

立法會
Legislative Council

LC Paper No. CB(2)204/01-02
(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 eighth meeting
held on Tuesday, 22 May 2001 at 8:30 am
in Conference Room A of the Legislative Council Building

Members Present : Hon IP Kwok-him, JP (Chairman)
Hon David CHU Yu-lin
Hon Martin LEE Chu-ming, SC, JP
Hon Eric LI Ka-cheung, 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 Ambrose LAU Hon-chuen, JP
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
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 Cyd HO Sau-lan
Hon James TIEN Pei-chun, JP
Ir Dr Hon Raymond HO Chung-tai, JP

Prof Hon NG Ching-fai
Dr Hon Philip WONG Yu-hong
Hon CHOY So-yuk
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

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 further response to issues raised at the meeting on 2 May 2001

(LC Paper No. CB(2) 1587/00-01 (01))

Mr Martin LEE said that the revised version of clause 4(c) proposed in the Administration's paper was even more unacceptable than the original version. Amending clause 4(c)(iii) as "under any other circumstances" would allow the Central People's Government (CPG) to remove the Chief Executive (CE) from office without giving any reasons. This would undermine the high degree of autonomy of the Hong Kong Special Administrative Region (HKSAR) provided under BL.

2. Deputy Secretary for Constitutional Affairs (DSCA) responded that the revised version of clause 4(c) was drawn up having regard to the views expressed by members at previous meetings. Deputy Law Draftsman (Bilingual Drafting & Administration) (DLD) added that clause 4(c)(i) was related to the resignation of CE under Article 52 of the Basic Law (BL 52). Clause 4(c)(ii) was related to the removal of CE from office under BL 73(9) and clause 4(c)(iii) was related to other circumstances under which the office of CE would become vacant. He stressed that clause 4(c)(iii) was only a descriptive rather than an empowering provision.

3. Mr Martin LEE requested the Administration to identify the articles in BL that conferred CPG with the power to remove CE under clause 4(c)(iii). He said that the BL had already set out circumstances under which the CE should be removed from office. The Administration should not incorporate in the Bill additional provisions not provided in BL. DSCA responded that clause 4 was not an empowering provision. The legal basis of the Administration's interpretation that the CPG had a power to revoke the appointment of CE was explained in the Administration's paper for the previous meeting (LC Paper No. CB(2) 1518/00-01(01)).

4. Mr Martin LEE said that the BL articles quoted in the Administration's paper (LC Paper No. CB(2) 1518/00-01) were related to the appointment rather than removal of CE. He asked whether there was any provision in BL that provided CPG with the power to remove CE under clause 4(c)(iii).

5. DSCA said that as explained by SCA at a previous meeting, it was a concept under the common law that a power of appointment included a power of removal. It should also be noted that a decision under BL 73(9) could be one to revoke the appointment of CE.

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6. Legal Adviser (LA) said that there was no express provision in BL that empowered CPG to remove CE. It was therefore necessary to examine, by applying principles generally adopted in the interpretation of BL, whether there was an implied power for CPG to remove CE. If there was an implied power, how such a power was to be exercised should also be studied. As undertaken at the previous meeting, he would provide a written legal advice on the issue.

7. Mr CHEUNG Man-kwong said that the removal of CE from office should be made in accordance with BL. The revised version of clause 4(c)(iii) would undermine the high degree of autonomy provided under BL 12, as it extended CPG's power beyond that provided under BL. He pointed out that the expression "appoint" was used in BL 15 and paragraph 1 of Annex I to BL. It should not be interpreted to mean "appoint and remove". Even if CPG had the power to remove CE, the removal should be made in accordance with the BL. Revised clause 4(c)(iii), the power under which was not found in BL, would provide CPG with unlimited power to revoke the appointment of CE.

8. Mr CHEUNG Man-kwong said that although the expression "appoint" was used in BL 15 and paragraph 1 of Annex I to BL, the expression "appoint or remove" was used in BL 48(6) and (7). This indicated that "appoint" was not equivalent to "appoint and remove" and thus the power to appoint should not include the power to remove. Mr Martin LEE, Ms Emily LAU and Miss Margaret NG took the same view. Mr LEE pointed out that the expression "removal" could also be found in addition to "appointment" in BL 55, 56, 73(7), 90 and 91. He added that when he was a member of the Drafting Committee for the BL of the HKSAR, the CPG's power to remove CE was not even raised in considering the drafting of BL 45.

9. DSCA stressed that clause 4 was not an empowering provision that conferred additional powers on CPG to remove CE from office. CPG's power to remove CE flowed from BL. He reiterated that a decision under BL 73(9) included a decision to revoke the appointment of CE. It was also a concept under the common law that a power of appointment included a power of removal.

10. Dr YEUNG Sum commented that the revised version of clause 4(c)(iii) was more unacceptable than the original version, as it would allow CPG to remove CE under any circumstances without giving any reasons. He asked whether it was appropriate to apply common law principles in the interpretation of BL, which was a constitutional document.

11. DSCA reiterated that clause 4 was not an empowering provision. Deputy Solicitor General (Constitutional) (DSG(C)) added that clause 4 and the Bill should be interpreted and operated in a manner consistent with BL.

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12. LA advised that BL was a piece of constitutional legal document. The CE Election Bill, when enacted, would be a constitutional legislation of HKSAR. In the interpretation of BL, which only set out the broad principles, the court might draw reference from the legislation of the HKSAR. Thus, clause 4(c)(iii) should be drafted prudently.

13. Ms Emily LAU considered that clause 4 should only incorporate the provisions set out in BL and clause 4(c)(iii) should be deleted. She sought LA's view on CPG's power to remove CE.

14. LA said that his preliminary view was that CPG seemed to have the power to remove CE from office. However, such a power should be exercised in accordance with the provisions in BL. If common law principles were applied in the interpretation of clause 4(c)(iii), which was a general provision, it could be noted that the power under clause 4(c)(iii) was not unlimited, but subject to the more specific provisions found in the earlier part of the Bill. However, as the provision was a constitutional one, the issue would have to be further examined.

15. Miss Margaret NG said that while clause 4(c)(i) and (ii) made reference to specific provisions in BL, clause 4(c)(iii) made no reference to any provision in BL. This gave the impression that clause 4(c)(iii) referred to any circumstances other than those set out in BL. She considered that if there were any other circumstances, they should be set out in specific terms. She added that BL was a constitutional document, a fundamental principle under which was a high degree of autonomy of the HKSAR. Under this principle, CPG might not remove CE from office other than the circumstances set out in BL 52 and 73(9). Clause 4(c)(iii) was inconsistent with this principle. She added that even if CPG had the power beyond BL to remove CE from office, the exercising of such a power should not be affected even without clause 4(c)(iii). However, deleting clause 4(c)(iii) would make it necessary for CPG to give explanations if CE was removed from office.

16. Mr SZETO Wah said that the passage of clause 4(c)(iii) would be equivalent to accepting the view that "appoint" was the same as "appoint and remove". It would also be equivalent to accepting the view that CPG was empowered under BL 15 to remove any principal official from office. Referring to BL 48(5), he pointed out that if "appoint" included "appoint and remove", the appointment and removal of principal officials would not have been separately dealt with in the provision.

17. Mr LEUNG Fu-wah asked whether -

- (a) the Bill could be considered as a piece of constitutional legislation;

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- (b) redress could be sought in Hong Kong courts in respect of a decision of CPG to remove an incumbent CE; and
- (c) clause 4(c)(iii) could be amended as "any circumstances under the BL".

18. DSCA responded that the Bill was enacted in accordance with Annex I to BL, which provided that an electoral law should be enacted by HKSAR in accordance with the principles of democracy and openness. As regards the question of redress, DSG(C) said that the CE could seek a declaration from court as to his rights and status under the law. However, the court had no jurisdiction over the acts of CPG.

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19. LA said that in the drafting of clause 4(c), it might be helpful to examine whether the Bill was a piece of constitutional legislation. As regards the question of redress, he suggested the Administration to provide the legal basis of its view. DSCA agreed to provide a written response.

20. Referring to DSG(C)'s remark that the courts had no jurisdiction over the acts of CPG, Miss Margaret NG said that the courts had jurisdiction over the effect of any particular act of CPG in the HKSAR. She added that there were two principles which might be of assistance in construing whether CPG had any power outside BL 52 and 73(9) to remove the CE. One principle was that any ambiguity associated with a legal instrument should be construed against the donor. If "remove" was not mentioned, it should be strictly construed that the CE could not be removed except under circumstances specified in the instrument. The other principle was that a constitutional document should be construed purposively and generously. BL was an instrument that conferred certain rights and autonomy on the HKSAR. Construing CPG's power as the power to remove CE at will for reasons not specified in BL would undermine the autonomy of HKSAR. Thus, it could be concluded that when the expression "appoint" was used, the power of removal was not supposed to be involved except for specified circumstances.

21. Mr NG Leung-sing said that if BL 45 was read in conjunction with BL 73(9), it could be noted that BL 45 dealt with the selection and appointment of CE, while BL 73(9) dealt with the passage of a motion of impeachment and the reporting of it to CPG for a decision. He suggested the Administration to consider amending "removes the CE from office" in clause 4 as "revokes the appointment of CE".

22. Referring to question 6 of the Administration's paper, DSCA responded that the expression "revoke" had originally been used in clause 4(c) and some members had suggested replacing "revoke" with other expressions. After examining the articles of BL, the Administration had proposed to replace the expression "revoke" in clause 4(c) with "remove" to bring it consistent with the

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expression used in BL, such as BL 48(5), 48(6), 73(7), 89 and 90.

23. Mr TSANG Yok-sing said that he did not consider clause 4 an empowering provision that conferred CPG with the power to remove CE from office under any circumstances. However, he considered that clause 4(c)(iii) was unnecessary and should be deleted. He said that if it was considered necessary in the drafting of BL that CPG should have the power to remove CE from office under circumstances it considered appropriate, an express provision to such effect should have been incorporated in BL.

24. Ms Emily LAU said that even though clause 4(c)(iii) was deleted, it was still necessary for the Administration to explain whether CPG had the power to remove CE from office under circumstances other than those set out in BL.

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25. DSCA undertook to consider the views expressed by members and provide a written response.

The Administration's response to issues raised at the meeting on 15 May 2001 (LC Paper No. CB(2) 1613/00-01 (01))

26. At the invitation of the Chairman, DSCA briefed members on the Administration's response to issues raised at the meeting on 15 May 2001.

27. Mr Martin LEE recalled that the Chinese and British governments had different views about the status of a British National (Overseas) (BNO) passport. The Chinese government considered that the BNO passport was merely a travel document and not a passport. He asked about the source from which the statement in the Administration's paper that "holders of BNO passports do owe allegiance to the Queen of the United Kingdom (UK) and are subject to the law of treason" was quoted. He considered it important to clarify whether this was the view of the UK Government only, or also the view of the Chinese government.

28. DSG(C) responded that the status of the former British Dependent Territories Citizen (BDTC) passport holders were dealt with in the Sino-British Joint Declaration (the Joint Declaration). The decision of the Chinese government was to permit Chinese nationals who were previously BDTCs to use travel documents issued by UK for the purpose of travelling to other states and regions. The UK government considered that holders of BNO passports were commonwealth citizens and that they owed allegiance to the Queen. BNO passport holders were entitled to consular services in a third country. The comment on the law of treason came from pages 331 and 332 of the book entitled "Constitutional and Administrative Law in Hong Kong" by Peter Wesley-Smith, who was a former professor of the University of Hong Kong.

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29. Mr Martin LEE said that CPG merely regarded the BNO passport as a travel document. The views quoted by the Administration were only those of the UK Government. It did not reflect the views of CPG.

30. DSCA said that according to a decision made by the Preparatory Committee for HKSAR (the Preparatory Committee) at its fifth meeting held on 5 October 1996, it was stated that the first CE should give up any foreign passports, including BDTC passport and BNO passport. DSG(C) added that under the Nationality Law of the People's Republic of China (PRC), all Hong Kong Chinese compatriots, whether they were holders of BDTC passports or not, were Chinese nationals. However, the competent authority of the government of PRC had, with effect from 1 July 1997, permitted Chinese nationals in Hong Kong who were previously called BDTCs to use documents issued by the UK government for the purpose of travelling to other states and regions.

31. Mr Martin LEE said that the Chinese and British governments held different views on a BNO passport. The Chinese government considered it a travel document only. It did not recognise any status or rights conferred upon the passport holder. He commented that the decision of the Preparatory Committee in respect of BNO passport holders was unnecessary and unfair in that it went against the views expressed earlier by the Chinese government.

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32. The Chairman requested the Administration to provide the relevant extracts of documents it quoted at the meeting.

(Post-meeting note : The extracts of documents provided by the Administration was circulated to members vide LC Paper No. CB(2) 1618/00-01 on 23 May 2001.)

33. Miss Margaret NG said that it was the view of the Chinese and British governments that BNO passport holders did not have a right of abode in UK. According to the Chinese laws, BNO passport holders were not entitled to any British consular protection in HKSAR. Any Chinese national was subject to the law of treason of PRC. Thus, it could be concluded that the holding of a BNO passport was not in violation of the objective criteria set out in BL 44. She said that the Preparatory Committee, which had already been dissolved, was involved in determining the method of selection of the first CE of the HKSAR only. Thus, the document quoted by DSCA was irrelevant to the Bill. She added that the requirement that a CE should not be a BNO passport holder might be unconstitutional.

34. DSCA responded that the decision of the Preparatory Committee on the first CE had been quoted for members' reference only. As explained in the Administration's paper, CE was required to swear allegiance to HKSAR under BL 104. Under BL 43, CE was the head of the HKSAR and was required to

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represent it. Under BL 48(9), CE had to conduct external affairs on behalf of the government of HKSAR. Any allegiance or duty to a foreign state would be inconsistent with the representational role of CE. It was thus justified to impose restriction on holders of BNO passport.

35. Mr SZETO Wah said that a BNO passport holder had no right of abode in UK. The holding of a BNO passport was thus not in contravention of the requirement in BL 44 that a CE should not have right of abode in any foreign country. He considered that the requirement on the travel document held by a CE should be amended as a requirement on the right of abode of CE in any foreign country.

36. DSCA responded that clause 13 dealt with the requirement that a candidate should have no right of abode in any foreign country, while clause 14(e) dealt with the requirement on the travel document held by a candidate. Foreign passport holders owed allegiance to a foreign state. This would be inconsistent with the representational role of CE.

37. Miss Margaret NG said that a travel document differed from a passport in that it had no nationality implication on the holder. She added that the holding of a foreign passport had no conflict with the pledging of allegiance to the HKSAR. A BNO passport holder should not be prohibited from being nominated.

38. DSCA responded that if BL 43, 48(9) and 104 were read together, it could be noted that the restriction on the holding of a BNO passport was justified.

39. Miss CHAN Yuen-han said that the Administration should explain clearly to the public the different views of the Chinese and British governments in respect of the status of a BNO passport holder.

40. DSCA said that there were different requirements in BL on the nationality of different types of persons. It could be noted from BL 67 that the percentage of LegCo Members who were not of Chinese nationality or who had right of abode in a foreign country should not exceed 20% of the total membership. As the requirement on CE was more stringent in view of his representational role, it was inappropriate for CE to hold a passport or similar document issued by a foreign country. In this connection, LA drew members' attention that BL 67 was mainly related to the right of abode in a foreign country rather than the holding of a foreign passport.

41. Dr YEUNG Sum said that although BL 44 only required a CE to be a permanent resident of HKSAR with no right of abode in any foreign country, the Administration had imposed additional requirements on the travel document held by a candidate. He added that the Chinese government had

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always held that the BNO passport was only a travel document and not a passport.

42. Mr TSANG Yok-sing informed members that he had attended the meeting of the Preparatory Committee on 5 October 1996. He recalled that the Preparatory Committee had not discussed the issue of allegiance as referred to by the Administration. It was noted that BL 104 did not distinguish between the allegiance required of CE and other categories of persons. While CPG had made it clear that holders of BDTC passports would not be entitled to British consular protection in HKSAR and other parts of PRC, the British government had said that BDTC passport holders would be entitled to receive British consular services and protection when in third countries. In view that a BDTC passport holder would be regarded as a British national in a third country, and that the CE was required to represent HKSAR, the Preparatory Committee had come to the conclusion that a candidate should give up his BNO passport.

43. DSCA shared the view of Mr TSANG Yok-sing. He stressed that the provisions in the Bill were fully consistent with BL.

44. Mr CHEUNG Man-kwong said that the major issue was the position of the Chinese and British governments on BDTC passports. This could be found in the memoranda exchanged between the Chinese and British governments in connection with the Joint Declaration. According to the UK memorandum, all persons who were BDTCs on 30 June 1997 would cease to be BDTCs with effect from 1 July 1997. Thus, there was no question of allegiance or treason. According to the Chinese memorandum, all Hong Kong Chinese citizens were Chinese nationals regardless of whether they BDTC passport holders. Mr CHEUNG said that a BDTC passport holder who satisfied the requirements in BL 44 should be eligible for being nominated. The Administration's proposal that BNO passport holders should be disqualified from being nominated was thus inconsistent with the memoranda of the two sides.

45. DSCA reiterated that the requirement in respect of BNO passports was justified and consistent with BL.

46. Mr NG Leung-sing said that there might be grounds for the Administration's proposal if there were examples where a country which issued a travel document not entitling the holder right of abode in the country had subsequently introduced legislative amendments that conferred such right to the holder.

47. Ms Emily LAU said that BNO passports were issued for historical reasons. She considered that the Bill should not impose additional

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requirements not provided for in BL. She requested the Administration to reconsider its proposal.

(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) 1647/00-01 on 26 May 2001.)

II. Date of next meeting

48. The Chairman reminded members that the next meeting would be held on 29 May 2001 at 8:30 am.

49. Members agreed that an additional meeting would be scheduled for 31 May 2001 at 8:30 am.

50. The meeting ended at 10:50 am.

Legislative Council Secretariat
30 October 2001