



Constitutional Development and Cases on Electoral Law

The year 2012 is an election year for the CE and the LegCo in Hong Kong. Moving towards the ultimate aim of selecting the CE and electing all members of the LegCo by universal suffrage as provided in the Basic Law, we have witnessed remarkable achievements in enhancing the democratic elements of the two elections in 2012. This article reviews the main legal issues in the context of constitutional development and reforms. It also includes a brief summary of the recent decisions of the HKSAR courts relating to electoral law.

Progress towards universal suffrage

BL 45 and BL 68 provide respectively that the methods for selecting the CE and for forming the LegCo shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress, with the ultimate aims of the selection of the CE by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures, and the election of all the members of the LegCo by universal suffrage. The specific method for selecting the CE is prescribed in Annex I to the Basic Law, and the specific method for forming the

LegCo and its procedures for voting on bills and motions are prescribed in Annex II to the Basic Law. The two Annexes also provide a mechanism for introducing changes after 2007.

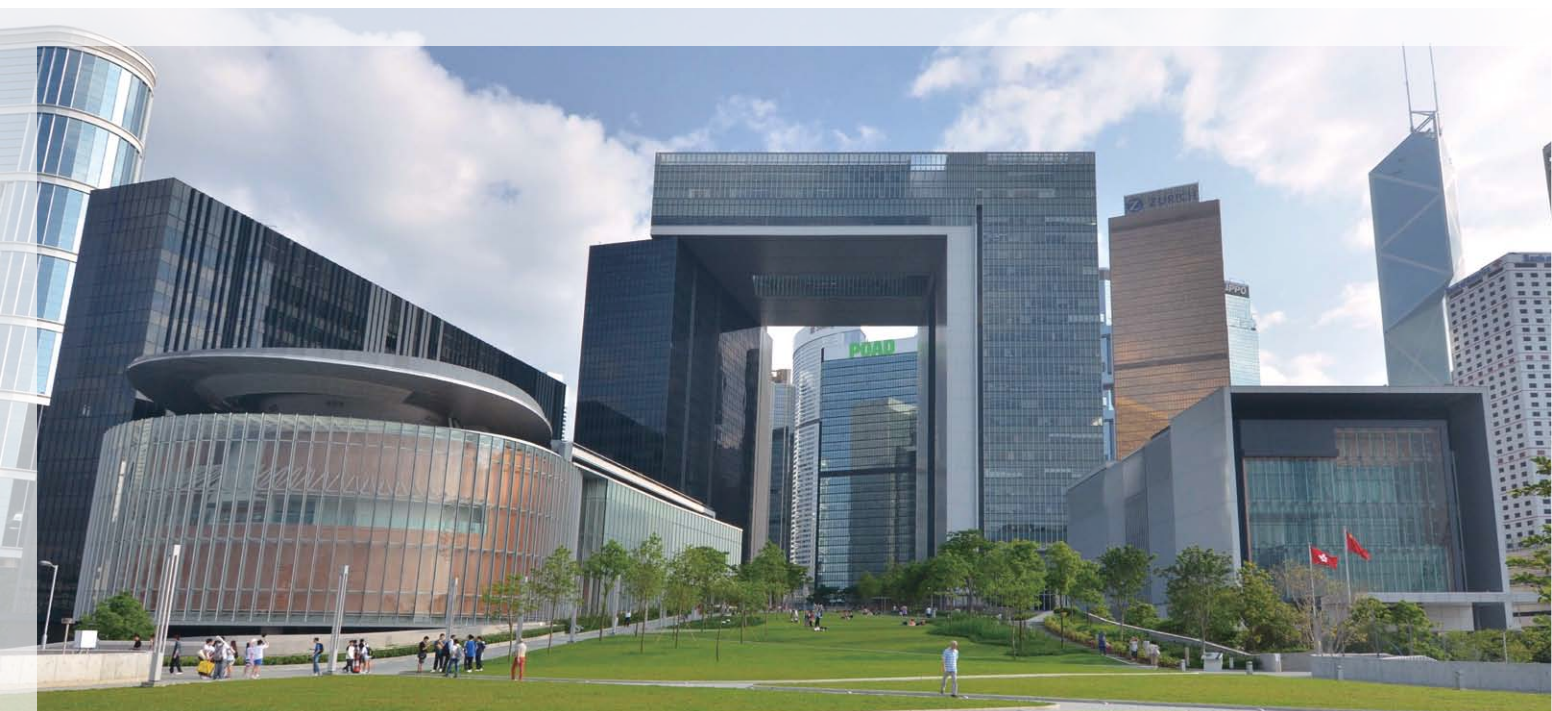
In respect of the selection of the CE, Article 7 of Annex I to the Basic Law provides that:-

“If there is a need to amend the method for selecting the [CE] for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the [LegCo] and the consent of the [CE], and they shall be reported to the [NPCSC] for approval.”

Similar mechanism for introducing changes to the method for forming the LegCo is prescribed in Article III of Annex II to the Basic Law. However, the amendments to the method for forming the LegCo shall be “reported to the NPCSC for the record”.

On 6 April 2004, the NPCSC adopted an interpretation of Article 7 of Annex I and Article III of Annex II¹ (“*2004 Interpretation*”), which Interpretation makes clear that the phrases “subsequent to the year 2007” and “after 2007” stipulated in the two Annexes include the year

¹ *The Interpretation by the NPCSC of Article 7 of Annex I and Article III of Annex II to the Basic Law of the HKSAR of the PRC*, adopted by the Standing Committee of the Tenth NPC at its Eighth Session on 6 April 2004.



2007. Article 3 of the *2004 Interpretation* describes how the amendments to Annexes I and II are to be effected:-

“The provisions in the two above-mentioned Annexes that any amendment must be made with the endorsement of a two-thirds majority of all the members of the [LegCo] and the consent of the [CE] and shall be reported to the [NPCSC] for approval or for the record mean the requisite legislative process through which the method for selecting the [CE] and the method for forming the [LegCo] and its procedures for voting on bills and motions are amended. Such an amendment may take effect only if it has gone through the said process, including the approval or recording ultimately given or made by the [NPCSC] in accordance with law. The [CE] of the [HKSAR] shall make a report to the [NPCSC] as regards whether there is a need

to make an amendment; and the [NPCSC] shall, in accordance with the provisions of Articles 45 and 68 of the Basic Law of the [HKSAR] of the [PRC], make a determination in the light of the actual situation in the [HKSAR] and in accordance with the principle of gradual and orderly progress. The bills on the amendments to the method for selecting the [CE] and the method for forming the [LegCo] and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the [HKSARG] into the [LegCo].”

In *Lau Kong Yung & others v Director of Immigration* (1999) 2 HKCFAR 300, the CFA held that the power of interpretation of the Basic Law conferred by BL 158(1) was in general and unqualified terms. The NPCSC had the power to make an interpretation of a provision of the Basic Law and the courts in the HKSAR are bound to



follow it (at 323-324). The *2004 Interpretation* is therefore binding on the courts of the HKSAR.

In the light of the mechanism described in the *2004 Interpretation*, the CE submitted a report to the NPCSC on 15 April 2004 on whether there was a need to amend the method for selecting the CE in 2007 and for forming the LegCo in 2008. Article 2 of the decision adopted by the NPCSC on 26 April 2004² provides that appropriate amendments that conform to the principle of gradual and orderly progress may be made to the specific method for selecting the third CE of HKSAR in the year 2007 and the specific method for forming the LegCo of the HKSAR in the fourth term in the year 2008. At the same time, the Ninth Session of the NPCSC was of the view that conditions had not yet existed for the selection of the CE by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures as provided for in BL 45 and the election of all the members of the LegCo by universal suffrage as provided for in BL 68.

The Government put forth, in October 2005, a package of proposals for amending the electoral methods for the 2007 CE election and the 2008 LegCo election. As the package of proposals was not endorsed by a two-third majority of all LegCo Members as required by Annexes I and II to the Basic Law, it was not implemented. The provisions relating to the two electoral methods in Annexes I and II to the Basic Law continued to apply to the

2007 CE election and the 2008 LegCo election.

At the beginning of the third term of the HKSARG in July 2007, the *Green Paper on Constitutional Development* was published. Following a three-month public consultation, in December 2007, the CE submitted to the NPCSC the “*Report by the CE of the HKSAR to the NPCSC on the Public Consultation on Constitutional Development and on whether there is a need to amend the methods for selecting the CE of the HKSAR and for forming the LegCo of the HKSAR in 2012*”.

On 29 December 2007, the NPCSC adopted a decision³ (“*2007 Decision*”), the Preamble of which makes clear that the election of the fifth term CE in the year 2017 may be implemented by the method of universal suffrage; and that after the CE is selected by universal suffrage, the election of the LegCo may be implemented by the method of electing all the members by universal suffrage. The *2007 Decision* also provides that the election of the fourth term CE in the year 2012 shall not be implemented by the method of universal suffrage, and the election of the fifth term LegCo in the year 2012 shall not be implemented by the method of electing all the members by universal suffrage. Subject to the above, appropriate amendments conforming to the principle of gradual and orderly progress may be made to the specific method for selecting the fourth term CE in 2012 and the specific method for forming the fifth term LegCo in 2012.

² *Decision of the NPCSC on Issues Relating to the Methods for Selecting the CE of the HKSAR in the Year 2007 and for Forming the LegCo of the HKSAR in the Year 2008*, adopted by the Standing Committee of the Tenth NPC at its Ninth Session on 26 April 2004.

³ *Decision of the NPCSC on Issues Relating to the Methods for Selecting the CE of the HKSAR and for Forming the LegCo of the HKSAR in the Year 2012 and on Issues Relating to Universal Suffrage*, adopted by the Standing Committee of the Tenth NPC at its Thirty-first Session on 29 December 2007.



Procedural steps for amendments to Annexes I & II of the Basic Law

The *2007 Decision* of the NPCSC confirms in clear terms the timetable for the attainment of elections of the CE by universal suffrage at the earliest from 2017, and thereafter all members the LegCo may be elected by universal suffrage. According to the relevant provisions of Annexes I and II to the Basic Law and the *2004 Interpretation*, amendments to Annexes I and II relating to both the method for selecting the CE and the method for forming the LegCo should go through five steps each time. The five steps are summarized in the *Explanations on the Draft 2007 Decision of the NPCSC*⁴:

- (a) the first step: the CE shall make a report to the NPCSC;
- (b) the second step: the NPCSC shall determine whether there is a need to make an amendment;
- (c) the third step: the bills on the amendments to the method for selecting the CE and the method for forming the LegCo shall

be introduced by HKSARG and shall be passed with the endorsement of a two-thirds majority of all the members of LegCo;

- (d) the fourth step: the CE shall consent to the amendments made by LegCo;
- (e) the fifth step: the CE has to report the amendments bills to the NPCSC for approval or for the record.

Implementing the 2012 electoral arrangements

The composition of the first three terms of the LegCo is prescribed in Annex II to the Basic Law. The number of seats returned by direct geographical elections increased from 20 in 1998 to 24 in 2000, and to 30 in 2004. The proportion of seats returned by direct geographical elections has been increased by 50% in the seven years since reunification, and accounts for half of all 60 seats in LegCo.

For changes to the CE election and LegCo

⁴ *Explanations on the Draft Decision of the NPCSC on Issues Relating to the Methods for Selecting the CE of the HKSAR and for Forming the LegCo of the HKSAR in the Year 2012 and on Issues Relating to Universal Suffrage*, Deputy Secretary-General of the NPCSC, Mr Qiao Xiaoyang, at the Thirty-first Session of the Standing Committee of the Tenth NPC in the Afternoon of 26 December 2007.



election after 2007, amendments to Annexes I and II to the Basic Law are required and the “five steps” approach applies. As mentioned above, steps were taken to conduct public consultations on reform proposals in 2005-2007. Thereafter, the CE submitted a report to the NPCSC in December 2007 and the NPCSC adopted the *2007 Decision* in December 2007. Therefore, the first two steps for implementing amendments to Annexes I and II to the Basic Law were completed by December 2007. Subsequently, the HKSARG issued the *Consultation Document on the Methods for Selecting the CE and for Forming the LegCo in 2012* on 18 November 2009 setting out the directions which might be considered and launched a three-month public consultation. After considering the views received, the Government put forth on 14 April 2010 a package of proposals

for the methods for selecting the CE and for forming the LegCo in 2012, with a view to broaden the room for participation in the two elections for 2012. The draft amendments to Annexes I and II to the Basic Law were submitted by the Government to the LegCo by way of a motion and were passed by the LegCo on 24 and 25 June 2010. CE signed his consent to the draft amendments on 29 June 2010. The amendments were reported to the NPCSC on 28 July 2010 and approved/recorded by the Standing Committee of the Eleventh NPC at its Sixteenth Session on 28 August 2010. Amendments to relevant electoral legislation were passed by the LegCo in March 2011.

As a result of the above reform, important progress was made in two elections in 2012 which broadened the room for political participation. For

the selection of CE, the number of members of the Election Committee in 2012 was increased from 800 to 1200, with the number of seats for each of the four sectors increased by 100. Most of the new seats of the political sector have been allocated to the elected District Council members and LegCo members so as to enhance the democratic elements of the electoral method. For the LegCo election in 2012, the number of seats was increased from 60 to 70, with 35 seats returned by geographical constituencies (“GCs”) and 35 seats returned by functional constituencies (“FCs”). The five new FC seats have been allocated to the newly established District Council (second) FC (“DC(2nd)FC”). Candidates for these 5 new DC(2nd)FC seats were incumbent DC members nominated by elected DC members and elected by all registered voters who did not have a vote in the other (traditional) FCs. In other words, for the first time in Hong Kong, every registered voter had two votes in the 2012 LegCo election, one for GCs and the other for FCs. Close to 60% of all seats in the LegCo (out of a total of 70 seats, 35 returned from the GCs, and 5 returned from DC(2nd)FC) have an electorate base of over 3 million voters.

Against this background, Hong Kong will continue to move towards the ultimate aim of selecting the CE and electing all members of the LegCo by universal suffrage in accordance with the Basic Law.

Recent cases on electoral law

The above is a summary of important milestones

of the constitutional developments of the HKSAR in the light of the relevant NPCSC Interpretation and Decisions and the amendments to Annexes I and II to the Basic Law. At the same time, there continues to be developments in our electoral law through decisions of the HKSAR courts. These cases mainly focus on the consistency of our electoral provisions with the right to vote and the right to stand for election under BL 26 and Article 21⁵ of the BoR.

BL 26

Permanent residents of the HKSAR shall have the right to vote and the right to stand for election in accordance with law.

Article 21 of the BoR - right to participate in public life

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.

Corporate vote

One of the significant lawsuits relating to election

⁵ S. 13 of the Hong Kong Bill of Rights Ordinance (Cap. 383) provides that Article 21 does not require the establishment of an elected ExCo or LegCo in Hong Kong.



is the constitutional challenge against corporate votes for FC elections to the LegCo in *Chan Yu Nam v Secretary for Justice* [2012] 3 HKC 38 (CA, 7 Dec 2010). The applicants argued that BL 26 and Article 21(b) of the BoR gave the right to vote to permanent residents of the HKSAR. As corporations could never be a permanent resident of Hong Kong, it was unconstitutional for them to vote in elections for the FCs in the LegCo. Both the CFI and the CA upheld the constitutionality of corporate votes.

In dismissing the applicants' appeal, the CA was of the view that BL 26 confers or records one of the rights which is inalienably accorded to permanent residents. It is a right of which they shall not be deprived, which is not the same as saying that the legislature is precluded from conferring a right on others to take part in the conduct of public affairs through elections, so long as the bestowal of that benefit on others accords with the Basic Law (at paragraph 93).

Both the CFI and the CA judgments made extensive reference to the history and the developments of LegCo elections since the 1980s. According to Stock VP (at paragraphs 81 to 85 of the CA judgment):-

"The history which I have summarized is infused with the theme of gradual progress from an appointed legislature to the goal of universal suffrage, a goal deliberately not yet reached. That theme is evident in the reservations to the ICCPR⁶; the announced

intention of their continued application after 1997; Green and White Papers in 1984; the terms of the Basic Law itself in 1990, in particular Art. 68; the 1990 Explanation; and the 2004 Interpretation.

It is a history which carries with it an almost uninterrupted and further theme of participation of major organizations, associations and institutions, as electors: in the papers of 1984; in the Annexes to the Basic Law; in the 1990 Explanation; in the 1996 Measures and the 2004 Interpretation.

Finally, there is in the history repeated expression given to the need for a smooth transition..."

In the light of this history, the CA found that it would have been surprising had the drafters of the Basic Law and those who rendered the Explanations and Decisions thereafter, intended thereby to promulgate and endorse a change as fundamental as the abolition in 1997 of corporate voting for FCs.

In rejecting the applicant's argument, Stock VP also stated (at paragraph 105) that:-

"What is clear is that BL 26 is part of a mosaic which includes BL 45, BL 68 and Annexes I and II to the Basic Law the effect of which is that in the early years of Hong Kong's new constitutional dispensation, there is room for participation through election in public

⁶ In 1976, the Government of the United Kingdom made the following reservation to the ICCPR Article 25(b) when it extended the application of the Covenant to Hong Kong:-

"The Government of the United Kingdom reserve the right not to apply sub-paragraph (b) of Article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong..."



affairs by all permanent residents but for a simultaneous continuation beyond 1997 of corporate participation in such affairs by or through major organizations and associations at elections.”

The applicants’ argument based on BL 25 and Article 1 of the BoR that there was inherent discrimination against individuals who did not have the financial means to own and control companies was also rejected by the CA as it proceeded on a false premise. The qualification for voting is not wealth or the ability to form a company at a given point in time, but rather the recognition as a key player or stakeholder within certain sectors of society (at paragraph 111).

The applicants’ application for leave to appeal to the CFA was refused by both the CA and the Appeal Committee of the CFA. The Appeal Committee noted that the conclusion of the CA

was amply supported not only (and crucially) by the references to the Basic Law, but also by the history of legislative constitutional development in Hong Kong and the relevant extrinsic materials identified by the CA.

Disenfranchisement provisions

Another aspect of our electoral law which has been subject to constitutional challenge is the disenfranchisement provisions. In *Chan Kin Sum Simon v Secretary for Justice* [2009] 2 HKLRD 166, two prisoners serving their sentence in Stanley Prison and a member of the LegCo challenged the now repealed s. 31(1)(a) and (b) and s. 53(5)(a) and (b) of the Legislative Council Ordinance (Cap. 542) as unreasonable restrictions on the right to vote under BL 26 and Article 21 of the BoR. Under these challenged provisions, a person who had been sentenced to death or imprisonment and had not fully served the



sentence or received a free pardon, or who was serving a sentence of imprisonment on the date of application for registration as an elector or on the date of election, was disqualified from being registered as an elector and voting.

According to the CFI, BL 26 does not provide an absolute right. The article has to be read together with Article 21 of the BoR and be subject to “reasonable restrictions”. The CFI was prepared to accept that the disenfranchisement pursued the legitimate aims of preventing crime by sanctioning the conduct of convicted prisoners; giving an incentive to citizen-like conduct, and enhancing civic responsibility and respect for the rule of law (paragraph 88). It, however, held that the existing general, automatic and indiscriminate restrictions on prisoners’ right to register as electors and to vote failed to satisfy the proportionality test and were unconstitutional. Arrangements should be made to enable prisoners to vote on the election day. The CFI also held that arrangements should be made to enable remanded unconvicted persons to vote on the election day whilst being held in custody. For detailed discussion of this case, please refer to the Judgment Update in Issue No.12.

To take forward the court’s judgment, the Government launched a public consultation exercise and, taking into account the views gathered, introduced the Voting by Imprisoned Persons Bill into the LegCo in May 2009. The Bill was enacted into the Ordinance on 24 June 2009. The Electoral Affairs Commission subsequently made the amendment regulations, which were tabled in the LegCo on June 16 and 26, to provide for the practical voting arrangements for prisoners

and remanded unconvicted persons. With the above amendments coming into operation on 30 October 2009, we have in place a clear and integral legal framework for prisoners to register as electors and for electors in custody to vote in public elections.

The right to stand for election

In *Wong Hin Wai & Leung Kwok Hung v Secretary for Justice* (HCAL 51&54/2012) (CFI, 21 June 2012), two applicants were convicted and sentenced to imprisonment for 14 days and 2 months respectively and were granted bail pending appeal. Both of them intended to stand for LegCo election and challenged the constitutionality of the disqualification provisions under s. 39(1)(b) (i) and (d) of the Legislative Council Ordinance (Cap. 542), which bar convicted persons with unserved sentence of imprisonment and persons serving sentence of imprisonment on the date of nomination/election from being nominated as a candidate in the LegCo elections.

On 24 June 2012, the CFI handed down the judgment on the two applications for judicial review. The CFI noted (at paragraph 29) that:-

“Given the distinction between the role of a voter and the role of candidate for LegCo election (who, if elected, would have to perform the duties of a LegCo member), the legitimate aims for which reasonable restriction can be imposed can be different. Thus, the criteria for eligibility for the latter could be considerably stricter than those for the former.”



On the restriction under s. 39(1)(b) on convicted persons with unserved sentence of imprisonment, the CFI accepted that the maintenance of public confidence in LegCo and the election process and the ensuring of proper operation of LegCo were legitimate aims (paragraph 85). While the CFI agreed that disqualification for convicts subject to a lengthy prison sentence could be justified, the Court did not regard s. 39(1)(b) as proportionate measures to pursue the above aims and declared it to be unconstitutional. As regards the restriction under s. 39(1)(d) on persons serving sentence of imprisonment on the date of nomination/election, the CFI noted that the two applicants had been given bail and were not subject to the restriction of s. 39(1)(d). The constitutionality of this provision was left to be considered in the future.

The Government had decided not to appeal against the judgment in order to promote certainty and smooth conduct of the then upcoming LegCo election in September 2012. However, noting that

s. 39(1)(b) was enacted to serve legitimate aims, and there has been a need to carefully re-examine the reasons for and against disqualifying persons to be nominated as candidates, the Government announced the intention to conduct a review on the qualification of persons with unserved prison sentences as candidates for LegCo elections and the related issues at an appropriate juncture and to propose changes to the relevant electoral legislation if necessary. Meanwhile, the 2012 LegCo election was organised in accordance with the prevalent electoral laws, as read with the latest judgment of the CFI.