

立法會

Legislative Council

LC Paper No. CB(2)1544/00-01

(Item II of these minutes have
been seen by the Administration)

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Legislative Council Panel on Constitutional Affairs

Minutes of special meeting held on Saturday, 3 March 2001 at 9:00 am in Conference Room A of the Legislative Council Building

Members Present : Hon Andrew WONG Wang-fat, JP (Chairman)
Hon Emily LAU Wai-hing, JP (Deputy Chairman)
Hon Margaret NG
Hon HUI Cheung-ching
Hon Howard YOUNG, JP
Dr Hon YEUNG Sum
Hon Audrey EU Yuet-mee, SC, JP

Members Absent : Hon James TIEN Pei-chun, JP
Hon CHEUNG Man-kwong
Hon Jasper TSANG Yok-sing, JP
Hon YEUNG Yiu-chung
Hon SZETO Wah

Public Officers Attending : Item II

Mr Clement C H MAK
Deputy Secretary for Constitutional Affairs

Mrs Philomena LEUNG
Principal Assistant Secretary for Constitutional Affairs

By invitation : Dr Anthony B L CHEUNG, JP
Associate Professor
Department of Public and Social Administration
City University of Hong Kong

Dr Michael E DEGOLYER
Associate Professor
Government and International Studies Department
Hong Kong Baptist University

Dr MA Ngok
Assistant Professor
Division of Social Science
Hong Kong University of Science and Technology

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

Staff in Attendance : Miss Yvonne YU
Senior Assistant Secretary (2)7

Action
Column

I. System of accountability for principal officials
(LC Paper No. CB(2)972/00-01(01) - List of issues for public consultation)

Meeting with academics

The Chairman welcomed the academics to the meeting and invited them to present their views.

Dr Anthony B L CHEUNG, JP, Associate Professor, Department of Public and Social Administration, City University of Hong Kong

(LC Paper No. CB(2)972/00-01(02)

2. Dr Anthony CHEUNG said that under the Basic Law (BL), principal officials were nominated by the Chief Executive (CE) for appointment by the Central People's Government (CPG). As both the CE and the executive authorities were accountable to the Hong Kong Special Administrative Region (HKSAR), and the legislature being a body representing the people of HKSAR, it followed that principal officials should also be accountable to the legislature.

Dr CHEUNG pointed out that the issue of having a fully accountable government, which was subject to controversial debates, would remain unresolved. However, this should not be a factor for further delaying the implementation of any system to enhance public accountability of principal officials.

3. Dr CHEUNG said that under the existing system in HKSAR, career civil servants took up the role of "ministers" (i.e. policy secretaries). Such a system had two major defects. Firstly, it unnecessarily politicized the senior civil service. Senior civil servants had departed from their traditional role and functioned more like politicians than civil servants. In addition, as CE was not democratically elected, there were considerable public expectations for top civil servants to exercise some form of check and balance over CE. Secondly, it blurred political and policy accountability. Although the policy secretaries had a policymaking role, they were strictly speaking career civil servants and could evade political accountability even when there were serious policy blunders. What was worse was that when a few non-civil servants were brought into the Government as policy secretaries after 1997, clearly as political appointment rather than civil service appointment, such appointees were still nominally civil servants not required to bear political responsibility.

4. Dr CHEUNG said that to delineate political and policy accountability clearly, it would be better if policy secretaries were made political appointees so that they could be separated from the career civil servants. He made the following points on the proposed accountability system for principal officials -

- (a) Under the proposed system, LegCo should play an important role in the nomination of persons for political appointment as principal officials. As LegCo's endorsement was required for the appointment of judges of the Court of Final Appeal and the Chief Judge of the High Court under the Basic Law (BL), the same procedure should apply to the nomination process;
- (b) Constitutional conventions should be established whereby LegCo, as the representative institution charged with the constitutional role of scrutinizing and monitoring Government performance, could move a motion of no-confidence on a politically appointed principal official who had failed in his duties, and CE should remove the official upon passage of the motion;
- (c) Potential conflicts of interest were bound to emerge in any system of political appointment, as people moved from the private sector into the Government and vice versa. The question of conflicts of interest could be addressed by having better mechanisms for declaration of interest, greater transparency in policymaking, and more important, stronger political scrutiny and policy audits;

- (d) As career civil servants were required to be loyal to the Government, appropriate arrangements should be in place to ensure mutual respect and good co-operation between political appointees and career civil servants;
- (e) Political appointees could be offered a new form of contract, i.e. the "political contract". The term of the office of the political appointees should be the same as that of CE. Furthermore, given the non-permanent nature of the job, political appointments should adopt a different mode of remuneration and conditions of service from that of the civil service, with provisions for retirement benefits and suitable compensation for pre-mature termination of office;
- (f) Suitable senior civil servants could be offered political appointment on condition that they would leave the civil service (under some form of voluntary retirement scheme if they were already on permanent and pensionable terms);
- (g) Political appointment should only apply to the top policymaking layer while all heads of Government departments and other executive agencies should continue to be appointed on career civil service terms. At the bureau level, policy secretaries should be on political appointment terms while his deputies could remain to be civil servants. He also suggested that reference could be made to the "permanent secretary" system of some other countries such as the United Kingdom (UK). Under such a system, a top civil servant, i.e. the "permanent secretary" was designated to head the civil service team in each bureau and to be the main advisor to the politically appointed secretary. Referring to the Chinese translation of his submission prepared by the Secretariat, Dr CHEUNG pointed out that the term "permanent secretary" should more appropriately be translated as (常任事務長);
- (h) The Public Service Commission should be upgraded and empowered to become the main protector of civil service merit in order to safeguard the institutional system. If the post of the Chief Secretary for Administration was eventually turned into a political appointment in future, consideration should be given to re-designate a top civil servant to be the principal advocate of civil service concerns and interests. In addition, he or she could also double as the permanent secretary of the Chief Secretary for Administration's Office or CE's Office; and

- (i) The Executive Council (ExCo) should become the advisory council of CE. Although ExCo Members could still be tasked to head major policy advisory committees or statutory bodies, political appointees should be ultimately responsible for their respective portfolios and should not be placed in a subservient role to some ExCo Members acting as a "policy super-boss".

Dr Michael DEGOLYER, Associate Professor, Government and International Studies, Hong Kong Baptist University

(LC Paper No. CB(2)972/00-01(03))

5. Dr Michael DEGOLYER said that he agreed with the basic principles of Dr CHEUNG's submission. He added that the ultimate aim for selecting CE by universal suffrage as provided in BL should be pursued as soon as possible.

6. Referring to his submission, Dr DEGOLYER said that the surveys conducted by the Hong Kong Transition Project before and after the LegCo elections in 1998 and 2000 showed that there was a steady rise in support of replacing functional constituency election with direct election (Table 1). On the other hand, the surveys also showed that there was consistently strong support for direct election of CE (Table 2).

7. Dr DEGOLYER said that the subject of whether Hong Kong was a good investment centre was discussed on a television programme of Radio Television Hong Kong. As Hong Kong allowed much more public discussions or debates than places like Singapore, people might have a perception that Hong Kong would be more politically unstable. However, the commentators of the programme pointed out that this was not the case and Hong Kong's stability was actually enhanced by encouraging rather than suppressing the expression of different views. As indicated in another survey (Table 3), the majority of the respondents found that the various types of political debates taking place in Hong Kong were acceptable.

Dr MA Ngok, Assistant Professor, Division of Social Science, The Hong Kong University of Science and Technology

(LC Paper No. CB(2)972/00-01(04))

8. Dr MA Ngok said that he had confined the scope of his submission to examine how the accountability of principal officials could be enhanced within the parameter of BL. Dr MA made the following points -

- (a) On some LegCo Members' suggestion that the appointment of principal officials should be subject to the endorsement of LegCo, he was of the view that this would contravene BL;

- (b) A feasible way of implementing a system of political accountability was to offer "political contracts" to policy secretaries. However, this would enhance "bureaucratic accountability" rather than "political accountability" as principal officials were nominated by and accountable to CE;
- (c) Political contracts should be of a duration of two to three years; either party could terminate the contract by giving two months' notice; and the length of all these contracts should preferably be the same;
- (d) A compensation scheme should be established for existing policy secretaries who were considered unsuitable for or who were unwilling to accept political appointment under the new system. The amount of compensation should be equivalent to the amount of salary plus other benefits as if he would have accrued upon retirement or completion of agreement. These officers should also be eligible for pension;
- (e) Political appointees under the new system could be offered a special type of contract or civil service contract. Under BL 79(4), a LegCo Member was no longer qualified for the office when he or she accepted a Government appointment and became a public servant. Although LegCo Members could be appointed as policy secretaries under the former type of contract, but in order not to cause confusion to electors, he did not recommend appointment of LegCo Members as policy secretaries under the proposed system;
- (f) If all policy secretaries were politically appointed in future, ExCo should be restructured. The major problem of the present system was that while policy secretaries were responsible for policy formulation, the final decisions were made by ExCo Members. This would lead to unclear delineation of responsibilities. Political appointees should replace ExCo Members and become CE's cabinet, similar to the cabinet system in some western countries; and
- (g) Dr MA expressed reservation about the effectiveness of the proposed accountability system given that CE was not returned by universal suffrage. Quoting the "Wong-Miller" incident as an example, he said that as CE was not accountable to the people, he could choose to protect a political appointee who had committed serious mistakes in spite of public demand for him to resign. Nevertheless, he was of the view that the introduction of a

political appointment system for principal officials was better than maintaining the status quo.

Desirability of implementing a political appointment system for principal officials

9. Ms Emily LAU said that according to Dr Anthony CHEUNG, unless CE was to take final responsibility for government policies and performance, the introduction of a political appointment system for principal officials might turn out to only strengthen his control over principal officials instead of enhancing public accountability. She noted that Dr MA had expressed similar views. Ms LAU asked the academics whether Members should support the proposed system in the absence of a democratically elected CE.

10. Dr MA Ngok said that under a parliamentary or presidential system in western countries, the ruling party or the head of the government would not sacrifice the interests of the party or jeopardize the chance of seeking a re-election for the sake of protecting a minister who had committed serious mistakes. However, such an external accountability system did not exist in Hong Kong. There was no incentive for CE to remove a principal official under similar circumstances. Dr MA said that in his view, the proposed political appointment system for principal officials could achieve about 20% of what could be achieved by some western democratic countries under a presidential system.

11. Dr Anthony CHEUNG said that he shared the concern of Ms Emily LAU. While he acknowledged that accountability had to come together with the mandate of people, he considered that the two issues needed not be dealt with at the same time as prolonging the anomaly of the existing system would only increase the risk of further politicizing the civil service. He considered that the proposed accountability system, even though not a perfect system, should be implemented as a first step.

12. Dr Michael DEGOLYER said that principal officials should be politically appointed and separated from the civil service. In the past, there was historical legacy that career civil servants were the colonial officials without political responsibility. They were deliberately and intentionally insulated from public pressure. This situation needed to be corrected and there was a need to separate civil servants who were responsible for implementation of policies from political appointees who were responsible for formulation of policies.

13. Dr Michael DEGOLYER further said that an accountability system was already in existence in Hong Kong. First, as a way to demonstrate accountability, he urged Members to discharge their role as members of the Election Committee. Secondly, LegCo Members were responsible for

monitoring the performance of Government by taking part in discussions of public policies and making decisions. Thirdly, the media played a role in monitoring the Government. Fourthly, the free market might be the most important mechanism in ensuring the functioning of accountability in Hong Kong as investors could choose to leave Hong Kong if they considered otherwise. Fifthly, the Beijing Government would not allow the HKSAR Government to do anything that would affect the Region's prosperity and stability. Lastly, the public could exercise people power. He quoted the public strikes in 1920's and 1960's as examples to illustrate this point. He considered that improvements were required on an accountability system which was already functioning in Hong Kong. It would not be necessary for any disasters or overwhelming opposition to bring about a more sensitive and responsive government.

14. On Dr DEGOLYER's remark about participation of LegCo Members in the Election Committee, Ms Emily LAU said that some Members did not want to mislead Hong Kong people into believing that there was some sort of real democratic election taking place.

15. Miss Margaret NG said that the purpose of establishing a system of accountability was to enhance the accountability of principal officials to the public, not to CE. On the mechanism for instituting a system of accountability, she was of the view that principal officials could be offered political appointment on contract. In addition, constitutional conventions should be established such that when a motion of no-confidence was passed by LegCo on a political appointee, he should resign or the CE should request him to resign. This mechanism required political appointees to be accountable to LegCo, to CE and to themselves. She opined that the greatest problem of the existing constitutional system was its lack of check and balance on the executive authorities. While the CE in Council represented the highest executive power in HKSAR, it was not answerable to the public.

16. Ms Margaret NG further said that unlike HKSAR, many western countries adopted a democratic political system whereby the people could ultimately exercise their power during elections. She was of the view if the legislature could not play a meaningful role in the proposed accountability system, such a system might in effect provide an opportunity for concentration of powers of CE. She hoped that the academics would oppose a system without the necessary checks and balances.

17. Dr MA Ngok said that democratic election was a very important monitoring mechanism. Although Hong Kong could not be considered as fully democratic in this respect, he was not too worried because Hong Kong was a relatively free place in the sense that its residents enjoyed freedom of speech and assembly, and there were bodies other than LegCo in monitoring the performance of the Government such as the mass media. He believed that

the proposed accountability system would enable CE to implement his policy in a more consistent manner.

18. Dr Anthony CHEUNG said that the proposed system should have three elements. Firstly, the proposed system should be backed up by legislation. Secondly, constitutional conventions should be developed to supplement legislation. For example, a principal official would voluntarily resign following the passage of a no-confidence motion by LegCo even though the latter had no power to remove him under BL. Thirdly, the system should have its cultures and values. For example, contrary to the existing system under which career civil servants were politically neutral and not held accountable for any policy failures, the political appointees under the new system should be held politically accountable for their actions.

19. Dr Anthony CHEUNG said that he had elaborated on the anomaly of the existing system earlier on at the meeting. He would therefore support implementation of the proposed accountability system to improve the situation. He added that in any systems of political appointment, it would be inevitable for the head of the government to appoint like-minded persons as ministers in order to facilitate smooth implementation of policy.

20. Ms Margaret NG considered that the civil service system exercised the necessary check on CE. If ExCo proposed any unrealistic policies, there would be opposition from the civil service. As a result, such proposals could not be implemented or required some modifications. With the proposed accountability system, she was concerned that political appointees would only be accountable to CE, hence undermining the check and balance power of the civil service.

21. The Chairman said that there were situations where a minister could not instruct a civil servant to do what he wanted. For example, in UK, a minister could not instruct an accounting officer (equivalent of a controlling officer in Hong Kong) to spend in excess of the budgeted amount. As the accounting officer was personally responsible for his actions, he could choose not to carry out the minister's instruction.

22. Dr Anthony CHEUNG also expressed concern about exertion of excessive political intervention in the civil service in the event that all principal official posts were filled by political appointees. He called for mechanisms to be established to safeguard the neutrality of the civil service. Dr CHEUNG said that the Civil Service Code in the UK set out the constitutional framework within which all civil servants worked and the values they were expected to uphold. If a political appointment system was implemented in Hong Kong, sufficient protection should be given to career civil servants. Personnel matters such as promotion and transfer of civil servants should be decided by civil servants, not political appointees. He had therefore suggested that the

Public Service Commission should assume an important role in this respect.

23.

23. In response to members' request, Dr CHEUNG undertook to provide some relevant overseas information in this respect for members' reference.

(Post-meeting note: The Civil Service Code and the Ministerial Code of UK and the Civil Service Benchmark Act (draft), Civil Service Neutrality Act (draft), Political Officials Remuneration Regulations and Political Officials Retirement Benefits Regulations of Taiwan have been circulated to members vide LC Paper No. CB(2)1236/00-01 on 4 April 2001).

24. Ms NG pointed out that she would be prepared to support a new system which was underpinned by legislation and supplemented by constitutional conventions. She agreed with Dr CHEUNG that it was common for heads of governments in some democratic countries to appoint like-minded persons as ministers. However, in the absence of an elected government in Hong Kong, problems would arise. Quoting the case of Mr Andrew LO Cheung-on, CE's senior special assistant, she was concerned that under the proposed system, CE could continue to employ a principal official who had committed policy mistakes and came under pressure to resign.

25. Dr YEUNG Sum said that although the proposed system was only a small step towards the ultimate constitutional goal of universal suffrage for LegCo and popular election of CE, he agreed that it should be taken.

Role of LegCo, legislation and constitutional conventions

26. Mr Howard YOUNG asked Dr CHEUNG to elaborate on his proposal that the appointment of principal officials under the new system should be subject to the endorsement of LegCo. On Dr CHEUNG's reference to the systems in US and Hong Kong, he pointed out that the process for LegCo to endorse the appointment of judges was drastically different from the practice in the US where congressional hearings were held on major presidential appointments.

27. Ms Emily LAU asked whether legislation was required to empower LegCo to vet or endorse the appointment and removal of political appointees under the proposed system of accountability, and whether to do so would contravene BL.

28. Dr Anthony CHEUNG said that in his view, in order to institutionalize political accountability, special legislation should be introduced to govern the appointment, transfer and removal, etc of political appointees. Some political systems such as Taiwan had enacted such legislation. Dr CHEUNG believed that enactment of legislation empowering LegCo to appoint or remove

principal officials would not be possible under the existing constitutional system. However, there was nothing to prevent the establishment of constitutional conventions for LegCo to vet these appointments. For example, a nominee could be requested to appear before LegCo to explain his policy portfolio and commitments etc. Dr CHEUNG was of the view that constitutional conventions could be adopted as a transitional arrangement, pending enactment of the required legislation to provide legal backing to the proposed system in the longer term.

29. Dr MA Ngok explained that according to Article 11 of the BL, no law enacted by the legislature of the HKSAR should contravene BL. Under BL, the power of appointment of principal officials of HKSAR rested with CPG. It was not a matter for LegCo to intercede. Hence, to propose any legislation to empower LegCo to appoint or remove principal officials would definitely contravene BL.

30. Dr MA added that if LegCo was simply given the power of "vetting" the nomination of political appointees, there should be no question of contravention of BL. However, he pointed out that while a constitutional convention in this respect could be developed, its success would hinge on the co-operation of the Administration.

31. Dr DEGOLYER agreed that it was reasonable for nominees to answer questions from LegCo before appointment as they had to bring forth policy proposals to LegCo for endorsement in future. This would only improve the relationship between the executive authorities and the legislature.

32. The Chairman said that it might be possible to enact legislation to the effect that the appointment by CPG was subject to the endorsement of LegCo. However, he personally did not consider it necessary for the proposed accountability system to be underpinned by legislation.

33. Dr YEUNG Sum made two points on the role of LegCo. First, principal officials under the new system should be accountable to LegCo. When LegCo passed a motion of no-confidence on a politically appointed principal official, he should voluntarily resign as a convention. CE must respect the views of LegCo in the circumstances. Secondly, while LegCo had no authority to endorse the appointment of principal officials, the appointment should be "vetted" by LegCo. LegCo should play a role in the appointment process by requesting a nominee to appear before LegCo to answer questions prior to the appointment by CPG.

34. Dr YEUNG Sum added that while constitutional conventions had no binding effect, they were important in the context of political accountability. Constitutional conventions could bring about reforms and could eventually be incorporated as law, as demonstrated in other political systems.

Voting on the budget

35. Dr DEGOLYER said that if LegCo wanted to enhance accountability of the executive quickly, it could simply vote down the budget.

36. The Chairman pointed out that under the existing constitutional system, it required a simple majority vote of LegCo Members to vote down the budget. However, it was necessary for Members to vote down the vote on account first.

37. Ms Margaret NG disagreed with Dr DEGOLYER. She said that the legislature was very sensitive to the sentiment of the public. If the public considered that the budget was a generally acceptable one, any attempt to vote down the budget for political reasons would be perceived by the public as depriving them from the benefits of the budget. In her view, LegCo had to operate in the political reality of Hong Kong.

38. Dr DEGOLYER quoted an example to illustrate that voting down a budget might not be impossible in Hong Kong. In 1994, the Republicans who were the majority in the House of Representatives of the US Congress voted down the budget and successfully forced the executive authorities to introduce changes. The budget was also successfully voted down in the second term in 1996.

39. Ms NG responded that the effectiveness of using this method as a means to monitor the executive authorities would depend on the political and social climate of a particular place. The Chairman considered that this could be employed as a tactic to buy time for further consultations with a view to reaching compromise.

Potential conflict of interests

40. Mr HUI Cheung-ching referred to Dr CHEUNG's suggestion that political appointees under the new system could be recruited from outside the civil service on agreement terms. He asked whether there were any measures to deal with conflict of interests arising from these officers taking up employment in the private sector after leaving the Government.

41. Dr Anthony CHEUNG said that frequent movements of policy secretaries and civil servants in the Government and the private sector was not uncommon. In considering the matter, he suggested that reference should be made to other governments which had clear guidelines on sanitisation period or restrictions on taking up post-service employment in the private sector.

Role of the ExCo

42. Dr MA Ngok said that under his proposal, politically appointed principal officials should be members of ExCo, somewhat similar to the cabinet system in UK. This would also address Ms Margaret NG's concern that ExCo might formulate unreasonable policies that were unacceptable to the civil service.

43. Dr CHEUNG shared the view of Dr MA that the role of ExCo should be changed. He said that under Article 55 of BL, members of ExCo shall be appointed by CE from among the principal officials, LegCo Members and public figures. Under the system proposed by him, the membership of ExCo would be confined to politically appointed principal officials. It would appear that such an arrangement might be inconsistent with BL. But in his view, there was no express provision in BL that this could not be done. An alternative approach was to allow the role of the ExCo to gradually diminish so that it would cease to function as the CE's inner cabinet.

44. The Chairman cautioned that the second approach might not be feasible because as prescribed in many existing ordinances, the CE in Council was an entity exercising a lot of powers. On Dr CHEUNG's first approach, he said that there was a view that the ExCo should comprise of the three groups of persons referred to in Article 55 of BL. Ms Margaret NG said that the role and composition of ExCo should be given careful consideration.

45. Dr MA Ngok said that while BL allowed flexibility for CE to appoint ExCo members, it was not clear about its composition.

Scope of the proposed system

46. Ms Margaret NG was concerned whether the proposed political appointment system would affect the independence of organizations such as the Independent Commission Against Corruption (ICAC) and the Securities and Futures Commission. The Chairman was of the view that persons such as the Commissioner of ICAC, Director of Audit and Chief Executive of the Hong Kong Monetary Authority should not be politically appointed.

47. Dr MA Ngok opined that the proposed accountability system should only apply to the secretaries at policy bureau level. Principal officials such as the Director of Audit and the Commissioner of ICAC should be exempt from the proposed system.

48. Members thanked the academics for their views which would assist members in further deliberation of the matter.

Action
Column

II. Any other business

49. The Chairman asked the Administration whether it would visit some overseas countries in the course of its study of the system of accountability for principal officials.

50. DSCA said that although the situation in Hong Kong was rather unique, the Administration considered it worthwhile to study overseas systems. Representatives of the Constitutional Affairs Bureau and the Civil Service Bureau planned to visit Australia and New Zealand by the end of March 2001. While the Administration had yet to finalize the itinerary, it planned to meet with senior civil servants and ministers of these countries.

51. The Chairman requested the Administration to brief the Panel on observations made during the visit, pending arriving at any concrete recommendations. DSCA agreed.

Adm

52. The meeting closed at 11:15 am.

Legislative Council Secretariat

17 May 2001