israel and contains also a critical examination of the position in the United States, where literally millions of prisoners and ex-prisoners are said to be disenfranchised in one way or another. See also Beham & O'Donnell, *Prisoners, Politics and the Polls, Enfranchisement and the Burden of Responsibility* (2008) 48 Brit J Criminol 319, which examines in particular the position in Ireland.

111. Having said that, it must be emphasised that so far as the position in Hong Kong is concerned, the modern trend by itself is not dispositive of the debate. Rather, Hong Kong's own political, social, cultural and historical background must be looked at carefully in determining the lawfulness of the disenfranchisement provisions in question. That said, it must also be noted that the modern trend, though by no means conclusive, is relevant. As Li CJ observed in *Chan Wah, supra,* at p 474D/E, what may be considered reasonable or not reasonable restrictions in one era may be different from those in quite a different era. The position in Hong Kong now may well be very different from that in 1997 when the LegCo Bill was passed into law by the Provisional LegCo in the infancy of the HKSAR.

~ Sweeping disenfranchisement ~

112. In the Hong Kong context, the automatic and blanket disenfranchisement includes a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. Unlike the position in the United Kingdom, no exception is made for those imprisoned for contempt of court or default in paying a fine. The disenfranchisement draws no distinction as to the type, nature or seriousness of different offences, the length of custodial sentences and the stage of completion of the terms of imprisonment. It operates without regard to the degree of culpability save to the extent that the offence in question merits imprisonment (or a suspended sentence), nor to personal circumstances.

113. It covers those who are released on bail pending appeal – including those whose appeals against convictions are subsequently allowed and those whose appeals against the sentences of imprisonment are wholly successful.

114. The disenfranchisement equally affects those serving a suspended sentence. A prisoner released on parole stands in no better position.

115. The disenfranchisement also covers all overseas sentences of imprisonment that have not been served out or freely pardoned. No distinction is drawn between sentences imposed in different countries or places.

116. When the legitimate aims of restricting voting rights are to prevent crime by sanctioning the conduct of convicted prisoners, to give an incentive to citizen-like conduct, to enhance civic responsibility and respect for the rule of law, and to impose an additional punishment for breaching the social contract, the nature and gravity of the offence and sentence in question as well as the culpability and individual circumstances of the prisoner must be relevant considerations. A blanket and total disenfranchisement simply does not take into account those matters.

~ Short-term prison sentence ~

117. As described, the number of adult prisoners who are Hong Kong permanent residents serving a term of six months or less was 626, as at 5 September 2008, thus constituting over 14% of those adult prisoners who are Hong Kong permanent residents and who were serving fixed terms imprisonment (4,299). From any perspective, this is a significant percentage.

118. The percentages of adult prisoners serving a 'short-term prison sentence', an expression which is normally used in Australia to refer to a sentence of six months or less, were even higher in Australia. That fact was an important factor taken into account by Gleeson CJ of the Australian High Court in *Roach v Electoral Commission*¸ *supra*, to conclude in his concurring judgment, that a similar blanket disenfranchisement in Australia was unconstitutional (at pp 1838-1839):

> "[22] As a matter of sentencing practicality, in the case of short-term sentences the availability of realistic alternatives to custody is of particular importance. If an offence is serious enough to warrant a sentence of imprisonment for a year or more,

> the likelihood is that the sentencing judicial officer will have formed the view that there was no serious alternative to a custodial sentence. In most Australian jurisdictions, there is a legislative requirement to treat imprisonment as a last resort when imposing a penalty. More than 95% of short-term sentences are imposed by magistrates. The availability, in all the circumstances of a particular case, of other sentencing options such as fines, community service, home detention, or periodic detention may be critical. Relevant circumstances may include the personal situation of the offender, or the locality. In the case of offenders who are indigent, or homeless, or mentally unstable, the range of practical options may be limited. …
>
> [23] The adoption of the criterion of serving a sentence of imprisonment as the method of identifying serious criminal conduct for the purpose of satisfying the rationale for treating serious offenders as having severed their link with the community, a severance reflected in temporary disenfranchisement, breaks down at the level of short-term prisoners. They include a not insubstantial number of people who, by reason of their personal characteristics (such as poverty, homelessness, or mental problems), or geographical circumstances, do not qualify for, or, do not qualify for a full range of, non-custodial sentencing options. At this level, the method of discriminating between offences, for the purpose of deciding which are so serious as to warrant disenfranchisement and which are not, becomes arbitrary.
>
> [24] The step that was taken by Parliament in 2006 of abandoning any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for the offence broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people."

119. I have not lost sight of the fact that the percentages of those serving short-term prison sentences in Australia are higher than that in Hong Kong according to the figures available, and that the constitutional wording in Australia is different. Nonetheless, the same or similar considerations apply in our case. In Hong Kong, it can equally be said that sentencing to a term of imprisonment is a measure of last resort. For

a convicted person who is liable to be imposed on him a short-term prison sentence, there are, in the normal run of cases, possible non-custodial alternatives, even leaving aside a suspended sentence (which is, for our present purposes, equivalent to a prison sentence). Community service order is one of them but as have been pointed out in *Cross and Cheung, Sentencing in Hong Kong* (5th ed) 88-89, a community service order is tailor-made for an accused who is, amongst other things, coming from a stable home background, perhaps with a family, has a good work record, is in employment, or has a realistic prospect of such.

120. Of course, it is not to say that these are rigid requirements. But it does illustrate the point that in Hong Kong, whether a person is given a community service order or a short-term prison sentence could turn on his personal background and so forth. Where, as here, a voting ban includes prisoners serving short-term prison sentences, whether a convicted person's right to vote is lost may well be determined by facts and circumstances that have no or little connection to the stated aims of imposing the voting restrictions. The restrictions, in other words, are simply arbitrary.

121. And it is a fact that in Hong Kong, a sentencing court does not take into account whether a person would lose his voting right, in deciding whether to impose a custodial sentence. The Government has not sought to introduce any evidence to the contrary.

~ Short-term vs long-term prison sentences ~

122. The blanket disenfranchisement makes no distinction between those who are serving short sentences and those who are serving longer ones. So long as one is serving a sentence in prison on election day, one cannot vote. This obviously could lead to very strange results. Prisoners who are serving sentences of, say, one year or less, and who happen to be serving their sentences on election day, are not entitled to vote. Yet a prisoner who has been sentenced to, say three years and six months' imprisonment shortly after the previous elections, is entitled to vote because barring any accident, he will be released in time, before election day, to vote in the next elections – assuming that he has been registered as an elector prior to sentencing (or manages to get himself registered as an elector immediately after release).

123. There is no justification for this sort of anonymous situations, where the stated aims for imposing the restrictions are simply defeated rather than promoted.

124. Anomalies are, of course, bound to be present in any general formula, particularly in the extremities of the net. Short of asking a sentencing court to deal with the question of disenfranchisement of a convicted person who is going to be sent to prison in each and every individual case, some sort of a general formula would have to be used. But the question is one of degree. The more anomalies there are, the less justifiable the general formula becomes.

~ Restriction proportional to length of sentence? ~

125. It is said that the restriction is proportional in the sense that it is linked to the length of sentence that one is serving. The longer the sentence, the longer the period of disenfranchisement. Superficially, this argument has its attraction. But once one remembers that LegCo elections are not held everyday, the argument loses much of its force. As we all know, LegCo elections are held every four years. Thus depending on when one is sentenced to prison, one may or may not miss an election.

126. Thus for instance, two prisoners are sent to jail for committing the same type of offence. Both are sentenced to imprisonment for say 1 year. But one is sentenced and imprisoned shortly after the previous election day, whereas the other is sentenced and jailed six months before the next election day. The result: the first one is released in time to get himself registered as an elector and to vote in the next elections; the other will simply miss the next elections even if he has been registered as an elector before sentencing. And all this is fortuitous.

127. A similar point has been made by Hugessan JA, delivering the judgment of the Federal Court of Appeal, in *Belczowski v The Queen, supra*, at pp 343h to 344a:

> "I would only note that, not only is the right taken away altogether, but, because of the very nature of the right to vote itself, it is taken away in an irregular and irrational pattern: persons who happen to be in prison on enumeration day, or voting day, no matter how short their sentence, lose the right to vote; others may serve up to four years and 364 days in prison and never be deprived of the franchise at all."

128. All this is quite unacceptable in terms of the stated aims of prevention of crime by sanctioning the conduct of convicted prisoners, of giving an incentive to citizen-like conduct, of enhancing civic responsibility and respect for the rule of law, and of imposing an additional punishment for breaching the social contract. These aims require that like prisoners be treated alike, and different prisoners be treated differently. When they are not, the justification based on these stated aims begins to break down.

~ Disqualification from registration ~

129. The disqualification from registration as an elector makes the situation even worse. A prisoner who has got himself registered as an elector prior to sentencing and who is released before election day, can vote as an elector. A person who has not registered himself as an elector prior to sentencing and who is also released before election day, may well not be able to vote unless he manages to beat the registration deadline immediately after release. (The registration deadline is 16 May in a non-District Council election year or 16 July in a District Council election year: Electoral Affairs Commission (Registration of Electors) (Legislative Council Geographical Constituencies) (District Council Constituencies) Regulation (Cap 541A), r 4(1)(a)).

130. Put another way, a prisoner who is released after the registration deadline but before election day is unable to vote if he has not registered as an elector prior to sentencing. Yet a person who has so registered prior to sentencing can vote.

131. It is difficult to see what legitimate aim this difference in treatment is intended to serve, or how it is proportionate as a measure to achieve the stated legitimate aims.

132. The disqualification from registration is also difficult to justify in the sense that it applies regardless of whether the prisoner is expected to be released from prison by the time of the next election. Thus the current provision, *by itself*, prevents a prisoner from registration as an elector and thus prevents him from voting at the next election when he is not expected to be released by the time of the next election. It also prevents a prisoner from registration as an elector and thus prevents him from voting at the next election even if he is expected to be released by then, unless the release should take place before the registration deadline. In other words, the treatment of these two prisoners are exactly the same, even though their circumstances are quite different. So far as the suggested legitimate aims are concerned, it is difficult to see how the failure to differentiate these two different situations can be justified on account of those supposed legitimate aims.

133. Para 34 of Mr Thomas' skeleton argues that since a right to vote in geographical constituencies cannot be enjoyed in the abstract, but must depend upon a prior process for registering the names and home addresses of those applying to be registered on the electoral roll, it is logical to deny the right to apply for registration to those who are disqualified from voting. This argument overlooks the time difference, as it were, between registration and voting. There is simply no apparent justification for disallowing a prisoner's registration as an elector if he is expected to be released before election day. In any event, given that the

existing provisions already disqualify a prisoner from voting, the ban on registration is simply superfluous.

134. It should be remembered that the disqualification of prisoners from registration during imprisonment was in fact considered back in 1992 by the then Administration to be something that was 'unduly harsh and should be removed'.

~ Inconsistency with art 79(6) of the Basic Law ~

135. In Australia, the disenfranchisement provisions created a particular anomaly, namely, that the disenfranchisement was, in each case, more stringent than the disqualification provisions concerning sentences and members of the House of Representatives: see *Roach*, *supra*, at pp 1837 & 1850 (paras 20 & 90). In Hong Kong, a similar discrepancy exists in relation to the Basic Law. Art 79(6) of the Basic Law provides that a LegCo member is no longer qualified for the office when he or she is convicted and sentenced to imprisonment for one month or more for an offence committed within or outside the SAR and is relieved of his or her duties by a motion passed by two-thirds of the members of the LegCo present. In other words, in order to be disqualified under art 79(6), the LegCo member must be sentenced to imprisonment for one month or more. And in this regard, a suspended sentence is not included because s 109B(5)(a) of the Criminal Procedure Ordinance only applies to "Ordinances" but not the Basic Law and in any event does not apply to provisions for "loss of office". But even so, he may not lose his seat unless, by a motion passed by two-thirds of his fellow members present, he is relieved of his duties. One can therefore see that a LegCo member

does not automatically lose his seat simply because he has been convicted and sentenced to imprisonment. Yet, anybody who is sentenced to any term of imprisonment, whether in Hong Kong or elsewhere, is disqualified from registration as an elector or from voting for a LegCo election candidate of his choice. And for that purpose, a suspended sentence is equated with a sentence of imprisonment.

136. Certainly, the thinking behind requiring a motion passed by two-thirds of the LegCo members present to relieve a convicted LegCo member from his duties as a perquisite for the loss of his seat is meant to ensure that a serving LegCo member does not lose his seat for relatively minor offences, particularly when the crime may not have been committed in Hong Kong. Moreover, the intention must be that one needs to examine carefully the nature and gravity of the offence and consider whether and to what extent it reflects on the LegCo member's person, character, integrity and ability to continue serving as a LegCo member. Plainly, the examination is intended by the Basic Law drafters to be a serious one because a two-third majority is required.

137. Yet when considering whether a right to vote should be deprived, a prisoner is not given the same careful and individualised treatment.

138. No doubt, there are obvious differences between a LegCo member losing his seat which is always a very serious matter and a convicted person being temporarily disenfranchised for imprisonment, and indeed in the former case art 21(a) of the Bill of Rights (the right to take part in the conduct of public affairs directly) is engaged. The elaborate

provisions in art 79(6) fully give effect to that constitutional right. What is in issue is whether the right to vote guaranteed under art 21(b) requires any lesser consideration.

~ Efficacy of restrictions to further legitimate aims ~

139. That depriving a prisoner of the right to vote (or to be registered as an elector) can help the prevention of crime is an indefensible notion. No evidence whatsoever has been produced by the Government, and the burden is certainly on the Government to justify, that a meaningful number of prisoners would have thought twice before committing their crimes if they had known that if caught, convicted and sentenced to imprisonment, they would lose the right to be registered as an elector or to vote. Nor is there any evidence that consideration of that sort ever affected their decisions to commit crimes, if it had ever entered into their minds at all.

140. Likewise, as regards the suggested aim to give an incentive to citizen-like conduct, this is really a matter of evidence. And there is simply no evidence, expert or otherwise, coming from the Government to say that prisoners who have been deprived of the right to vote whilst serving their sentences would, after release, treasure more the right to vote, and that would in turn act as an incentive for them to behave in a citizen-like manner. The same can be said about enhancing civic responsibility and respect for the rule of law.

141. As regards enhancing respect for law, the Chief Justice in *Sauvé (No 2)* had some strong words to say (at p 549):

> "42 The government also argues that denying penitentiary inmates the vote will enhance respect for law because allowing people who flaunt the law to vote demeans the political system. The same untenable premises we have been discussing resurface here – that voting is a privilege the government can suspend and that the commission of a serious crime signals that the offender has chosen to 'opt out' of community membership. But beyond this, the argument that only those who respect the law should participate in the political process is a variant on the age-old unworthiness rationale for denying the vote.
>
> 43 The idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process is ancient and obsolete. Edward III pronounced that citizens who committed serious crimes suffered 'civil death', by which a convicted felon was deemed to forfeit all civil rights. Until recently, large classes of people, prisoners among them, were excluded from the franchise. The assumption that they were not fit or 'worthy' of voting – whether by reason of class, race, gender or conduct – played a large role in this exclusion. We should reject the retrograde notion that 'worthiness' qualifications for voters may be logically viewed as enhancing the political process and respect for the rule of law. As Arbour J.A. stated in *Sauvé No 1, supra*, at p. 487, since the adoption of s. 3 of the *Charter*, it is doubtful 'that anyone could now be deprived of the vote on the basis … that he or she was not decent or responsible."

142. For my part, I do not necessarily say that depriving the right to vote can never achieve these aims. But they are factual assertions which must be backed by evidence. And there is no such evidence before the Court. In this regard, it must be remembered that the Canadian Government, in *Sauvé (No 2)*, has actually put in substantial evidence, including expert evidence, to seek to justify the disenfranchisement provisions (based on imprisonment of two years or more) under challenge.

143. Mr Thomas has repeatedly submitted that these are very complicated considerations and the Court should better leave them to the experts and the elected legislature to consider. Of course, if there is

competing evidence before the Court, and the Court finds it difficult to determine the dispute, it might well be wise for the Court to defer to the wisdom of the legislature and experts.

144. However, in the present case, the Court simply has no such evidence, expert or otherwise, to suggest that disenfranchisement in a total and blanket manner would help serve the aims of prevention of crime and of giving an incentive to citizen-like conduct, or that it would help enhance civic responsibility and respect for the rule of law. These are matters that common sense alone is not sufficient to establish.

145. As I say, I do not necessarily preclude that some form of disenfranchisement could achieve such aims or some of them. But in the absence of concrete evidence, the Court is simply unable to come to such conclusion by merely using common sense and experience in life.

~ Government's duty to adduce evidence to justify ~

146. Speaking about the duty on the part of the Government to justify the disenfranchisement by sufficient materials and information, the Constitutional Court of South Africa has got some very pertinent observations to make in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (Nicro)* 2005 (3) SA 280, 301-302:

> "[65] In a case such as this where the government seeks to disenfranchise a group of its citizens and the purpose is not self-evident, there is a need for it to place sufficient information before the Court to enable it to know exactly what purpose the disenfranchisement was intended to serve. Insofar as the government relies upon policy considerations, there should be

> sufficient information to enable the Court to assess and evaluate the policy that is being pursued. In this regard, and bearing in mind that we are concerned here with legislation that disenfranchises voters, I agree with the comments of McLachlin CJ in the second *Sauvé* case:
>
> > 'At the end of the day, people should not be left guessing about why their *Charter* rights have been infringed. Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remains constant throughout the justification process. As this Court has stated, the objective 'must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective'.'
>
> …
>
> [67] Moreover, we are concerned with a blanket exclusion akin to that which failed to pass scrutiny in the first *Sauvé* case. Mr Gilde mentions crimes involving violence or even theft, but the legislation is not tailored to such crimes. Its target is every prisoner sentenced to imprisonment without the option of a fine. We have no information about the sort of offences for which shorter periods of imprisonment are likely to be imposed, the sort of persons who are likely to be imprisoned for such offences, and the number of persons who might lose their vote because of comparatively minor transgressions. In short we have wholly inadequate information on which to conduct the limitation analysis that is called for. Moreover, the provisions as formulated appear to disenfranchise prisoners whose convictions and sentences are under appeal."

147. Regrettably, the materials and information that have been placed before the Court to justify the restrictions are similarly limited.

~ A matter of policy? ~

148. It is argued that prisoner disenfranchisement is a policy issue on which people in the Hong Kong community hold different views. That is why the executive and legislature should enjoy a wide 'margin of

appreciation' for judging what reasonable restrictions are to be put in place. This is especially so when the Court is judging questions of penal philosophy and policy. It is also pointed out that restrictions on prisoners registering as electors or their right to vote have been in place in Hong Kong for over 55 years. Settling the policy or changing those restrictions requires extensive public consultation and debate within the community. The Government and the legislature are far better equipped to carry out this exercise, to interpret the views expressed, to understand all ramifications, and to deal with them. Reaching a position that most people can accept is challenging, it is contended.

149. Although Mr Thomas has omitted to point out that for the first 44 years, disenfranchisement was only restricted to those sentenced to a term exceeding 6 months, there is nonetheless force in these contentions. However, the Court is not asked in these applications to settle the issue by defining what the reasonable restrictions should be. That is not the task of the Court. What the Court is asked to do is to examine *the* restrictions imposed by the legislature/executive and to say whether *these particular restrictions* are *unreasonable*. The Court is not here to perform the hypothetical task of settling a reasonable restriction. That is the task of the legislature and executive. Nobody has suggested that it is an easy task.

~ Evaluating the 'quality' of legislative debate and margin of appreciation ~

150. In *Hirst*, the majority's discussion on proportionality actually led the Court to evaluate not only the law and its consequences, but also

the parliamentary debate, in order to assess 'the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom' (para 79). As has been pointed out in the joint concurring opinion of Judges Tulkens and Zagrebelsky (at para 0-II7), this is an area in which 'two sources of legitimacy meet, the Court on the one hand and the national Parliament on the other. This is a difficult and slippery terrain for the Court in view of the nature of its role, especially when itself accepts that a wide margin of appreciation must be given to the Contracting States'.

151. What must be remembered is that *Hirst* was a case decided by the European Court on compliance by the United Kingdom Government with its convention obligations under the European Convention and its Protocols. In those circumstances, as a matter of European human rights law, the European Court accorded a margin of appreciation, and indeed a wide margin, to the Contracting States. The reason was that there are 'numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into its democratic vision' (para 61).

152. And strictly speaking, 'margin of appreciation' is not a domestic concept. It is a concept used in the European Court context. This has been clearly explained by Lord Hope in *R v Director of Public Prosecution, Ex p Kebilene* [2000] 2 AC 326, 380E to 381D:

> " The doctrine of the 'margin of appreciation' is a familiar part of the jurisprudence of the European Court of Human Rights. The European Court has acknowledged that, by reason of their

direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed to evaluate local needs and conditions than an international court: *Buckley v United Kingdom* (1996) 23 E.H.R.R. 101, 129, paras. 74-75. Although this means that, as the European Court explained in *Handyside v United Kingdom* (1976) 1 E.H.R.R. 737, 753, para. 48, 'the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights,' it goes hand in hand with a European supervision. The extent of this supervision will vary according to such factors as the nature of the Convention right in issue, the importance of that right for the individual and the nature of the activities involved in the case.

This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.

In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. This point is well made at p. 74, para. 3.21 of *Human Rights Law and Practice* (1999), of which Lord Lester of Herne Hill and Mr Pannick are the general editors, where the area in which these choices may arise is conveniently and appropriately described as the 'discretionary area of judgment.' It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind

> where the courts are especially well placed to assess the need for protection."

153. See also *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, 447-449 (paras 101 to 105), where the Court of Final Appeal was dealing with the constitutionality of the mandatory life sentence for murder. The Court emphasised that the question of the appropriate punishment for what society regards as the most serious crime was a controversial matter of policy involving different views on the moral and social issues involved. The legislature had to make a difficult collective judgment taking into account the rights of individuals as well as the interests of society. It had to strike a balance bearing in mind the conditions and needs of the society itself, including its culture and traditions and the need to maintain public confidence in the criminal justice system.

154. I have no difficulty with the concept of margin of appreciation or deferring to the judgment of the legislature. The point I wish to make here is that by whatever name the courts' deference is called, one should be very slow, in a domestic context, to evaluate *the quality* of the legislative debate, particularly with a view to *lowering* the deference or respect that the courts should have, in a given case, for the choice made by the legislature. That is, generally speaking, no business of the courts. Once the legislature has spoken, the courts should generally take it from there. Furthermore, the courts should, where appropriate, defer to the wisdom and choices made by the LegCo or the executive, in particular where questions of social or economic policy are involved. The respect and deference is much less required where the rights are of high constitutional importance or are of a kind where the courts are especially

well placed to assess the need for protection. See also the observations by Ma CJHC in *Leung v Secretary for Justice* [2006] 4 HKLRD 211, 239-240 (paras 52-53).

155. In the present case, I think what is right is that the Court should proceed on the basis that the legislature has given the matter serious thought on many occasions, and in fact has twice voted down attempts to remove the same or similar restrictions. Due respect must be had to the choices made by the legislature (and the executive).

156. That said, it does not relieve the Court of its constitutional role and responsibility to examine the choices, as made, closely and see whether the restrictions on voting rights they represent can be justified. There is no escape from the Court's unique constitutional task here.

157. I have, in my analysis above, paid due respect and deference to the legislature's choices. However, it does not immune the restrictions so imposed from scrutiny by the Court. There is a minimum standard below which no restrictions can go.

~ Majority judgment of the Court of Appeal in Sauvé (No 2) ~

158. Mr Thomas places considerable reliance on the judgment of Linden JA (Isaac CJ concurring) in *Sauvé v Canada (Chief Electoral Officer)* 180 DLR (4th) 385, ie *Sauvé (No 2)* when the case was before the Federal Court of Appeal. By a majority, the Court of Appeal upheld the disenfranchisement provisions made by Parliament after extensive consultation following the first *Sauvé* litigation. The new provisions only

applied to those serving a sentence of two years or more in a correctional institution. As described, on appeal, the Supreme Court overturned the majority's decision. The main theme of Linden LJ's judgment was deference to Parliament.

159. However, it must be remembered that the legislation under debate in *Sauvé (No 2)* was enacted by Parliament after extensive consultation and vigorous debate, and in fact there had been a royal commission on electoral reform and party financing which dealt with the matter, whose report had been considered by Parliament. The new law was enacted by Parliament with the specific aim to conform with the Canadian Charters requirements and the judicial decisions (ie the first *Sauvé* litigation). It was in that context that Linden JA advocated the approach of deference to Parliament.

160. Secondly and equally importantly, the provisions in *Sauvé (No 2)* were applicable only to those serving a sentence of two years or more. It was really a case of where to draw the cut-off line – particularly bearing in mind that the Royal Commission had recommended disenfranchisement to all those prisoners serving sentences of ten years or more and an alternative motion to trigger the disenfranchisement only after a sentence of five years or more is handed down was also defeated in Parliament. The question of where to draw the line, that is to say: two years, five years or ten years, did not really involve a difference in kind, as opposed to drawing a line at the imposition of a term of imprisonment (regardless of length).

161. Thirdly, unlike the Canadian provisions, the Hong Kong provisions apply to persons on parole. Thus Linden JA said at p 421:

> "73 It is also important not to overlook that this legislation does not apply to persons on parole. Parliament has made a choice that is only while in prison that a person is disenfranchised. Once a person is released on parole, that person may again vote in federal elections. Thus the rights to participate in electing our representatives is restored to those convicted prisoners who are considered ready to return to life outside prison. To the extent that the deprivation of the right to vote is a meaningful one, the promise of automatic return of that rights to persons on parole sets as an additional incentive for convicted persons to behave well while in prison, and to be rehabilitated."

162. In Hong Kong, by comparison, the position for a prisoner is doubly bad in the sense that before he has fully served his sentence, he cannot even register as an elector. So even if he is released on parole before election day, he cannot vote (unless he has registered as an elector prior to sentencing) for two separate and independent reasons – that he is only given a conditional release and that he is not registered as an elector.

~ Views of UNHRC ~

163. Mr Thomas has pointed out that the United Nations Human Rights Committee has never criticised Hong Kong for the restrictions under challenge, although criticism has been made regarding other provisions in the pre-1997 electoral law, which has been duly rectified in the LegCo Ordinance passed in 1997: See Joseph, Schultz & Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed) 659-660 and footnote 23. That, certainly, is a matter to be taken into account. However, the matter must ultimately be

decided by the Hong Kong courts in accordance with the constitutional provisions and the relevant case law.

Conclusion

164. The right to vote is without doubt the most important political right: *Nowak*, *op cit*, at p 574 (para 18). Having considered the matter carefully, I have come to the view that the general, automatic and indiscriminate restrictions on the right to vote and the right to register as an elector cannot be justified under the proportionality test. They are unreasonable restrictions. And if being a prisoner is a 'status', the restrictions also amount to unjustified discrimination against those behind bars (as well as those who have been sentenced to imprisonment, which sentences have not been served out or freely pardoned).

165. Having said that, I must strongly emphasise 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). Far from it – I have yet to come across a single case that suggests so. The single and all important question that the Court has to decide in the instant case is whether the restrictions in question are compatible with the constitutional right of prisoners to vote. The Court is not otherwise concerned with where the cut-off line should be drawn and how it should be drawn. That is a matter for the legislature: *Hirst* in para 83. Although in the concurring judgment of Judge Caflisch, the learned judge did set out his view on what would constitute reasonable restrictions (para 0-I7), for my part, I do not think it is the function of the

courts to say what would constitute reasonable restrictions in Hong Kong. That is the function of the legislature, not the courts.

166. Having reached that conclusion based on art 26 of the Basic Law and art 21 of the Bill of Rights, there is no need to dwell on the other arguments also raised on behalf of the applicants – arguments based on discrimination, art 6(1) of the Hong Kong Bill of Rights (which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person) and art 6(3) of the Bill of Rights (which provides that the essential aim of the penitentiary system shall be reformation and the social rehabilitation of prisoners).

REMANDED PERSONS' RIGHTS TO VOTE

167. I will leave the question of prisoners' access to polling stations for the time being and consider the position of remanded persons first.

168. It should be remembered that these are unconvicted people who are held in custody awaiting trial.

Right to vote not affected

169. It is useful to set out at the outset that Mr Thomas has on behalf of the respondents told the Court in no uncertain terms that it is not the position of the respondents that these remanded persons have lost the right to vote as a matter of law. In other words, it is accepted that none of the provisions under challenge, nor indeed any other provisions in the

Ordinance, disqualify or prohibit these persons from voting on election day.

170. Their difficulties, so far as the present challenge is concerned, lie in the lack of access to polling stations on election day. In other words, one is, in relation to these remanded persons, only concerned with the question of their inability to vote for practical, as opposed to legal, reasons.

171. This must be correct. According to *General Comment 25* issued by the UN Human Rights Committee as expanded interpretations of rights in the ICCPR, 'persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote': para 14. And the provisions under challenge quite plainly do not apply to those who have not been convicted of any crime and sentenced to a term of imprisonment as a result.

EAC

172. This brings me to the functions, power and duties of the Electoral Affairs Commission (EAC). The Commission is established under the EAC Ordinance as an independent body for the purpose of making recommendations regarding the delineation of geographical constituencies and District Council constituencies and demarcation of their boundaries and to be responsible for the conduct and supervision of elections, regulating the procedure for providing financial assistance to candidates under the LegCo Ordinance and under the District Councils Ordinance and matters incidental thereto (the preamble). S 4 sets out the functions of the Commission:

"The functions of the Commission are-

(a) …

(b) to be responsible for the conduct and supervision of elections;

(c) …

(d) without limiting the generality of paragraphs (b) and (c), to-

(i) supervise the registration of electors;

(ii) regulate the procedure at an election; and

(iii) conduct or supervise promotional activities relating to registration of electors;

(e) to keep under review the matters referred to in paragraphs (b), (c) and (d);

(f) to report to the Chief Executive on any matter relating to elections …

(g) to perform any other function it may perform or is required to perform under this or any other Ordinance; and

(h) to generally make arrangements, take such steps or do such other things as it considers appropriate for the purpose of ensuring that elections and any process referred to in paragraph (c) are conducted openly, honestly and fairly."

173. S 7(1)(b) states that the Commission may, by regulation, provide for the conduct or supervision of, and procedure at any election. S 7(1)(d)(iv), (v) and (vi) stipulate that without limiting the generality of s 7(1)(b), the Commission may, by regulation, provide for the designation of polling stations, the supervision of polling stations and the regulation of the ballot and the procedure or procedures for voting and counting at an election. Regulations 28 and 29 of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap 541D)

provide for the Chief Electoral Officer to designate polling stations, counting stations, small polling stations and main counting stations and for that officer to designate some polling stations as special polling stations (ie stations to be used for voting by persons with a disability for whom access to other polling stations would be difficult).

No polling stations in remand centres

174. No polling stations have been designated at any places of detention for remanded persons in Hong Kong. In the evidence filed, a number of practical difficulties including security concerns have been pointed out if remanded persons are specially catered for and polling stations are to be set up in remand centres. Other alternatives, such as postal and advance polling, have been touched on and various concerns have been pointed out.

175. Another argument advanced against making special provisions to cater for remanded persons is that it would be unfair to other electors who are unable to exercise the right to vote at polling stations for various other reasons, including those immobilized in hospitals, those who are unable to attend by reason of employment or sickness overseas and so forth.

176. A further argument is that remanded persons, if they are minded to vote (assuming that they have been registered as an elector), can ask for bail from the courts to enable them to do so.

Discussion

177. These arguments can be disposed of quickly.

178. The fact that a remanded person can ask the court for bail to enable him to vote on election day does not deal with the real point made against the Government. The real point here goes to the difficulty faced by a remanded person when such an application by him to the court for bail fails. Does it mean that he therefore loses, as a matter of practical reality, the right to vote? It must be remembered that bail is a discretionary matter, whereas voting is a *right* guaranteed under the Basic Law and the Hong Kong Bill of Rights. There is therefore no justification for leaving an unconvicted person's right to vote to the discretion of the courts in terms of granting or refusing special bail. Or does it therefore mean that the Court hearing his bail application must, on account of his constitutional right to vote, grant him bail? Yet Mr Thomas has never submitted that it should be so.

179. The existence of other categories of persons who cannot vote for various practical reasons is not a good ground for denying a remanded person his right to vote in practice. Logically, it is unsound. Moreover, there is a crucial difference between these examples and the situation of an unconvicted person held on remand. The difference is that in the former case, people are unable to vote due to circumstances which the authorities are not responsible for. So a patient staying in the ICU of a hospital is unable to vote for reasons that have nothing to do with the Government. However, a person on remand is unable to vote because he is prevented by the authorities, against his wishes, from physically attending a polling station to vote.

180. A similar argument has been rejected by the Constitutional Court of South Africa in *Nicro, supra*, which concerned prisoners, who were serving sentences of imprisonment without the option of a fine to register as voters and to vote while in prison. A similar argument was raised against these prisoners that if they were allowed special voting arrangements, that would be unfair to others who also faced practical difficulties in voting, which argument was duly rejected by the Court (at p 298):

> "[52] There is no substance in the contention that prisoners would be favoured over others who have difficulty in attending polling stations if arrangements are made to enable them to register and vote at the prison in which they are detained.
>
> [53] Prisoners are prevented from voting by the provisions of the Electoral Act and by the action that the State has taken against them. Their position cannot be compared to people whose freedom has not been curtailed by law and who require special arrangements to be made for them to be able to vote. Whether the failure to make such arrangements for particular categories of persons is reasonable and justifiable will depend on the facts of those cases. We are not called upon to consider that in the present case. The mere fact that it may be reasonable not to make special arrangements for particular categories of persons who are unable to reach or attend polling stations on election day does not mean that it is reasonable to disenfranchise prisoners. Whether or not that is reasonable as a matter of policy raises different considerations."

181. Although the Court there was dealing with the position of convicted prisoners, the same reasoning applies to remanded persons under our discussion.

182. It is convenient and in fact right to call the difficulties cited by the respondents 'practical' difficulties. But when these practical difficulties lead to a denial of a remanded person's right to vote in practice,

this gives rise to a legal objection. In the earlier case of *August*, *supra*, the Constitutional Court in South Africa had to deal with the Electoral Commission's duty to make arrangements to enable prisoners to register and vote – at that time, there was no law attempting to cut down prisoners' rights to register and vote guaranteed under the South African Constitution. This is how the Court analysed the right to vote and the practical implications (at pp 9 to 12):

> "[16] The right to vote by its very nature imposes positive obligations upon the Legislature and the executive. A date for elections has to be promulgated, the secrecy of the ballot secured and the machinery established for managing the process. For this purpose the Constitution provides for the establishment of the Commission to manage elections and ensure that they are free and fair. The Constitution requires the Commission to be an independent and impartial body with such additional powers as are given to it by legislation. Section 5(1)(e) of the Electoral Commission Act (the Commission Act) therefore provides that it is one of the functions of the Commission to
>
> > '(e) compile and maintain voters' rolls by means of a system of registering of eligible voters by utilising data available from government sources and information furnished by voters'.
>
> This clearly imposes an affirmative obligation on the Commission to take reasonable steps to ensure that eligible voters are registered.
>
> [17] Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive policy. Rights may not be limited without

justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.

…

[20] … The basic argument of the respondents, therefore, was that, although the right of prisoners to vote remained intact, prisoners had lost the opportunity to exercise that right through their own misconduct. This argument was accepted by Els J. At the heart of his judgment is a statement that prisoners are the authors of their own misfortune and therefore cannot require special arrangements to be made for them to vote.

[21] The suggestion that prisoners otherwise eligible should be disqualified from enjoying their rights not by statute, but by the mere fact of their incarceration, was considered and firmly rejected by the US Supreme Court in the case of *O'Brien v Skinner*. Speaking for the Court, Burger CJ stated that the appellant prisoners were

> '… not disabled from voting except by reason of not being able physically – in the very literal sense – to go to the polls on election day or to make the appropriate registration in advance by mail'.

He held that their voting rights were being infringed, although

> '… under no legal disability impeding their legal right to register or to vote; they are simply not allowed to use the absentee ballot and are denied any alternative means of casting their vote although they are legally qualified to vote'.

[22] Marshall J was even more emphatic in his concurring judgment. He said:

> '… (N)or can it be contended that denial of absentee ballots to [prisoners] does not deprive them of their right to vote any more than it deprives others who may 'similarly' find it 'impracticable' to get to the polls on election day …; here, it is the State which is both physically preventing [the prisoners] from going to the polls and denying them alternative means of casting their ballots. *Denials of absentee registration and absentee ballots is effectively an absolute denial of the franchise to these [prisoners]*.'

(My emphasis.) These views are directly applicable in the present case. In reality no provision has been made either in the 1998 Electoral Act or in the Commission Act or in the regulations of the Commission to enable the prisoners to exercise

> their constitutional right to register and vote. Nor has the Commission made any arrangements to enable them to register and vote. The Commission accordingly has not complied with its obligation to take reasonable steps to create the opportunity to enable eligible prisoners to register and vote. The consequence has been a system of registration and voting which would effectively disenfranchise all prisoners without constitutional or statutory authority unless some action is taken to prevent that. The applicants have accordingly established a threatened breach of s19 of the Constitution."

183. Although *August* concerned *convicted* prisoners in South Africa, since they nonetheless had the constitutional right to vote which no legislation had (yet) sought to remove and their only problem was the lack of arrangements for them to register and vote, their position was identical to the case of remanded persons that is under discussion.

184. In my view, the authorities cannot have it both ways. They cannot, on the one hand, detain a remanded person in a place of detention on election day thereby preventing him from physically attending a normal polling station to cast his vote (if he so wishes), yet argues, on the other hand, that they are, nonetheless, under no duty, in those circumstances, to make special arrangements in the place of detention (or elsewhere) so as to enable the remanded person to exercise his constitutional right to vote. The lack of special arrangements available to those on remand to enable them to vote on election day is indefensible. The Court fully recognises the possible concerns, including security ones, that such special arrangements might entail. But similar arrangements have been made elsewhere, and I do believe that if one tries hard enough, reasonably satisfactory arrangements can be worked out.

185. Indeed, one must not assume that if a remanded person should make a special bail application to a judge for allowing him to vote on election day whilst generally held in custody awaiting trial, the Court will necessarily refuse such an application – in the event that special bail is granted, special arrangements will indeed be required to be made by the Government to enable the person to attend a polling station to vote. The problem, in other words, will simply not go away.

186. In the long run, it would seem better to put in place a mechanism or arrangements to enable those held on remand to vote, probably at the places of their detention.

187. The responsibility for making such arrangements falls on the EAC.

PRISONERS' ACCESS TO POLLING STATIONS

188. Returning to the position of prisoners, unless some valid restrictions are imposed on the right to vote that comply fully with the constitutional requirements of art 26 of the Basic Law and art 21 of the Hong Kong Bill of Rights, they are entitled to vote whilst serving sentences in prison.

189. Their position on access to polling stations and special arrangements is no different from that of remanded persons. What I have said in relation to the latter group of people applies equally to them.

CHANGE OF REGISTERED ADDRESS

190. Finally, there is a challenge by Mr Choi (in HCAL 83/2008) that the EAC has wrongfully refused his application to change his address to his prison cell in Stanley for the purposes of the register of electors, he having registered himself as an elector in the register of Kowloon West Constituency before he was sentenced to imprisonment.

191. I have no difficulty in rejecting the challenge.

192. The matter is covered by s 28 of the LegCo Ordinance:

> " (1) A natural person is not eligible to be registered as an elector in the register of geographical constituencies unless, at the time of applying for registration, the person satisfies the Electoral Registration Officer-
>
> (a) that the person ordinarily resides in Hong Kong; and
>
> (b) that the residential address notified in the person's application for registration is the person's only or principal residence in Hong Kong.
>
> (2) The Electoral Registration Officer may omit from the final register of geographical constituencies the name of an elector if satisfied on reasonable grounds-
>
> (a) that the elector no longer ordinarily resides in Hong Kong; or
>
> (b) that the residential address last notified to that Officer is no longer the elector's only or principal residence in Hong Kong.
>
> (3) In this section, a reference to a person's only or principal residence in Hong Kong is a reference to a dwelling-place in Hong Kong at which the person resides and which constitutes the person's sole or main home."

193. The question turns on Mr Choi's 'only or principal address in Hong Kong', which means 'a dwelling place in Hong Kong at which [Mr Choi] resides and which constitutes [Mr Choi's] sole or main home.'

194. On the facts, the EAC was quite entitled to come to the conclusion that Mr Choi's prison cell in Stanley was not his dwelling place in Hong Kong at which he resided and which constituted his sole or main home at the time of application for change of address.

195. There is no substance in the application.

MR LEUNG'S STANDING

196. Lastly, I come to the question of standing. It is argued against Mr Leung (in HCAL 82/2008) that he lacks standing or sufficient interest to bring the proceedings, because he is neither a prisoner nor a remanded person.

197. Various authorities have been cited by both sides regarding the law on standing and the development in UK. In my view, the short answer is that Mr Leung is obviously not a busybody or meddlesome person. He was, at the time, an incumbent LegCo member, seeking re-election. He, together with all his fellow candidates, as opposed to the general public in Hong Kong, had a special interest in the composition of the pool of electors eligible and practically able to vote on election day. They were the candidates to receive from these electors their votes. Any provisions which would prevent an otherwise eligible person from being registered as a voter, or from exercising his right to vote whether as a

matter of law or practical realities, would therefore directly affect Mr Leung and his fellow candidates.

198. In those circumstances, I fail to see how it can be said that Mr Leung lacks the requisite standing to bring these proceedings.

199. In any event, so far as the position of remanded persons is concerned, in my view, it is quite unlikely that any challenge will be brought by such persons due to the temporary nature of their detention and possibly, their preoccupation with the offences that they are being charged with and still awaiting trial for.

200. Finally, the merits of the matter are also relevant. I have dealt with the substantive merits in great length.

201. All these matters I am entitled to take into account. All things considered, I take the view that Mr Leung does have sufficient interest to bring the proceedings.

OUTCOME

202. In conclusion, I take the view that the disenfranchisement provisions relating to voting and registration contravene the right to vote constitutionally guaranteed under art 26 of the Basic Law and art 21 of the Hong Kong Bill of Rights, 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 to vote on election day.

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

204. Mr Choi's challenge against the EAC's refusal to change his address to his prison cell in Stanley in the register of electors is unfounded and is therefore dismissed.

205. The parties are agreed that as regards the appropriate relief to be granted, a further opportunity to be heard should be given, including the filing of appropriate evidence.

206. I therefore give the following directions:

(1) leave to the respondents to file and serve evidence pertaining to the question of relief within 14 days from the date this judgment is handed down;

(2) hearing on all questions relating to relief (including costs) be adjourned to a date to be fixed, in consultation with counsel's diaries; estimated length: 1 day.

207. I would like to thank counsel for their assistance in this important and difficult case.

(Andrew Cheung)
Judge of the Court of First Instance
High Court

Mr Hectar Pun and Mr Earl Deng, instructed by Tang, Wong & Chow, for the applicants in HCAL 79/2008 and HCAL 83/2008

Mr Martin Lee SC and Ms Jocelyn SL Leung, instructed by K M Cheung & Co, for the applicant in HCAL 82/2008

Mr Michael Thomas SC and Mr Simon NM Young, instructed by the Department of Justice, for the 1st and 2nd respondents in all three applications

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Annex
Prisoner Disenfranchisement Provisions
1953-1981

Voter Disqualifications	Candidate Disqualification
Urban Council Ordinance (Cap. 101) [1953] **3. Composition of the Urban Council** ... (10) No person shall be entitled to be included in any of the parts of the register who – (a) has in any part of Her Majesty's Dominions or in any territory under Her Majesty's Protectorate or in any territory in which Her Majesty has from time to time jurisdiction been sentenced to death or imprisonment (by whatever name called) for a term exceeding six months and has not either suffered the punishment to which he was sentenced or such other punishment as may by competent authority have been substituted therefor or received a free pardon; or ...	Not excerpted.
Urban Council Ordinance (Cap. 101) [1955] **16. Disqualification by status** No person shall be entitled to be registered as an elector or to vote at the election of any ordinary member of the Council who – … (b) has in any part of Her Majesty's Dominions or in any territory under Her Majesty's Protectorate or in any territory in which Her Majesty has from time to time jurisdiction been sentenced to death or imprisonment (by whatever name called) for a term exceeding six months and has not either suffered the punishment to which he was sentenced or such other punishment as may by competent authority have been substituted therefor or received a free pardon; or ... **17. Temporary disqualification** (1) The following persons are disqualified from being registered as electors or voting at an election of an ordinary member of the Council held within seven years from the date of conviction- (a) any person convicted of a corrupt practice or of an illegal practice within the meaning of any enactment for the time being in force providing for the punishment of corrupt or illegal practices; (b) any person convicted of an offence under section 3 or section 4 of the Prevention of Corruption Ordinance. ...	Not excerpted.
Urban Council Ordinance (Cap. 101) [1973] **First Schedule, Part I** **4. Disqualification by status** (1) No person shall be entitled to be registered as an elector on any register to be compiled pursuant to paragraph 7 or, even if registered, to vote at the election of members of the Council who– … (b) has in any Commonwealth country been sentenced to death or imprisonment (by whatever name called) for a term exceeding six months and has not either suffered the punishment to which he	Not excerpted.

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was sentenced or such other punishment as may by competent authority have been substituted therefor or received a free pardon; or ... **5. Temporary disqualification** (1) The following persons are disqualified from being registered as electors or, even if registered, from voting at an election of members of the Council held within seven years from the date of conviction- (a) any person convicted of a corrupt practice or of an illegal practice within the meaning of the Corrupt and Illegal Practices Ordinance, other than the illegal practice consisting of a contravention of any of the provisions of section 19(2) of that Ordinance, or convicted of a corrupt or illegal practice within the meaning of any other enactment for the time being in force providing for the punishment of corrupt or illegal practices; (b) any person convicted of an offence under section 3 or 4 of the repealed Prevention of Corruption Ordinance; (c) any person convicted of any offence under Part II of the Prevention of Bribery Ordinance. ...	
Electoral Provisions Ordinance (Cap. 367) [1981] **11. Disqualification from registration** (1) A person shall be disqualified from being registered as an elector or, even if registered, from voting at an election, if he – (a) has in Hong Kong or any other territory or country been sentenced to death or imprisonment (by whatever name called) for a term exceeding 6 months and has not either suffered the punishment to which he was sentenced or such other punishment as may by competent authority have been substituted therefor or received a free pardon; … (d) where the election is to be held or is held within 7 years from the date of conviction, has been convicted- (i) of a corrupt practice or of an illegal practice within the meaning of the Corrupt and Illegal Practices Ordinance, other than the illegal practice consisting of an contravention of any of the provisions of section 19(2) of that Ordinance, or of a corrupt or illegal practice within the meaning of any other enactment for the time being in force providing for the punishment of corrupt or illegal practices; (ii) of any offence under section 3 or 4 of the repealed Prevention of Corruption Ordinance; (iii) of any offence under the Prevention of Bribery Ordinance; or (e) on the date he applies for registration or on the date of the election, is serving a sentence of imprisonment.	**Electoral Provisions Ordinance (Cap. 367) [1981]** **19. Disqualifications for nomination or election** A person shall be disqualified for being elected or being nominated as a candidate or holding office as a member if he- ... (b) has in Hong Kong or any other territory or country been sentenced to death or imprisonment (by whatever name called) for a term exceeding 3 months and has not either suffered the punishment to which he was sentenced or such other punishment as may by competent authority have been substituted therefor or received a free pardon; (c) has been convicted of treason; … (g) where the election is to be held or is held within 10 years from the date of his conviction has been convicted- (i) of any offence in Hong Kong or any other territory or country and sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine; (ii) of a corrupt practice or of an illegal practice within the meaning of the Corrupt and Illegal Practices Ordinance (Cap. 288), other than the illegal practice consisting of a contravention of any of the provisions of section 19(2) of that Ordinance, or of a corrupt or illegal practice within the meaning of any other enactment providing for the punishment of corrupt or illegal practices; (iii) of any offence under section 3 or 4 of the repealed Prevention of Corruption Ordinance (Cap. 201);

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	(iv) of any offence under the Prevention of Bribery Ordinance; or (h) on the date of his nomination or of the election he is serving a sentence of imprisonment.

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Prisoner Disenfranchisement Provisions 1985-2008

Voter Disqualifications	Candidate Disqualification
Legislative Council (Electoral Provisions) Ordinance (Cap. 381) [1985] **15. Disqualification from voting or being registered** … (2) A person shall be disqualified from being registered as an elector, or even if registered, from voting at an election, if – (a) he has in Hong Kong or any other place been sentenced to death or imprisonment (by whatever name called) for a term exceeding 6 months and has not either suffered the punishment to which he was sentenced or such other punishment as may by competent authority have been substituted therefor or received a free pardon; … (d) without prejudice to paragraph (a), where the election is to be held or is held within 7 years from the date of his conviction he has been convicted- (i) of a corrupt practice or of an illegal practice within the meaning of the Corrupt and Illegal Practices Ordinance (Cap. 288), other than the illegal practice consisting of a contravention of any of the provisions of section 19(2) of that Ordinance, or of a corrupt or illegal practice within the meaning of any other enactment providing for the punishment of corrupt or illegal practices; (ii) of any offence under the Prevention of Bribery Ordinance (Cap. 201); or (e) on the date he applies for registration or on the date of the election, he is serving a sentence of imprisonment. …	**Legislative Council (Electoral Provisions) Ordinance (Cap. 381) [1985]** **21. Disqualification for election or holding office** (1) A person shall be disqualified from being nominated as a candidate in an election or holding office as an elected Member if- ... (c) he has in Hong Kong or any other place been sentenced to death or imprisonment (by whatever name called) for a term exceeding 6 months and has not either suffered the punishment to which he was sentenced or such other punishment as may by competent authority have been substituted therefor or received a free pardon; (d) he has been convicted of treason; … (g) without prejudice to paragraph (c), where the election is to be held or is held within 10 years from the date of his conviction he has been convicted- (i) of any offence in Hong Kong or any other place in respect of which he has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine; (ii) of a corrupt practice or of an illegal practice within the meaning of the Corrupt and Illegal Practices Ordinance (Cap. 288), other than the illegal practice consisting of a contravention of any of the provisions of section 19(2) of that Ordinance, or of a corrupt or illegal practice within the meaning of any other enactment providing for the punishment of corrupt or illegal practices; (iii) of any offence under the Prevention of Bribery Ordinance (Cap. 201); or (h) on the date of his nomination or of the election he is serving a sentence of imprisonment. ...
Legislative Council (Electoral Provisions) Ordinance (Cap. 381) [1995] **15. Disqualification from voting or being registered** … (2) A person shall be disqualified from being registered as an elector, or even if registered, from voting at an election, if – (a) he has in Hong Kong or any other place been sentenced to death or imprisonment (by whatever name called) for a term exceeding 6 months and has not either suffered the punishment to which he was sentenced or such other punishment as may by competent authority have been substituted therefor or received a free pardon; …	**Legislative Council (Electoral Provisions) Ordinance (Cap. 381) [1995]** **21. Disqualification for election or holding office** (1) A person shall be disqualified from being nominated as a candidate in an election or holding office as an elected Member if- ... (c) he has in Hong Kong or any other place been sentenced to death or imprisonment (by whatever name called) for a term exceeding 3 months and has not either suffered the punishment to which he was sentenced or such other punishment as may by competent authority have been substituted therefor or received a free pardon; (d) he has been convicted of treason;

(d) without prejudice to paragraph (a), where the election is to be held or is held within 7 years from the date of his conviction he has been convicted- (i) of a corrupt practice or of an illegal practice within the meaning of the Corrupt and Illegal Practices Ordinance (Cap. 288), other than the illegal practice consisting of a contravention of any of the provisions of section 19(2) of that Ordinance, or of a corrupt or illegal practice within the meaning of any other enactment providing for the punishment of corrupt or illegal practices; (ii) of any offence under the Prevention of Bribery Ordinance (Cap. 201); or (iii) of any offence under section 23 of the Boundary and Election Commission (Registration of Electors) (Functional Constituencies and Election Committee Constituency) Regulation (Cap. 432 sub. leg.) or section 21 of the Boundary and Election Commission (Registration of Electors) (Geographical Constituencies) Regulation (Cap. 432 sub. leg.); or (e) on the date he applies for registration or on the date of the election, he is serving a sentence of imprisonment.	… (g) without prejudice to paragraph (c), where the election is to be held or is held within 10 years from the date of his conviction he has been convicted- (i) of any offence in Hong Kong or any other place in respect of which he has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine; (ii) of a corrupt practice or of an illegal practice within the meaning of the Corrupt and Illegal Practices Ordinance (Cap. 288), other than the illegal practice consisting of a contravention of any of the provisions of section 19(2) of that Ordinance, or of a corrupt or illegal practice within the meaning of any other enactment providing for the punishment of corrupt or illegal practices; (iii) of any offence under the Prevention of Bribery Ordinance (Cap. 201); (iv) of any offence under section 23 of the Boundary and Election Commission (Registration of Electors) (Functional Constituencies and Election Committee Constituency) Regulation (Cap. 432 sub. leg.) or section 21 of the Boundary and Election Commission (Registration of Electors) (Geographical Constituencies) Regulation (Cap. 432 sub. leg.); or (h) on the date of his nomination or of the election he is serving a sentence of imprisonment. ...
Legislative Council Bill [1997] **29. When person is disqualified from being registered as an elector** (1) 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– (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 from the date of the person's conviction, is or has been convicted- (i) of a corrupt practice or an illegal	**Legislative Council Bill [1997]** **37. When person is disqualified from being nominated as a candidate and from being elected as a Member** (1) A person is disqualified from being nominated as a candidate at an election, and from being elected as a Member, if the person- ... (b) has, in Hong Kong or any other place, been sentenced to death or imprisonment (by whatever name called) and has not- (i) served the sentence or undergone such other punishment as a competent authority may have been substituted for the sentence; or (ii) received a free pardon; or (c) has been convicted of treason; or (d) on the date of nomination, or of the election, is serving a sentence of imprisonment; or (e) without limiting paragraph (b), where the election is to be held or is held within 5 years after the date of the person's conviction, is or has been convicted-

practice (other than the illegal practice consisting of a contravention of section 19 of the Corrupt and Illegal Practices Ordinance (Cap. 288)); or (ii) of a corrupt or an illegal practice within the meaning of any other enactment providing for the punishment of corrupt or illegal practices; or (iii) of any offence under the Prevention of Bribery Ordinance (Cap. 201); (iv) of any prescribed offence under regulations in force under the Electoral Affairs Commission Ordinance (of 1997); or	(i) of any offence in Hong Kong or any other place in respect of which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine; or (ii) of a corrupt practice or an illegal practice (other than the illegal practice consisting of a contravention of section 19 of the Corrupt and Illegal Practices Ordinance (Cap. 288)); or (iii) of a corrupt or an illegal practice within the meaning of any other enactment providing for the punishment of corrupt or illegal practices; or (iv) of any offence under the Prevention of Bribery Ordinance (Cap. 201); (v) of any prescribed offence under regulations in force under the Electoral Affairs Commission Ordinance (of 1997); or
...	...
51. When an elector is disqualified from voting at an election … (5) An elector (including a member of the Election Committee) is also disqualified from voting at an election 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 – (iii) served the sentence or undergone such other punishment as a competent authority may have substituted for the sentence; or (iv) 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 a corrupt practice or an illegal practice (other than the illegal practice consisting of a contravention of section 19 of the Corrupt and Illegal Practices Ordinance (Cap. 288)); or (ii) of a corrupt or an illegal practice within the meaning of any other enactment providing for the punishment of corrupt or illegal practices; or (iii) of any offence under the Prevention of Bribery Ordinance (Cap. 201); (iv) of any prescribed offence under regulations in force under the Electoral Affairs Commission Ordinance (of 1997); or …	
Legislative Council Ordinance (Cap. 542) [1997] **31. When person is disqualified from being registered as an elector** (1) A natural person is disqualified from being registered as an elector for a constituency if the person –	**Legislative Council Ordinance (Cap. 542) [1997]** **39. When person is disqualified from being nominated as a candidate and from being elected as a Member** (1) A person is disqualified from being nominated as a candidate at an election, and from being elected as a

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(a) has, in Hong Kong or any other place, been sentenced to death or imprisonment (by whatever name called) and has not either – (v) served the sentence or undergone such other punishment as a competent authority may have substituted for the sentence; or (vi) 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 a corrupt practice or an illegal practice (other than the illegal practice consisting of a contravention of section 19 of the Corrupt and Illegal Practices Ordinance (Cap. 288)); or (ii) of a corrupt or an illegal practice within the meaning of any other enactment providing for the punishment of corrupt or illegal practices; or (iii) of any offence under Part II of the Prevention of Bribery Ordinance (Cap. 201); (iv) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (129 of 1997); or ...	Member, if the person- ... (b) 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 been substituted for the sentence; or (ii) received a free pardon; or (c) has been convicted of treason; or (d) on the date of nomination, or of the election, is serving a sentence of imprisonment; or (e) without limiting paragraph (b), where the election is to be held or is held within 5 years after the date of the person's conviction, is or has been convicted- (i) of any offence in Hong Kong or any other place in respect of which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine; or (ii) of a corrupt practice or an illegal practice (other than the illegal practice consisting of a contravention of section 19 of the Corrupt and Illegal Practices Ordinance (Cap. 288)); or (iii) of a corrupt or an illegal practice within the meaning of any other enactment providing for the punishment of corrupt or illegal practices; or (iv) of any offence under Part II of the Prevention of Bribery Ordinance (Cap. 201); or (v) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (129 of 1997); or ...
53. When an elector is disqualified from voting at an election … (5) An elector (including a member of the Election Committee) is also disqualified from voting at an election 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 – (vii) served the sentence or undergone such other punishment as a competent authority may have substituted for the sentence; or (viii)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 a corrupt practice or an illegal practice (other than the illegal practice consisting of a contravention of section 19 of the Corrupt and Illegal Practices Ordinance (Cap. 288)); or (ii) of a corrupt or an illegal practice within the meaning of any other enactment providing for the punishment of corrupt or illegal	

practices; or (iii) of any offence under Part II of the Prevention of Bribery Ordinance (Cap. 201); (iv) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (129 of 1997); or …	

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Legislative Council Ordinance (Cap. 542) [2008]	Legislative Council Ordinance (Cap. 542) [2008]
31. When person is disqualified from being registered as an elector (1) 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); (iii) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap 541); or ...	**39. When person is disqualified from being nominated as a candidate and from being elected as a Member** (1) A person is disqualified from being nominated as a candidate at an election, and from being elected as a Member, if the person- ... (b) 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 been substituted for the sentence; or (ii) received a free pardon; or (c) has been convicted of treason; or (d) on the date of nomination, or of the election, is serving a sentence of imprisonment; or (e) without limiting paragraph (b), where the election is to be held or is held within 5 years after the date of the person's conviction, is or has been convicted- (i) in Hong Kong or any other place, of an offence for which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine; or (ii) of having engaged in corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554); or (iii) of an offence against Part II of the Prevention of Bribery Ordinance (Cap 201); or (iv) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap 541); or ...
53. When an elector is disqualified from voting at an election … (5) An elector is also disqualified from voting at an election 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 – (iii) served the sentence or undergone such other punishment as a competent authority may have substituted for the sentence; or (iv) 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); (iii) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap 541); or …	