

立法會
Legislative Council

LC Paper No. CB(2)203/01-02
(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 seventh meeting
held on Tuesday, 15 May 2001 at 8:30 am
in the Chamber of the Legislative Council Building

Members Present : Hon IP Kwok-him, JP (Chairman)
Hon Andrew WONG Wang-fat, JP (Deputy Chairman)
Hon David CHU Yu-lin
Hon James TIEN Pei-chun, JP
Ir Dr Hon Raymond HO Chung-tai, JP
Hon Martin LEE Chu-ming, SC, JP
Hon NG Leung-sing
Prof Hon NG Ching-fai
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 CHOY So-yuk
Hon SZETO Wah
Hon Abraham SHEK Lai-him, JP
Hon LEUNG Fu-wah, MH, JP
Hon Audrey EU Yuet-mee, SC, JP

Members Absent : Hon Cyd HO Sau-lan
Hon Eric LI Ka-cheung, JP
Hon Margaret NG
Dr Hon Philip WONG Yu-hong
Hon Ambrose LAU Hon-chuen, JP
Hon Timothy FOK Tsun-ting, SBS, JP
Hon TAM Yiu-chung, GBS, JP

Hon Tommy CHEUNG Yu-yan, JP
Hon Michael MAK Kwok-fung
Dr Hon LO Wing-lok
Hon LAU Ping-cheung

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

Mr Lawrence PENG
Senior Government Counsel

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 Paul WOO
Senior Assistant Secretary (2)3

I. Meeting with the Administration

The Administration's response to issues raised at the meeting on 2 May 2001
(LC Paper No. CB(2) 1518/00-01 (01))

Polling date

Ms Audrey EU said that the fact that the polling date of the next five Chief Executive (CE) elections would not fall within the Easter holidays did not necessarily imply that this was the case for future elections.

2. Secretary for Constitutional Affairs (SCA) responded that occasions when CE's office became vacant, especially those other than normal expiry of term of office, could occur at any time. The basic rule was that the CE election would be held on the first Sunday 95 days before the office of CE became vacant.

3. Mr Howard YOUNG considered that the CE election should be held on a Thursday rather than a Sunday. He added that many people usually left Hong Kong before long holidays. If the CE election was held on a Sunday, it should be subject to the condition that there should be no public holiday within two days of the polling date.

4. Mr SZETO Wah considered that all CE elections and by-elections should be held on a Sunday which was not preceded or followed by long holidays. To allow flexibility, he said that the polling date could be fixed on a date somewhere between 95 days and 85 days.

5. Mr Andrew WONG considered that the polling date should be set within a short period before the date of expiry of the term of the serving CE and the Electoral Affairs Commission (EAC) should be the authority for determining the polling date.

6. Ms Emily LAU considered that the method of determining the polling date should be set out in clear terms.

7. SCA undertook to consider the views expressed by members in finalising its proposed Committee Stage amendments (CSAs).

Central People Government's (CPG's) power to remove CE from office
(Clause 4)

8. Mr CHEUNG Man-kwong commented that the arguments given in the Administration's paper were unconvincing and inconsistent with the Basic Law (BL). He pointed out that -

- (a) a "decision" of CPG under Article 73(9) of BL (BL 73(9)) might not necessarily be a decision to revoke the appointment of CE. Revoking the appointment of CE was only one of the possibilities;
- (b) it was questionable whether a refusal by CE to resign under the circumstances set out in BL 52 would trigger off the impeachment procedure under BL 73(9), which dealt with circumstances where CE refused to resign when charged with serious breach of law or dereliction of duty; and
- (c) there was no legal basis for CPG to revoke the appointment of a newly elected CE who had yet to discharge his duties.

9. Referring to BL 12 and BL 15, SCA said that CPG's power to remove CE from office flowed from BL regardless of whether there was clause 4(c). Clause 4 reflected all the circumstances under which the office of the CE would become vacant. It was not an empowering provision that conferred additional powers on CPG to revoke the appointment of CE. Deputy Solicitor General (Constitutional) (DSG(C)) added that local legislation should not constrain the powers of CPG, which flowed from BL and the Constitution of the People's Republic of China (the Constitution).

10. Mr CHEUNG Man-kwong said that the exercising of CPG's power to revoke the appointment of CE should be made in accordance with the procedures set out in BL. Although local legislation should not constrain CPG's power, it should not expand the power of CPG. Clause 4 should be drafted in a manner consistent with BL.

11. Ms Emily LAU considered that clause 4(c) should be deleted and redrafted in accordance with the provisions in BL 52 and BL 73(9). She sought the advice of the Legal Adviser (LA) and the Department of Justice on whether CPG had unlimited power under BL to revoke the appointment of CE.

12. LA advised that clause 4 was not an empowering provision. He said that the major issue to be examined was how clause 4 should be appropriately drafted and whether there was legal basis for the Administration's interpretation of CPG's power to remove CE from office, which was not expressly provided for in BL. He undertook to provide a legal advice on the issue.

13. DSG(C) said that the powers and status of the CPG came from the Constitution, although there was no provision of the Constitution that expressly provided for the CPG's power to remove the CE from office. The BL was a piece of national legislation enacted under the Constitution and which could be

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amended or repealed as provided for in the Constitution. Thus, ultimate control would rest with the CPG. Ms Emily LAU requested the Administration to provide a written response on the issue.

14. Mr Andrew WONG said that the major issue was whether "the power to appoint" in BL 15 should be interpreted as including "the power to remove".

15. Dr YEUNG Sum said that the current drafting of clause 4 had the effect that CPG could remove CE from office without giving any reasons. He considered that clause 4 should only incorporate the provisions in BL 52 and BL 73 (9).

16. SCA responded that besides the circumstances set out in BL 52 and BL 73(9), it would also be necessary to set out in clause 4 all other circumstances under which the office of CE would become vacant.

17. Mr Martin LEE said that with the present drafting of clause 4(c), CPG could revoke the appointment of a CE whose acts were acceptable to the public and the Legislative Council (LegCo) but not the CPG. In addition, CPG could take no action against a CE on whom a motion of impeachment had been passed by LegCo under BL 73(9).

18. SCA responded that the scenarios quoted by Mr Martin LEE could occur regardless of whether there was clause 4(c). He said that BL 45 provided for the selection of CE and BL 15 provided for the appointment of CE. In the event that the appointment of a CE was revoked by CPG, it must be due to very serious and convincing reasons that would be explained by CPG and acceptable to the public.

19. Mr HUI Cheung-ching asked whether CPG must revoke the appointment of CE upon the passage by LegCo of a motion of impeachment under BL 73(9). SCA responded that while he was not in a position to provide an answer on behalf of CPG, he considered that CPG would probably revoke the appointment of CE under such a situation. He added that the "decision" referred to in BL 73(9) could be a decision other than revocation of the appointment of CE.

20. Mr SZETO Wah said that it was not necessary to invoke the impeachment procedure under BL 73(9) if CE resigned under BL 52. He added that clause 4 should also set out circumstances under which CE resigned.

21. SCA responded that if CE refused to resign under BL 52, the ultimate enforcement would be through the impeachment procedure under BL 73(9).

22. Mr Andrew WONG said that clause 4 had not addressed the situation where a vacancy arose as a result of an elected CE being ruled to be not duly

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elected by way of election petition. He added that if the same thing happened again when a new poll was held, a new CE might not be elected in time before the office of CE became vacant on the expiry of a normal term of office.

23. SCA responded that this was precisely the reason for introducing the "leap-frog" procedure that allowed an appeal against the decision of the Court of First Instance in relation to the CE election to be lodged to the Court of Final Appeal direct. This fast-track approach was proposed in order that any legal challenges would be settled as a matter of urgency so that there would be no doubt over the legality of the CE by the time he assumed office.

Adm 24. SCA undertook to provide a response to the views expressed by members and the Administration's proposed amendments to clause 4 for discussion at the next meeting.

Situations where a candidate returned at an election could not assume office

25. Ms Audrey EU said that the office of CE might become vacant if an election was ruled in an election petition as invalid. She asked whether such a situation was dealt with in clause 4.

26. SCA responded that the situation of a candidate returned at an election could not assume office could be dealt with in clause 11(2).

27. Mr Martin LEE expressed concern that if an incumbent CE died and thus could not assume office, no CE would be available for appointing the new polling date under clause 11(2). SCA responded that it was set out in clause 2(2) that for the purposes of clause 11(2), the term "Chief Executive" included the Acting Chief Executive. In this connection, the Administration was considering moving a CSA to incorporate this provision under clause 11.

Disqualification from being nominated (Clause 14)

28. Mr CHEUNG Man-kwong said that under clause 14(f)(i), a person would be disqualified from being nominated as a candidate for the CE election if he had been imprisoned in or outside Hong Kong for political reasons for a period exceeding three months. He added that the legal system in other places differed from that in Hong Kong. He expressed concern that a person might be disqualified from being nominated if he had been imprisoned for more than three months in other places for acts not outlawed in Hong Kong or for offences which carried less than three months' imprisonment term in Hong Kong.

29. SCA responded that the requirements in clause 14(f)(i) were consistent with those for the LegCo and the District Councils (DC) elections. The same provisions could be found in section 39 of the LegCo Ordinance (Cap. 542).

30. Mr CHEUNG Man-kwong said that it was not unusual that leaders of some foreign countries had previously been imprisoned when they were dissidents. He reiterated his concern which was shared by Mr Martin LEE.

31. Mr Martin LEE said that the requirements under clause 14(e) were inconsistent with BL 44. He pointed out that under clause 14(e), a holder of British National (Overseas) (BNO) passport would be disqualified from being nominated as candidates. This was inconsistent with BL 44 which only required CE to be a permanent resident of the Hong Kong Special Administrative Region (HKSAR) with no right of abode in any foreign country. He considered that there should not be restriction on the possession of BNO passports, if such restriction was not found in BL.

32. SCA responded that eligibility for nomination as a candidate as stipulated in BL 44 was set out in clause 13. Clause 13(c) provided that a person was eligible for being nominated if he had no right of abode in any foreign country. Clause 14 set out the circumstances under which a person was disqualified from being nominated. In drafting the Bill, the Administration had made reference to the arrangements for the selection of the first CE of HKSAR which also specified that BNO passport holders were not eligible for being nominated. Clause 14 had the effect of disqualifying a BNO passport holder from being nominated as a candidate.

33. Mr CHEUNG Man-kwong said that many residents of Hong Kong were BNO passport holders. The BNO passport was generally regarded as a travel document with no nationality implication.

34. SCA said that CE was accountable to CPG and HKSAR for the administration of HKSAR. The CE had to swear allegiance to the HKSAR and the CPG. He was required to represent the HKSAR and discharge his duties under BL. A person who wished to stand for the CE election would have to give up his BNO passport. DSG(C) added that holders of BNO passports owed allegiance to the Queen of the United Kingdom (UK) and were subject to the law of treason.

35. Mr Martin LEE said that the second paragraph of BL 43 provided that CE should be accountable to CPG and HKSAR. BL 104 provided that CE must swear allegiance to HKSAR only. Thus, the Administration was not accurate in saying that CE was required to swear allegiance to the HKSAR and the CPG. He said that the BL had already imposed stringent requirements on CE. The Administration should not impose further requirements in the Bill on CE.

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36. Ms Emily LAU said that about two million permanent residents of HKSAR were BNO passport holders because of historical reasons. She pointed out that the BNO passport had all along been regarded as a travel document, and expressed concern about the Administration's remark that it was more than a travel document. As BL imposed no restriction on the travel document held by a CE, it was inappropriate for the Bill to do so.

37. SCA responded that BL set out the principles while clause 14 set out the details. Under BL 43, the CE was the head of the HKSAR and was required to represent HKSAR. More stringent requirements were thus imposed on CE. He considered that the major issue was the question of allegiance.

38. Mr Andrew WONG opined that the requirement that a CE should not be a BNO passport holder was a reasonable one. It would remove doubt that the passport holder might owe allegiance to the UK.

39. Mr Andrew WONG asked about the meaning of clause 14(e)(iii) and whether a holder of Taiwan Entry Permit was eligible to run in the CE election.

40. SCA responded that a Home Visit Permit was an example of an entry permit referred to in clause 14(e)(iii). He said that a person who held a passport or a similar travel document other than those set out in clause 14(e)(i), (ii) and (iii) would be disqualified from being nominated. He undertook to provide a written response on the issue. In this connection, LA advised members that according to the definition in the Interpretation and General Clauses Ordinance (Cap. 1), the People's Republic of China included Taiwan, HKSAR and Macau.

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41. In response to Mr Andrew WONG's question on clause 14(g), Deputy Law Draftsman (Bilingual Drafting & Administration) (DLD) said that a person who had recovered from mental incapacity would be eligible for being nominated as a candidate.

42. Mr SZETO Wah asked whether an incumbent CE would be disqualified from holding office under the Bill if he had done something during the term of his office which would have made him ineligible for being nominated as a candidate under clause 13 or disqualified under clause 14, such as acquiring a right of abode in a foreign country or holding a foreign passport. Mr Howard YOUNG also asked whether holders of temporary permits into other countries, such as Vietnam, would be disqualified from being nominated as a candidate. SCA undertook to provide a written response.

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43. Mr CHEUNG Man-kwong asked why the date for a candidate to reach 40 years of age was different under clause 13(d)(i)(A) and 13(d)(ii)(A). In the case of an election to fill a vacancy arising from a normal expiry of term of office under clause 4(a), the date was the day the vacancy arose. However, in

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the case of an election arising under clause 4(b) or 4(c), the date was the polling date.

44. DLD explained that BL 44 required that the CE should be 40 years of age. In the case of an election to fill a vacancy arising from a normal expiry of term of office, a candidate, if elected, had to reach 40 years of age by the time he was appointed to fill the vacancy. In the case of an election arising from the death of CE or the removal of CE from office by CPG, it was not certain when the elected CE would be appointed by CPG. Hence the polling date was proposed to be the date when a candidate had to reach 40 years of age.

45. In response to Ms Audrey EU's question about the relationship between clauses 13 and 14, DLD explained that clause 13 reflected the eligibility criteria for nomination as a candidate stipulated in BL 44, while clause 14 dealt with circumstances under which a person was disqualified from being nominated as a candidate. Clause 14(a) set out the requirement in BL 46 that a CE should serve for not more than two consecutive terms.

46. Mr Martin LEE considered that clause 13 should deal with eligibility for nomination, while clause 14 should deal with disqualification after nomination.

(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)1613/00-01 on 22 May 2001.)

II. Way forward and date of next meeting

47. The Chairman informed members that if the resumption of Second Reading debate on the Bill was to take place at the Council meeting on 11 July 2001, the deadline for giving notice of resumption of debate would be 23 June 2001 and the deadline for giving notice to move CSAs would be 30 June 2001.

48. Members noted that the next meeting would be held on 22 May 2001 at 8:30 am. They agreed that the meeting on 5 June 2001 would be a double-slot meeting held from 8:30 am to 12:45 pm.

49. The meeting ended at 10:45 am.

Legislative Council Secretariat
30 October 2001