

立法會
Legislative Council

LC Paper No. CB(2)279/00-01
(These minutes have been seen
by the Administration)

Ref : CB2/BC/13/00

**Legislative Council
Bills Committee on Chief Executive Election Bill**

**Minutes of the ninth meeting
held on Tuesday, 29 May 2001 at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members Present :** Hon IP Kwok-him, JP (Chairman)
Hon James TIEN Pei-chun, JP
Hon Martin LEE Chu-ming, SC, JP
Hon NG Leung-sing
Hon Margaret NG
Hon CHEUNG Man-kwong
Hon HUI Cheung-ching
Hon CHAN Yuen-han
Hon Jasper TSANG Yok-sing, JP
Hon Howard YOUNG, JP
Dr Hon YEUNG Sum
Hon Emily LAU Wai-hing, JP
Hon SZETO Wah
Hon Timothy FOK Tsun-ting, SBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon Michael MAK Kwok-fung
Hon LEUNG Fu-wah, MH, JP
Dr Hon LO Wing-lok
Hon LAU Ping-cheung
Hon Audrey EU Yuet-mee, SC, JP
- Members Absent :** Hon Andrew WONG Wang-fat, JP (Deputy Chairman)
Hon David CHU Yu-lin
Hon Cyd HO Sau-lan
Ir Dr Hon Raymond HO Chung-tai, JP
Hon Eric LI Ka-cheung, JP
Prof Hon NG Ching-fai
Dr Hon Philip WONG Yu-hong

Hon Ambrose LAU Hon-chuen, JP
Hon CHOY So-yuk
Hon Abraham SHEK Lai-him, JP
Hon Tommy CHEUNG Yu-yan, JP

Public Officers : Mr Robin IP
Attending Deputy Secretary for Constitutional Affairs

Ms Doris HO
Principal Assistant Secretary for Constitutional Affairs

Mr Bassanio SO
Principal Assistant Secretary for Constitutional Affairs

Mr James O'NEIL
Deputy Solicitor General (Constitutional)

Mr Gilbert MO
Deputy Law Draftsman
(Bilingual Drafting & Administration)

Ms Phyllis KO
Senior Assistant Law Draftsman

Clerk in : Mrs Percy MA
Attendance Chief Assistant Secretary (2)3

Staff in : Mr Stephen LAM
Attendance Assistant Legal Adviser 4

Mr Paul WOO
Senior Assistant Secretary (2)3

Action
Column

I. Meeting with the Administration

The Administration's responses to issues raised at previous meetings by members on clause 4 of the Bill
(LC Paper Nos. CB(2) 1587/00-01(01) and 1647/00-01(01))

Dr YEUNG Sum expressed concern that the expression "any other circumstances" in the new clause 4(c)(iii) proposed in the Administration's paper (LC Paper No. CB(2) 1587/00-01(01)) would provide the Central People's Government (CPG) with unlimited power to remove the Chief Executive (CE) from office for any reasons.

2. Deputy Secretary for Constitutional Affairs (DSCA) responded that clause 4 was not an empowering provision that conferred additional powers on CPG to remove CE from office. It only reflected all the circumstances under which the office of CE would become vacant. The declaration of a vacancy was the necessary trigger for the holding of an election of a new CE. Clause 4(c)(iii) was a catch-all provision that catered for circumstances which did not fall within clause 4(c)(i) and (ii). The CPG's power to remove CE from office was not unlimited, but subject to the constraints referred to in the Administration's paper.

3. Referring to the Administration's view that situations where a CE was physically or mentally incapable of resigning or where the whereabouts of a CE could not be ascertained did not fall within the scope of clause 4(c)(i) and (ii), Mr CHEUNG Man-kwong said that according to the dictionary XIANDAI HANYU CIDIAN (現代漢語詞典), which was an authoritative Chinese dictionary, "瀆職" had the meaning of "在執行職務時犯嚴重過失" and "不盡職". Thus, the situations quoted by the Administration could be dealt with under the provision relating to dereliction of duty in Article 73(9) of the Basic Law (BL 73(9)) i.e. under clause 4(c)(ii). He further said that under the principle that the Hong Kong Special Administrative Region (HKSAR) should enjoy a high degree of autonomy, the removal of CE from office should be triggered off in accordance with BL before a decision was finally made by CPG. This was the reason for the use of the expression "appoint" in BL articles relating to CE and the use of the expression "appoint and remove" in BL articles relating to principal officials. He considered that clause 4(c)(iii) was unnecessary and inconsistent with the principle under BL of maintaining a high degree of autonomy for HKSAR. His view was shared by Mr SZETO Wah.

4. Mr TAM Yiu-chung disagreed with Mr CHEUNG Man-kwong's view that the two situations quoted in the Administration's paper fell within the meaning of dereliction of duty in BL 73(9). He considered that clause 4(c)(iii) would not undermine the high degree of autonomy of HKSAR.

5. DSCA reiterated that clause 4(c)(iii) was a catch-all provision which dealt with circumstances other than those set out in clause 4(c)(i) and (ii). It might not be appropriate for the situations to be dealt with under BL 73(9), which required the passage of a motion by a majority of Legislative Council (LegCo) Members. He stressed that clause 4(c)(iii) was necessary.

6. Mr Martin LEE said that while BL 52 set out the circumstances under which CE should resign, it made no reference to CPG's power to remove a CE who did not resign under such circumstances. However, it could be noted that under BL 79, the President of LegCo should declare a LegCo Member who was no longer qualified for office under the circumstances set out in the article. This difference in drafting reflected that the absence of a reference to the removal of CE in BL 52 was deliberate. He said that any failure of CE to resign under BL 52 should be dealt with under BL 73(9). Clause 4(c)(iii) would undermine the high degree of autonomy of HKSAR provided under BL.

7. DSCA responded that CPG's power to remove CE flowed from BL. If CE refused to resign in accordance with BL 52, the ultimate enforcement would be through the impeachment procedure under BL 73(9). Deputy Solicitor General (Constitutional) (DSG(C)) added that there might be situations which did not fall within the scope of BL 52 or 73(9). Clause 4(c)(iii) was thus necessary for dealing with such situations.

8. Mr Martin LEE said that whereas the expression "refuses to resign" was used in BL 73(9), the Chinese version of the expression was "不辭職", which covered the situations of "refuses to resign" as well as "unable to resign". Thus, the situations quoted in the Administration's paper could be dealt with under BL 73(9). In this connection, Mr CHEUNG Man-kwong pointed out that the Standing Committee of the National People's Congress had decided that where there were discrepancies in the meaning between the English and Chinese versions of a provision in BL, the meaning of the Chinese version should prevail.

9. Ms Audrey EU said that the word "appoint" should not be interpreted as "appoint and remove", especially in view of the fact that the expression "appoint or remove" was used in BL 48. She considered that if it was really necessary to set out all the circumstances under which the office of a CE became vacant, clause 4(c)(iii) could be deleted with the addition of a new clause 4(d) along the line of "the office being vacant under any other circumstances". This would avoid the need to interpret whether CPG had the power to remove CPG under any circumstances.

10. Ms Emily LAU asked whether clause 4(c)(iii) would have the effect of allowing CPG to remove CE for reasons other than those set out in BL, and whether CPG had the power to remove CE even without clause 4(c)(iii). She pointed out that the argument given by the Administration at previous meetings that a power of appointment included a power of removal under the common law was not found in the Administration's paper and asked whether the Administration still maintained such a view. Referring to page 3 of the Administration's paper, she questioned how the constitutional constraint on CPG's power to remove CE would apply if there was no specific provision in

the Constitution of the People's Republic of China (PRC) that covered the exercise of this power.

11. DSCA reiterated that clause 4 was not an empowering provision. The common law concept was quoted at previous meetings to support the Administration's view about CPG's power to remove CE, which flowed from BL. This power was not unlimited, but subject to the constraints set out in the Administration's paper.

12. In response to Ms Emily LAU's question about the need to ascertain from the Administration on whether the Bill was a piece of constitutional legislation, Assistant Legal Adviser 4 (ALA 4) said that the purposive approach, which was an approach commonly used in the interpretation of a constitutional document, would have to be adopted in the interpretation of the Bill, if it was a piece of constitutional legislation.

13. Miss Margaret NG said that the issue should be examined objectively from a legal point of view. She said that new clause 4(c)(iii) would undermine the high degree of autonomy provided under BL. BL was a constitutional document that should be construed purposively and generously. If a CE failed to resign in accordance with the provisions in BL 52, the ultimate enforcement would be through the impeachment procedure under BL 73(9). Thus, if a CE was seriously ill and unable to resign, the issue could be dealt with under BL 73(9).

14. Mr Howard YOUNG said that if CPG had the power to remove CE from office, such a power should not be denied merely because it was not expressly provided in BL. He asked whether CPG had the power to remove a CE who suddenly declared Hong Kong independent, or who was appointed by another country which conquered Hong Kong. He suggested that the removal of CE under any other circumstances be amended to read "any other circumstances under the BL."

15. Mr NG Leung-sing said that while the scope of clause 4(c)(iii) might be a bit broad, it was clearly provided in BL 73(9) that the ultimate decision to remove CE from office rested with CPG.

16. ALA 4 drew members' attention to the new clause 4(c)(i) which contained the additional expression "or otherwise" after "upon his resignation under BL 52". This additional expression was not found in BL.

17. Mr CHEUNG Man-kwong said that CPG had stated that the HKSAR would serve as an example, especially before the people of Taiwan, of how the principle of "one country, two systems" would be implemented. If a CE could be removed by CPG under any circumstances, it would be very difficult for the people of Taiwan to have confidence in the implementation of the principle of

"one country, two systems". Thus, it would be unwise to introduce clause 4(c)(iii) merely for the purpose of setting out all the circumstances under which the office of CE would become vacant.

18. Mr Martin LEE said that according to the Concise Oxford Dictionary, the expression "dereliction of duty" in BL 73(9) had the meaning of "neglect to carry out one's duty" as well as "failure to carry out one's duty". It therefore contained the meaning of "inability to carry out one's duty". The expression "refuses to resign" in BL 73(9) could not deal with the situation where a CE was incapable of carrying out his duty.

19. Ms Emily LAU suggested that legal professionals and academics should be invited to give written views on clause 4 of the Bill and the Administration's revised proposal, as well as related issues such as whether CPG had the power to remove CE, whether clause 4 would undermine the high degree of autonomy of HKSAR and whether the clause was in contravention of BL. Miss Margaret NG said that the views of experts in constitutional law should also be sought. She added that views should also be sought on Ms Audrey EU's proposal on clause 4 in addition to the Administration's proposal. Mr CHEUNG Man-kwong considered that the Administration should also be invited to comment on Ms EU's proposal. Members agreed. They also agreed that a meeting with deputations would be considered, if necessary and upon the request of deputations.

Deliberations on other areas of the Bill

Nomination

20. At the invitation of the Chairman, DSCA explained that a nomination of a candidate should be made by not less than 100 members of the Election Committee (EC). It should be accompanied by a declaration to the effect that the candidate would uphold BL and pledge allegiance to the HKSAR. These requirements were consistent with those under BL 104 and Annex I to BL. The Administration proposed that the Returning Officer should publish by notice in the Gazette within seven days after the close of nominations the names of all validly nominated candidates and the names of EC members who nominated these candidates.

21. On the proposal to make public the names of the subscribers to candidates, Mr NG Leung-sing said that some EC members in the commercial sector had expressed concern that a subscriber for an incumbent CE seeking re-election might be subject to allegations of being given preferential treatment if the subscriber, say, bid for government projects or contracts.

22. DSCA responded that the proposal would ensure that the election was transparent, open and fair. It was consistent with the practice adopted for the

LegCo elections and District Councils (DC) elections.

23. Mr Martin LEE said that a former LegCo Member had pointed out that under the nomination arrangements for the selection of the first CE, a first round of election was conducted by secret ballot and candidates with 50 votes or more were eligible to stand for the second round of election. These were different from the arrangements proposed in the Bill. He said that the proposal might create pressure on EC members to nominate a candidate favoured by CPG so as to demonstrate their allegiance. He said that a transparent and open nomination process would not be meaningful if the election itself was not democratic, open and transparent. Moreover, the proposal would discourage EC members from nominating candidates other than those favoured by CPG.

24. Mr Martin LEE further said that the CE election differed from other elections in that CPG had expressed support for a potential candidate. He stressed that a subscriber would be subject to political pressure if his name was made public.

25. DSCA responded that in drawing up the proposal under the Bill, consideration had been given to the method for the selection of the first CE of HKSAR. The Administration considered that the proposal was consistent with the practice for the elections of other tiers of representative government in Hong Kong and should therefore be adopted.

26. Miss CHAN Yuen-han considered that a nomination system should be open and transparent. She said that if the business sector had serious concerns about the proposed arrangement, they should submit their views for members' consideration.

27. Ms Emily LAU said that a transparent and open nomination process would be meaningless if the CE election was a "small circle" type of election with its electorate confined to a 800-member EC.

(Post-meeting note : The paper submitted by the Administration in response to the issues raised by members was circulated vide LC Paper No. CB(2) 1782/00-01 on 9 June 2001.)

II. Date of next meeting

28. The Chairman reminded members that the next meeting would be held on 31 May 2001 from 8:30 am to 12:45 pm. He requested the Administration to provide a legislative timetable for the introduction of subsidiary legislation relating to the CE election. DSCA agreed.

Action
Column

(*Post-meeting note* : The legislative timetable provided by the Administration was circulated vide LC Paper No. CB(2) 1796/00-01 on 11 June 2001.)

29. The meeting ended at 10:25 am.

Legislative Council Secretariat
5 November 2001