

立法會
Legislative Council

LC Paper No. CB(2)280/00-01
(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 tenth meeting
held on Thursday, 31 May 2001 at 8:30 am
in the Chamber of the Legislative Council Building

Members Present : Hon IP Kwok-him, JP (Chairman)
Hon James TIEN Pei-chun, JP
Hon David CHU Yu-lin
Hon Martin LEE Chu-ming, SC, JP
Hon NG Leung-sing
Prof Hon NG Ching-fai
Hon Margaret NG
Hon CHEUNG Man-kwong
Hon HUI Cheung-ching
Dr Hon Philip WONG Yu-hong
Hon Jasper TSANG Yok-sing, JP
Hon Howard YOUNG, JP
Dr Hon YEUNG Sum
Hon Ambrose LAU Hon-chuen, JP
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk
Hon SZETO Wah
Hon Timothy FOK Tsun-ting, SBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon LEUNG Fu-wah, MH, JP
Hon LAU Ping-cheung
Hon Audrey EU Yuet-mee, SC, JP

Members Absent : Hon Andrew WONG Wang-fat, JP (Deputy Chairman)
Hon Cyd HO Sau-lan
Ir Dr Hon Raymond HO Chung-tai, JP
Hon Eric LI Ka-cheung, JP

Hon CHAN Yuen-han
Hon Michael MAK Kwok-fung
Hon Abraham SHEK Lai-him, JP
Hon Tommy CHEUNG Yu-yan, JP
Dr Hon LO Wing-lok

Public Officers : Mr Michael M Y SUEN, GBS, JP
Attending Secretary for Constitutional Affairs

Mr Robin IP
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

I. Meeting with the Administration

Matters arising from previous meeting
(LC Paper No. CB(2)1677/00-01)

Vacancy in office (clause 4)

The Chairman informed members that in accordance with the decision taken by the Bills Committee at the last meeting held on 29 May 2001, the Secretariat had written to the legal professional bodies and academics to seek their views on the implications of clause 4 of the Bill, in particular clause 4(c) concerning revocation of the appointment of the Chief Executive (CE) by the Central People's Government. They had been requested to submit their views by 10 June 2001 so that the Bills Committee could consider the views at the meeting on 12 June 2001.

2. Miss Margaret NG referred to the paper prepared by the Legal Services Division of the LegCo Secretariat on "Power of the Central People's Government under the Basic Law to revoke the appointment of the Chief Executive" (LS102/00-01 circulated under LC Paper No. CB(2)1677/00-01 dated 30 May 2001). She said that she had discussed the paper with some legal experts who had reservations about the arguments put forward in the paper and the conclusion reached. She considered that the paper should be carefully discussed.

3. The Chairman said that it would be more appropriate to defer discussion of the paper to the meeting on 12 June 2001 so that all the views received by the Bills Committee on the issue could be considered in a focused manner.

4. In response to members, Secretary for Constitutional Affairs (SCA) said that the Administration would consider all the views carefully and propose amendments to clause 4 of the Bill where necessary.

5. At the suggestion of Ms Emily LAU, the Chairman asked the Administration to provide extracts of law specifying the circumstances under which the office of the head of state became vacant in some overseas countries.

Withdrawal of candidature

6. Some members said that the major concern about the introduction of a mechanism to allow withdrawal of candidature after the close of nominations was that it could lead to corrupt practice at election. Mr CHEUNG Man-
kwong pointed out that the withdrawal mechanism together with the provision in clause 22 which allowed the only candidate to be returned at an election would make corrupt or unfair practices possible.

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7. Mr TAM Yiu-chung expressed the view that prohibiting candidates to withdraw from candidature would not completely solve the problem of corrupt or unfair practices. He said that for instance, a candidate could openly urge the voters not to vote for him. That could in effect promote the election of another candidate.

8. SCA said that existing anti-corruption legislation could prevent corrupt and illegal conduct at elections. Deputy Solicitor General (Constitutional) (DSG(C)) pointed out that a wide definition of "advantage" was provided under the Elections (Corrupt and Illegal Conduct) Ordinance (ECICO). Under the definition, advantage included, inter alia, "any valuable consideration, gift or loan; or any office, employment or contract; the performance or forbearance from performing a duty; any favour or any other service" etc. Moreover, a person would be regarded as engaged in corrupt conduct under the ECICO if he offered an advantage to a candidate as an inducement for him not to use his best endeavours to promote his own candidature.

9. Members requested the Administration to provide relevant information on practices in overseas countries. SCA replied that a withdrawal mechanism was not common in overseas countries, but undertook to provide any useful information if available.

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Voting method

10. SCA said that the voting method proposed in the Bill, which was used for the election of the first term CE, was a common system adopted in many countries such as France, Finland, Brazil, Russia and Peru. He said that the procedures and voting system introduced in the Bill were designed to deal with all foreseeable situations which might occur during a poll.

11. In response to members, SCA added that as the number of candidates standing for the CE election would not be large, it was unlikely that there would be numerous rounds of voting in the election.

12. In response to Ms Emily LAU, SCA said that clause 22 of the Bill, which specified that the only candidate should be returned, followed the practice for the LegCo and District Councils elections. The Administration saw no need to adopt another system for the CE election.

13. Miss Margaret NG pointed out that clause 26(1) of the Bill specified that a candidate should be returned at the election if the candidate received more than half of the total number of valid votes cast. She asked whether it would be acceptable, from the policy point of view, if a candidate was returned at an election where the number of valid votes cast was disproportionately small, e.g. less than 400 votes.

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14. SCA responded that the requirement of clause 26(1) served the purpose of ensuring that the election could proceed smoothly. He said that the prospect of a low voter turnout rate was highly unlikely, if not impossible.

Election petitions and judicial review

(LC Paper No. CB(2)1352/00-01(02))

15. Members noted item 2 of the above paper submitted by the Administration, which explained the differences between the leapfrog procedures proposed in the Bill vis-à-vis that proposed in the Court of Final Appeal (Amendment) Bill 2001 to be introduced.

Election expenses limit

(LC Paper No. CB(2)1235/00-01(01))

16. SCA advised that having regard to the collective views expressed, the Administration would reconsider the need for setting a ceiling on election expenses. He added that if it was eventually agreed that a ceiling should be set, the limit would be prescribed by regulation subject to negative vetting by LegCo, after the Bill was passed by LegCo.

17. In reply to members' enquiry about whether the election expenses limit should be specified in principal legislation, SCA said that the relevant enabling provision was section 45 of the ECICO, which provided that election expenses limits be prescribed by subsidiary legislation.

18. Dr YEUNG Sum and Ms Emily LAU supported the setting of a ceiling on election expenses to ensure that the chance of a candidate getting elected would not be unfairly prejudiced because of limited financial means. Mr James TIEN considered that the absence of an election expenses limit might not necessarily work to the advantage of candidates with better financial means. He said that there might not be a consensus view among LegCo Members on this issue. Mr NG Leung-sing said that an election expenses limit, if found to be necessary, should be set objectively and acceptable to the public. Ms Emily LAU opined that the size of the electorate, i.e. the number of members of the Election Committee (EC), should be a relevant factor for deciding on the level of the ceiling.

19. Miss Margaret NG opined that in the absence of an election expenses limit, detailed guidelines to regulate electioneering activities became all the more important to ensure that an election would be conducted fairly. SCA responded that the Electoral Affairs Commission (EAC) would promulgate guidelines in this respect.

Adm 20. The Administration was requested to provide a written response to the following issues for further consideration of the Bills Committee -

- (a) the Administration's concluded view on whether a ceiling on election expenses should be set for the CE election; and
- (b) whether other democratic countries imposed a ceiling on election expenses for the election of the head of state and if so, the level of the ceiling.

Applicability of anti-bribery legislation to CE election

(LC Paper No. CB(2)1217/00-01(03))

21. The Administration advised that the ECICO was applicable to the CE election. Section 11 of the ECICO, in particular, provided that a person engaged in corrupt conduct if he, without reasonable excuse, offered an advantage to a person as an inducement to vote (or not to vote) or as a reward for having voted (or having not voted) for a particular candidate. It was also an offence for a person to solicit or accept such advantage. The Administration believed that the ECICO, together with the technical amendments to it proposed in the Bill, provided effective measures to prevent corrupt and illegal conduct in the CE election.

22. Assistant Legal Adviser informed members that a marked-up copy of Part 8 of the CE Election Bill (Consequential Amendments) would be provided for members' reference.

(Post-meeting note - The marked-up copy was issued vide LC Paper No. CB(2)1711/00-01(01).)

23. Mr Martin LEE said that a situation might arise where certain member(s) of the Election Committee could approach an incumbent CE seeking re-election, and hinted at him that by taking a certain course of action, such as in relation to a certain Bill, it could have a bearing on his chance of winning at the election. He doubted whether acts of this kind could be caught by the existing anti-bribery legislation.

24. DSG(C) considered that the above situation could be dealt with under the definition of "advantage" in the ECICO, which included, among other things, "the exercise of or forbearance from exercising a right or power", or "the performance of or forbearance from performing a duty".

25. Some members pointed out that certain provisions of the Prevention of Bribery Ordinance (POBO), which specifically applied to government officers, did not apply to the CE because of his constitutional status. This could open a gap for corrupt or illegal conduct at the CE election. To close the potential gap, the POBO should be amended early.

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26. SCA responded that the issue of amending the POBO to make it applicable to the CE was being considered in detail by the Administration and the LegCo Panel on Constitutional Affairs. The Administration would expedite the process of drafting the relevant legislative proposals. SCA added that the POBO did not specifically deal with corrupt acts at elections. He saw no need to deal with the matter of amendment of the POBO and the CE Election Bill at the same time.

27. SCA added that the general provisions of the POBO applied to all including the CE. Furthermore, Article 47(1) of the Basic Law required that the CE must be a person of integrity, dedicated to his or her duties. A breach of Article 47(1) could lead to the impeachment procedure under Article 73(9) of the Basic Law.

28. Some members said that as certain provisions of the POBO did not at present applied to the CE and there was a possibility that the incumbent CE would stand for the election in 2002, there was a pressing need to amend the POBO to extend its applicability to CE so that the new legislative framework could be brought into operation before the next CE election. They also said that it was an unsatisfactory situation that CE was only subject to the common law or the general provisions of the POBO, the requirements of which were less stringent than that applicable to government officers.

29. Some members further pointed out that the ECICO only regulated corrupt and illegal conduct at election but not acts of a serving CE who had yet to declare candidacy. Also, Article 47(1) of the Basic Law was not a criminal offence provision. Law enforcement authorities such as the Independent Commission Against Corruption could not investigate or prosecute on the basis of Article 47(1) of the Basic Law.

30. DSG(C) said that the offence provisions in ECICO did not just cover activities during the election period. He pointed out that section 6(2) of the ECICO stated that a person might be convicted of an offence of having engaged in corrupt conduct at an election if the person was found to have engaged in the conduct before, during or after the election period. Also, sections 7 to 9 of the ECICO dealt with conduct not just of bribing a candidate but also prospective candidates, i.e. a person who had not yet declared the intention to stand in the election.

31. In response to members, SCA said that he could not make any definite commitment on when amendments to the POBO could be completed because the work also involved other policy Bureaux. He undertook to convey members' concern to the relevant policy Bureaux for consideration.

32. The Chairman suggested that the issue of amendment of the POBO could be followed up by the Panel on Constitutional Affairs.

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Regulation of election-related activities
(LC Paper No. CB(2)1235/00-01(01))

33. In response to members' queries concerning regulation of electioneering activities of an incumbent CE, SCA said that the essential principle was that there should be a differentiation between the official duties of the CE and the activities undertaken by the CE as a candidate for the CE election. Given the constitutional role of the CE, an incumbent CE must continue to perform his official duties during the election period. In the interests of fairness, however, safeguards should be put in place to ensure a level playing field for all candidates in conducting electioneering activities. He said that if an incumbent CE sought re-election, he would consider whether an independent election office should be set up for the specific purpose of handling electioneering matters.

34. SCA further advised that the EAC was committed to ensuring that a fair, open and honest election would be conducted. It would set out in the electoral guidelines for the CE election the practical arrangements and would consult the public on the proposed guidelines.

35. Ms Emily LAU and Mr SZETO Wah expressed the view that arrangements should be made for candidates for the CE election to debate issues of public interest or importance in telecast programmes. Even if there was only one candidate standing for election, the candidate should also appear in public fora to explain his election platform and to answer questions from members of the public.

Adm 36. The Administration was requested to provide information on how electioneering activities of an incumbent head of state seeking re-election were regulated in some overseas countries

Participation of senior government officials in electioneering activities of CE election
(LC Paper No. CB(2)1235/00-01(01))

37. Ms Emily LAU pointed out that comments had recently been made by senior leaders of the People's Republic of China which were seen as clear indication that they were in support of the incumbent CE seeking re-election to the second term. She asked how the Administration would ensure that senior civil servants were well aware of the restrictions on them regarding participation in electioneering activities to avoid giving the public the impression that they were using their positions to promote, or influence, the election of a particular candidate.

38. SCA advised that the Civil Service Bureau (CSB) had issued a circular on the participation of civil servants in electioneering activities for the LegCo

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election. The circular provided that certain officers at the senior level and those who might be particularly susceptible to accusations of bias because of the nature of their duties were prohibited from participating in any form of electioneering activities. The CSB would issue a circular of similar nature for the purpose of the CE election in due course. He added that an underlying principle was that a balance should be struck between the need for civil servants to remain impartial and to enjoy the same rights as any other people such as freedom of expression.

39. SCA further advised that the EAC had recommended that the electoral guidelines should be extended to cover the participation of senior government officials at functions, in public or otherwise, during the election period. The EAC would conduct a public consultation before promulgating the relevant guidelines.

40. The Administration was requested to explain in writing how it would regulate the situations of government officials expressing views at public or other functions which could be seen as in support or otherwise of a particular candidate for the CE election, and whether the Administration would consult LegCo Members on the circular to be issued by CSB on participation of civil servants in electioneering activities for the CE election.

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Winning candidate to declare he was not a member of political party (clause 32)

41. Dr YEUNG Sum said that the Democratic Party was of the view that clause 32 did not serve any meaningful purpose but to discriminate against political parties and derogate their roles and functions. He considered that clause 32 should be removed from the Bill. Ms Emily LAU expressed similar views. She said that clause 32 carried an implication that a political party would manipulate the CE to pursue its own selfish interests. This would impede the development of political parties in Hong Kong. She also queried whether the requirement of clause 32 was in contravention of the right to association which was a basic human right.

42. SCA responded that the purpose of clause 32 was to ensure that the CE would be independent from any political party, so that he could act impartially in performing his unique constitutional functions. He said that the blueprint for the development of the political structure of the Hong Kong Special Administrative Region (HKSAR) was laid down in the Basic Law, which envisaged changes over time in a gradual and orderly fashion, and having regard to the prevailing actual situation of Hong Kong. He said that the political institutions of the HKSAR were still in an evolutionary stage. Political parties were still at an early stage of development. To enable the CE to act in the best interests of the whole community without divided loyalties or conflict of interest, it was necessary to ensure that his relationship with any political

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party, if any, be severed.

43. SCA further said that the political structure of Hong Kong would be reviewed in accordance with the principle of gradual and orderly progress. The question of CE's membership of a political party would be reconsidered in due course in the light of the prevailing circumstances.

44. Dr YEUNG Sum said that Article 45 of the Basic Law provided a framework for democratic development in Hong Kong, and a process under which the CE would eventually be elected by universal suffrage. Yet, no requirements similar to that prescribed in clause 32 of the Bill were found in the Basic Law. He considered that clause 32 was absolutely unnecessary.

45. Dr YEUNG Sum further pointed out that the Democratic Party had conducted an opinion survey on the matter. The result showed that the majority view of the respondents was that a CE's membership of a political party would not necessarily affect his dedication to act in the overall interests of the community. Mr James TIEN also opined that the two bore no direct causal relationship.

46. Mr Martin LEE considered that clause 32 was wholly ineffectual. He said that no one would believe that a person who had won in a CE election with the support of a political party would sever any connection whatsoever with the political party on becoming the CE. He further said that the argument that the question of CE's membership of a political party should be considered in the light of the level of maturity of political parties in Hong Kong could not stand. He queried whether the Administration could draw similar reference from other democratic countries.

47. Members requested the Administration to provide legal advice to confirm that the proposal to require a winning candidate to declare he was not a member of political party was in compliance with the Basic Law and the International Covenant on Civil and Political Rights.

Adm

II. Any other business

Timetable for the 2002 CE election (LC Paper No. CB(2)1677/00-01(01))

48. Members noted the Administration's paper which set out the items of work for the 2002 CE election and the timing for completion of the work. SCA said that the Administration wished to have the Second Reading debate of the Bill resumed at the LegCo meeting on 11 July 2001, which would be the last Council meeting before the summer recess.

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Committee Stage amendments

49. The Chairman requested members to submit Committee Stage amendments as soon as possible so as to allow sufficient time for the Bills Committee to consider the proposals.

III. Date of next meeting

50. The next meeting was scheduled for 5 June 2001 at 8:30 am.

51. The meeting ended at 12:40 pm.

(Post-meeting note - The papers submitted by the Administration in response to the issues raised by members were circulated vide LC Paper Nos.CB(2)1774/00-01(01) and 1782/00-01(01))

Legislative Council Secretariat

5 November 2001