

立法會
Legislative Council

LC Paper No. CB(2)61/01-02
(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 twelfth meeting
held on Tuesday, 12 June 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
Ir Dr Hon Raymond HO Chung-tai, JP
Hon Martin LEE Chu-ming, SC, JP
Hon Eric LI Ka-cheung, JP
Hon NG Leung-sing
Prof Hon NG Ching-fai
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 Abraham SHEK Lai-him, JP
Hon Michael MAK Kwok-fung
Hon LEUNG Fu-wah, MH, JP
Hon LAU Ping-cheung
Hon Audrey EU Yuet-mee, SC, JP

Members: Hon Andrew WONG Wang-fat, JP (Deputy Chairman)
Absent Hon Cyd HO Sau-lan
Hon David CHU Yu-lin
Hon CHOY So-yuk
Dr Hon Philip WONG Yu-hong
Hon Ambrose LAU Hon-chuen, 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

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

Mr Lawrence PENG
Senior Government Counsel

Attendance : Hong Kong Bar Association
by Invitation Mr Johannes CHAN

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

Staff in : Mr Jimmy MA
Attendance Legal Adviser

Mr Stephen LAM
Assistant Legal Adviser 4

Mr Raymond LAM
Senior Assistant Secretary (2)5

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I. Confirmation of minutes of meeting held on 28 March 2001
(LC Paper No. CB(2) 1751/00-01)

The minutes of the meeting held on 28 March 2001 were confirmed.

II. Meeting with representative of the Hong Kong Bar Association and the Administration
(LC Paper Nos. CB(2) 1774/00-01, 1782/00-01, 1786/00-01 and 1796/00-01)

2. Members noted the written submissions from Mr Eric T M CHEUNG and the Law Society of Hong Kong on clause 4 of the Chief Executive Election Bill (the Bill). They also noted the Administration's responses to issues raised at previous meetings.

Clause 4 of the Bill

3. At the invitation of the Chairman, Mr Johannes CHAN presented the views of the Hong Kong Bar Association (the Bar), as detailed in the submission tabled at the meeting, on clause 4 of the Bill.

(Post-meeting note : The Bar's submission tabled at the meeting was subsequently circulated to members vide LC Paper No. CB(2)1810/00-01 on 13 June 2001.)

4. Mr CHEUNG Man-kwong sought the Bar's view on the Administration's revised proposal on clause 4 as set out in the Administration's paper (LC Paper No. CB(2) 1782/00-01(01)). Mr Johannes CHAN made the following comments -

- a) clause 4(a) and (b) was considered uncontroversial and acceptable to the Bar;
- b) an additional provision should be inserted after proposed clause 4(b) to provide for the resignation of CE under Article 52 of the Basic Law (BL 52), and the resignation of CE under other circumstances which should take effect upon acceptance by the Central People's Government (CPG). The wording was set out in paragraph 4 of the Bar's submission;

- c) clause 4(c)(i) - "Upon his resignation under BL 52 or otherwise" - should be amended to read "when the Chief Executive should have resigned under Article 52 of the Basic Law but is unwilling or unable to do so because of illness or otherwise";
- d) clause 4(c)(ii) concerning BL 73(9) was considered acceptable; and
- e) clause 4(c)(iii) - "under any other circumstances consistent with the Basic Law" - was considered unnecessary and should be deleted. Mr CHAN added that this clause gave CPG unlimited power to remove CE. While the Administration had cited situations to support the need for clause 4(c)(iii), he pointed out that the scope of BL 52 and BL 73(9) was wide enough to cover such situations. In addition, unlike proposed clause 4(c)(iii), a proper procedure was prescribed under BL 73(9) for removal of CE.

5. Secretary for Constitutional Affairs (SCA) said that there was not much difference between the Bar's views and those of the Administration on clause 4 of the Bill. The Administration shared the view that CPG's power to remove the CE from office was not unrestricted. The main question was how such a power was restricted and how the restriction should be reflected in the Bill. He informed members that the Administration was working on further amendments to clause 4, and would provide the relevant Committee Stage amendments for discussion at the meeting to be held on 19 June 2001.

6. Mr CHEUNG Man-kwong said that the removal of CE from office should be made in accordance with BL. The scope of BL 52 and BL 73(9) was wide enough to cater for most circumstances under which the office of CE would become vacant, so long as the terms "dereliction of duty" and "serious breach of law" referred to in BL 73(9) could be more clearly defined in the Bill. He further said that with clause 4(c)(iii), CPG could request the Standing Committee of the National People's Congress (NPCSC) to give an interpretation on any article of BL and use the interpretation to remove CE from office. He added that clause 4(c)(iii) was unnecessary, as CPG was entitled to exercise its power to remove CE under the Constitution of the People's Republic of China (the PRC Constitution) regardless of whether there was clause 4(c)(iii).

7. SCA asked members whether they agreed that CPG was empowered under the PRC Constitution to remove CE from office. He said that this was the main reason for the Administration's revised proposal on clause 4(c).

8. Dr YEUNG Sum considered it inappropriate to conclude whether CPG had such a power at this stage. He suggested that the discussion of the Bills Committee should be confined to BL and the circumstances under which the office of CE became vacant under clause 4. He said that issues related to the PRC Constitution should be dealt with separately and in the presence of experts in the PRC Constitution.

9. SCA responded that the two issues were related, as a vacancy would arise if CPG exercised its power to remove CE from office. The Administration had stressed many times 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.

10. Mr CHEUNG Man-kwong said that CPG's power in respect of HKSAR under the PRC Constitution had already been incorporated in BL through Article 31 of the PRC Constitution. The removal of CE from office should be dealt with in accordance with BL, i.e. BL 52 and BL 73(9).

11. Ms Emily LAU sought the Bar's view on whether CPG had the power to remove CE from office under the PRC Constitution and, if so, the article in the PRC Constitution that conferred such a power. She also asked whether such a power was conferred under Article 63 of the PRC Constitution.

12. Mr Johannes CHAN said that he shared the view that the Bill should be based on BL rather than the PRC Constitution. As regards the interpretation of the PRC Constitution, he said that some parts of the PRC Constitution were unclear and there were not many precedents. Moreover, it should be noted that there were differences between the PRC Constitution and common law. There were also different legal views within the Bar about the interpretation of the PRC Constitution. Even if CPG had the power to remove CE from office, there was still the question of which article in the PRC Constitution conferred such a power, as no reference was made to CE in the PRC Constitution. Article 63 of the PRC Constitution provided for an express power of NPC to remove officers of various constitutional offices from office. It was not certain whether this article could be interpreted as having implied power to remove CE. Another article that possibly could confer CPG with such power was Article 89(17) of the PRC Constitution. Mr CHAN considered that it would be unwise to try interpreting the PRC Constitution and incorporate such an interpretation in the Bill. He reiterated that clause 4(c)(iii) was not necessary. As the power to remove CE from office was an important one, a clear mechanism should be established for the exercise of such a power. However, clause 4(c)(iii) seemed to provide a summary procedure for removal. He added that the reference to "serious breach of law" in BL 73(9) included the

laws of HKSAR. Thus, the duties and requirements in respect of CE could be set out in detail in local legislation. Any breach of local legislation by CE could be dealt with under BL 73(9).

13. Ms Emily LAU sought the Bar's view on the suggestion in paragraph 11 of Mr Eric T M CHEUNG's submission (LC Paper No. CB(2)1774/00-01(02)) that in case CE wished to resign, his resignation should be accepted by the Legislative Council (LegCo) by way of a resolution before the matter was reported to CPG for a decision to remove him. Mr Johannes CHAN responded that he had yet to study the submission of Mr CHEUNG. The Bar had not studied the issue of requiring in law that LegCo had a role to play in the resignation of CE. From a legal point of view, there was no such requirement in BL. Nevertheless, there might be a need for CE to provide an explanation for his resignation to LegCo for political reasons.

14. Referring to paragraphs 11 to 15 of the Bar's submission, Ms Emily LAU pointed out that the Bar took a different view from that of the Administration in respect of CPG's power to remove CE from office under the common law.

15. On SCA's remark in paragraph 7 above, Ms Emily LAU said that having regard to the Bar's view, the issue of whether CPG had power under the PRC Constitution to remove CE from office should be further deliberated.

16. SCA stressed 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. He said that as there were different views on the issue, the Administration would re-examine the issue and consider further revising clause 4.

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17. Mr SZETO Wah said that BL 18 provided that national laws should not be applied in HKSAR except for those listed in Annex III to BL. It did not provide for the PRC Constitution to be applied in HKSAR. Many problems would arise if the PRC Constitution would apply to HKSAR. He considered that the incorporation of clause 4(c)(iii) in the Bill, which sought to provide for the application of PRC Constitution in HKSAR, was inappropriate and in contravention of BL 18.

18. SCA disagreed with the view of Mr SZETO Wah. He said that if CPG had the power to remove CE from office, HKSAR should not enact legislation to restrict the exercising of such a power.

19. Mr SZETO Wah commented that CPG's power in respect of HKSAR was set out in BL. He said that CPG should comply with BL, which was

different from the PRC Constitution. SCA responded that the power to which he referred was CPG's power under BL.

20. Miss Margaret NG considered that HKSAR was not empowered to entrench CPG's power under the PRC Constitution in local legislation. She said that CPG's powers as provided under the PRC Constitution were applied in HKSAR through BL, which was enacted in accordance with Article 31 of the PRC Constitution. She suggested that the Administration should study a speech made by Mr QIAO Xiao-yang of NPCSC at the tenth anniversary of the promulgation of BL, which clarified that CPG's powers in respect of HKSAR under the PRC Constitution were restrained by BL.

21. Miss Margaret NG asked whether clause 4(c)(iii) would have the effect of permitting acts not prohibited in BL. Mr Johannes CHAN responded that there was such a possibility, as many issues were not covered by BL. The Bar was concerned that clause 4(c)(iii) might go beyond the original intent of the Administration and become a power of removal under summary procedures. Thus, the Bar considered that clause 4(c)(iii) was not justified and should be deleted. The Administration's concerns could be addressed through other means.

22. Dr YEUNG Sum said that it was most important for a procedure to deal with a vacancy in the office of CE to be put in place. Clause 4(c)(iii), which had a wide scope, was unacceptable.

23. Ms Audrey EU asked whether the Bar's suggestions in respect of clause 4 could address all the Administration's concerns. SCA responded that the Administration would need to carefully study the Bar's submission.

24. Referring to the Bar's suggestion that clause 4(c)(i) should be amended to read "when the Chief Executive should have resigned under Article 52 of the Basic Law but is unwilling or unable to do so because of illness or otherwise", Miss Margaret NG asked whether it should be revised to avoid using the words "should have resigned" or "unwilling or unable to do so". Referring to BL 73(9), she pointed out that the meaning of "不辭職" in the Chinese text was inconsistent with that of "refuses to resign" in the English text.

25. Mr Johannes CHAN responded that it would be more appropriate for the meeting to discuss policy issues and leave the refinement of wordings to the drafting experts of the Administration. He said that the drafting of the proposed clause 4(c)(i) had provided flexibility for addressing situations where the removal of CE was necessary because CE was unable to discharge his duties or was unable to resign. It had already catered for various foreseeable situations.

26. Ms Emily LAU said that a CE could resign in situations not covered by BL 52. She asked whether a mechanism should be provided for a CE to explain the reasons of his resignation to LegCo and the public.

27. SCA responded that it should be up to a CE to decide whether to disclose his personal reasons for resignation. He considered it unnecessary to make such disclosure a requirement in law.

Clause 11 of the Bill

28. Referring to LC Paper No. CB(2)1782/00-01(01), Mr CHEUNG Man-kwong invited the Bar's view on the Administration's proposal to amend clause 11 to deal with the situation where it was necessary to hold a new election because -

- a) the CE election failed, e.g. the death of all candidates; and
- b) the CE-elect could not assume office.

Mr Johannes CHAN said that he had yet to examine the issue in detail.

29. In response to Mr CHEUNG Man-kwong's question about a candidate returned at an election not being able to assume office because an instrument of appointment had yet to be issued by CPG, SCA said that if such a situation occurred, he believed that CPG would explain its reason for not making the appointment. However, he pointed out that the matter raised was outside the scope of the Bill.

30. SCA explained that the Administration proposed to delete clause 11(2) and to provide under clause 4 that, if the CE-elect could not assume office upon the expiry of term of the CE or upon the expiry of the six-month period when the office first became vacant, the office of the CE would become vacant and an election would be held on the first Sunday 120 days after the office of the CE became vacant.

31. Miss Margaret NG said that it was inappropriate to categorise the situation described as a vacancy in the office of CE. She considered that since the CE was elected but not yet appointed, it was a situation where the office of the CE "remained vacant" rather than "became vacant". Mr SZETO Wah shared Miss NG's view. He added that situations where the CE-elect could not assume office because an instrument of appointment was not issued by CPG could be covered by clause 4(a). It was unnecessary to make separate provision for such situations.

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32. SCA responded that the Administration's response only sought to spell out the approach in addressing the issue. The Administration would consider members' views in drafting the relevant amendments.

33. Referring to the Administration's proposed amendment to clause 11, Ms Emily LAU questioned why a new election to cater for the situation described in paragraph 28(a) above was proposed to be held 42 days after the election failed, while a new election to cater for the situation described in paragraph 28(b) above was proposed to be held on the first Sunday 120 days after the office of the CE became vacant. She considered that the lead time of 120 days should apply to an election held under both situations. Mr CHEUNG Man-kwong and Ms Audrey EU held the same view.

Clause 22 of the Bill

34. Referring to clause 22 of the Bill, Ms Audrey EU expressed concern that if all candidates except one died, the remaining candidate would be declared returned at the election. She said that a potential candidate might decide not to run for an election so that his supporters would vote for another candidate. She considered that a new election should be held in the event that all candidates except one died. Her view was supported by Mr James TIEN, Mr SZETO Wah and Miss Margaret NG. Mr TIEN further suggested that a new election should also be held even in a situation where more than two candidates were validly nominated and only one died. Mr SZETO said that with the current drafting of clause 22, there was a possibility that a candidate might cause other candidates to die in order to be returned at the election. Miss NG added that it was important for the candidate returned at the election to be widely accepted by electors.

Adm 35. SCA undertook to consider the views and suggestions made by members.

(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)1876/00-01 on 18 June 2001.)

Other issues

36. Legal Adviser sought the Bar's view on whether the decision of LegCo to charge CE with serious breach of law or dereliction of duty, and whether a failure on the part of LegCo to trigger off the impeachment mechanism for whatever reasons under BL 73(9), was subject to judicial review. Mr Johannes CHAN responded that he would need more time to examine the issue which was complicated. To his knowledge, issue of such a nature was usually dealt with in a constitutional court.

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III. Date of next meeting

37. The Chairman reminded members that the next meeting would be held at 12:45 pm on the same day.

38. The meeting ended at 10:30 am.

Legislative Council Secretariat

15 October 2001