

立法會
Legislative Council

LC Paper No. CB(2)1245/04-05
(These minutes have been seen
by the Administration)

Ref : CB2/PL/CA

Panel on Constitutional Affairs

Minutes of meeting
held on Monday, 21 February 2005 at 2:30 pm
in the Chamber of the Legislative Council Building

Members present : Dr Hon LUI Ming-wah, JP (Chairman)
Hon Jasper TSANG Yok-sing, GBS, JP (Deputy Chairman)
Hon James TIEN Pei-chun, GBS, JP
Hon Albert HO Chun-yan
Ir Dr Hon Raymond HO Chung-tai, S.B.St.J., JP
Hon LEE Cheuk-yan
Hon Martin LEE Chu-ming, SC, JP
Hon Fred LI Wah-ming, JP
Hon Margaret NG
Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
Hon James TO Kun-sun
Hon CHEUNG Man-kwong
Hon CHAN Yuen-han, JP
Hon CHAN Kam-lam, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
Hon LEUNG Yiu-chung
Hon SIN Chung-kai, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Howard YOUNG, SBS, JP
Dr Hon YEUNG Sum
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk
Hon Andrew CHENG Kar-foo
Hon Timothy FOK Tsun-ting, GBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon Abraham SHEK Lai-him, JP
Hon Tommy CHEUNG Yu-yan, JP
Hon Albert CHAN Wai-yip
Hon Frederick FUNG Kin-kee, JP

Hon Audrey EU Yuet-mee, SC, JP
Hon Vincent FANG Kang, JP
Hon WONG Kwok-hing, MH
Hon LEE Wing-tat
Hon LI Kwok-ying, MH
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Dr Hon KWOK Ka-ki
Dr Hon Fernando CHEUNG Chiu-hung
Hon CHEUNG Hok-ming, SBS, JP
Hon WONG Ting-kwong, BBS
Hon TONG Ka-wah, SC
Hon CHIM Pui-chung
Hon Patrick LAU Sau-shing, SBS, JP
Hon Albert Jinghan CHENG
Hon KWONG Chi-kin
Hon TAM Heung-man

**Members
absent**

: Dr Hon David LI Kwok-po, GBS, JP
Hon Bernard CHAN, JP
Hon WONG Yung-kan, JP
Hon LAU Chin-shek, JP
Hon LAU Wong-fat, GBS, JP
Dr Hon Joseph LEE Kok-long
Hon Daniel LAM Wai-keung, BBS, JP
Hon MA Lik, JP

**Public officers
attending**

: Item IV

Mr Stephen LAM Sui-lung
Secretary for Constitutional Affairs

Mr Clement MAK Ching-hung
Permanent Secretary for Constitutional Affairs

Mr Joseph LAI Yee-tak
Deputy Secretary for Constitutional Affairs

Miss Linda LEUNG Ka-ying
Acting Principal Assistant Secretary for Constitutional
Affairs

Item V

Mr Stephen LAM Sui-lung
Secretary for Constitutional Affairs

Mr Clement MAK Ching-hung
Permanent Secretary for Constitutional Affairs

Mr Joseph LAI Yee-tak
Deputy Secretary for Constitutional Affairs

Mr Raymond TAM Chi-yuen
Principal Assistant Secretary for Constitutional Affairs

Clerk in attendance : Mrs Percy MA
Chief Council Secretary (2)3

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Mr Watson CHAN
Head, Research and Library Services Division

Mr CHAU Pak-kwan
Research Officer 5

Mrs Eleanor CHOW
Senior Council Secretary (2)4

Action

I. Confirmation of minutes of meetings

(LC Paper No. CB(2)825/04-05 – Minutes of meeting on 20 December 2004

LC Paper No. CB(2)863/04-05 – Minutes of meeting on 13 January 2005)

The minutes of the meetings held on 20 December 2004 and 13 January 2005 were confirmed.

II. Information papers issued since the last meeting

2. Members noted the following papers which had been issued since the last meeting –

- (a) LC Paper No. CB(2)672/04-05(01) – Letter dated 29 December 2004 from Hon Margaret NG in response to the Administration's

Action

letter dated 23 December 2004 concerning the number of "tendered" ballot papers issued in the 2000 and 2004 LegCo elections; and

- (b) LC Paper No. CB(2)672/04-05(02) – Letter dated 14 January 2005 from the Administration in response to Hon Margaret NG's letter dated 29 December 2004.

III. Items for discussion at the next meeting

(LC Paper No. CB(2)862/04-05(01) – List of outstanding items for discussion)

3. Secretary for Constitutional Affairs (SCA) proposed to discuss the Administration's proposals on matters relating to election-related publicity materials at the next meeting to be held on 21 March 2005. He said that the matter was referred to the Constitutional Affairs Bureau by the Complaints Division of the Legislative Council Secretariat. Members agreed.

4. Members expressed concern about the lack of progress of the item on "Application of certain provisions of the Prevention of Bribery Ordinance (Cap. 201) to the Chief Executive", which was last deliberated by the Panel in January 2002. Members agreed to discuss the item at the next meeting. Dr YEUNG Sum said that the Chief Secretary for Administration (CS) should be invited to report progress and the way forward at the meeting.

5. In response to members' questions on the outstanding items for discussion, SCA said that the Administration was not in a position to update members on the item "The question of important bill under Article 50 of the Basic Law" at this stage. As regards the items on "Restriction on activities of former holders of the office of the Chief Executive (CE)" and "Review of the remuneration of the third term CE", SCA said that they would be dealt with after the overall direction for the methods for selecting CE in 2007 and for forming the Legislative Council (LegCo) in 2008 (the "electoral methods") had been set.

IV. Political party law

(Research Report on "The Regulatory Framework of Political Parties in Germany, the United Kingdom, New Zealand and Singapore" prepared by the Research and Library Services Division of the LegCo Secretariat in April 2004

IN17/04-05 – Information Note on "Views on Political Party Law in Hong Kong" prepared by the Research and Library Services Division of the LegCo Secretariat

LC Paper No. CB(2)607/04-05(03) – Paper provided by the Administration on "Political party law")

Action

Issues raised by members on Information Note prepared by the Research and Library Services Division (RLSD)

6. Dr YEUNG Sum asked whether public funding would be provided for political party development in western democratic countries. Head (Research and Library Services) (H(RL)) said that the Information Note on "Views on Political Party Law in Hong Kong" (the Information Note) did not address the issue raised by Dr YEUNG. RLSD, however, had prepared in the last session a Research Report on "The Regulatory Framework of Political Parties in Germany, the United Kingdom (UK), New Zealand and Singapore" (the Research Report). In Germany, public funding of political parties was prescribed by law. In UK, public funding of political parties was confined to opposition parties in Parliament. In New Zealand, public funding was available for political parties to perform their parliamentary duties. Singapore did not provide any financial assistance for political parties.

7. Mr Frederick FUNG referred to paragraph 3.3 of the Information Note which listed some of the factors that were considered by academics having the effect of impeding development of political parties in Hong Kong, including the Central People's Government's antipathy attitude towards party politics in Hong Kong, social fragmentation within Hong Kong and the lack of incentives for business elites to form political parties. Mr FUNG asked whether studies had been carried out by RLSD to ascertain the factors, such as the ones mentioned in paragraph 3.3 of the Information Note, that would encourage or impede political party development in Hong Kong. Mr FUNG also expressed concern about the view of a commentator (paragraph 3.4 of the Information Note) that the development of political parties might impede democratic development in Hong Kong.

8. Research Officer 5 (RO5) said that there were more discussions on the issue of political party development by academics in 1980s when party politics had not yet flourished. When more political parties were formed in 1990s, academics began to focus their attention on other related issues such as constitutional development and the impact of the electoral system on development of political parties. As regards paragraph 3.4 of the Information Note, RO5 said that the view of that commentator represented a minority view. The majority of commentators and academics considered that the existence of political parties provided an important basis for democratic development in Hong Kong.

9. Mr Frederick FUNG requested RSLD to provide supplementary information, if any, on factors which were considered by commentators/academics as having the effect of encouraging or hindering political party development in Hong Kong.

H/RL

10. Referring to the Research Report, Mr LAU Kong-wah enquired whether the formation of political parties in the four countries came before the enactment

Action

of a political party law or vice versa. Pointing out that the Administration held the view that the introduction of a political party law would hinder political party development, Mr LAU asked whether this was the case in overseas countries.

11. RO5 said that in democratic countries, political parties were usually in existence for some time before enactment of a political party law. For instance, political party law had only been introduced recently in UK and after World War II in Germany. In these countries, political parties were regulated by a specific law on political parties and/or relevant electoral laws. While the regulatory framework in UK and Germany did not impose too many restrictions on political parties, political parties in Singapore were regulated by a wide range of laws covering various aspects of political parties. RO5 further said that whether the enactment of a political party law was meant to facilitate or hinder the development of political parties would depend on the objectives of the law.

12. Commenting on the progress of democratic development in UK, Mr LAU wondered why a political party law was only introduced recently. RO5 explained that for UK and some western countries, political party related legislation mainly served the purpose of registration and enhancing financial transparency of political parties. Historically, political parties were formed and financed by private bodies. In recent years, following the decrease in membership of political parties, there was a need for political parties to seek financial assistance from other sources such as public funding. This called for the introduction of legislation to regulate the donations and expenditure of political parties. Some countries also required political parties to register in order to be eligible for certain benefits, for instance, printing of party slogan or emblem on ballot papers and receipt of financial assistance based on the number of votes received in an election.

H(RL)

13. Ms Emily LAU said that political party related legislation did not necessarily have the effect of hindering political party development as pointed out by the Administration. Referring to the Electoral Act in Australia which provided a voluntary registration system for political parties to encourage party development, she requested H(RL) to provide supplementary information on overseas places which had in place a voluntary registration system of political parties.

14. Members also requested H(RL) to provide the following supplementary information concerning the four countries covered in the Research Report –

(a) non-financial assistance provided by the respective governments to encourage political party development (raised by Hon LEE Wing-tat); and

H(RL)

(b) historical development of universal suffrage in relation to political party development (raised by Hon Margaret NG).

Briefing by SCA and issues raised by members

Action

15. At the invitation of the Chairman, SCA briefed members on the Administration's paper which set out its position on the introduction of a political party law.

16. Mr CHEUNG Man-kwong said that the greatest impediment to political party development was the Basic Law. The political structure enshrined in the Basic Law was an executive-led system where checks and balances could not be effectively exercised by LegCo on the Government. Political parties could not become a ruling party and opposition parties were powerless despite they had the support of the people. Under the separate voting system, the Government could choose not to respond to mainstream views that were supported by the public and LegCo. Mr CHEUNG further said that a political party law introduced under the existing political system would only create hurdles to restrict the operation of political parties. In his view, the Government's formal recognition of political parties was more important than any financial assistance provided to political parties.

17. Dr YEUNG Sum said that according to paragraph 4.3 of the Information Note, it was the view of CS that it was not the responsibility of a government to facilitate the development of political parties in an open society. Dr YEUNG asked whether the Government would consider providing policy, legislative and financial support to facilitate development of political parties.

18. SCA clarified that, as explained by CS on an earlier occasion, it was the view of the Government that it should not play a leading role in how various political parties develop. This was a matter for the parties themselves. Nevertheless, the Government would provide an environment which facilitated the growth and development of political parties, despite the absence of a law on political party. In the 2004 LegCo election, the Administration had introduced legislative provisions to provide partial financial support to candidates who got elected or who had received 5% of valid votes or more. Candidates were also allowed to print the names and emblems of their parties or the candidates' photographs on the ballot paper. The Administration hoped that through constitutional development, more room would be created for political talents to participate in public affairs.

19. Ms Miriam LAU asked about the appropriate timing and the factors involved in determining the timing for introducing a law on political party. SCA said that according to overseas experience, a political party law would normally be enacted when political parties had developed to a certain level of maturity, e.g. the emergence of a few major political parties, the public was familiar with the political parties and their members standing as candidates in an election, and the adoption of the proportional representation electoral system which allowed allocation of seats on the basis of the number of votes cast, etc. SCA added that the situation in Hong Kong was different. There were both independent Members and Members affiliated with political parties and groups, and some independent Members did not have the intention to form or join any political

Action

parties. The political parties in Hong Kong were still at a developmental stage. In his view, more room should be created through constitutional development for political talents to participate in public affairs, and less restrictions should be imposed on the operation of political parties.

20. Mr Howard YOUNG held the view that introducing a law on political party at this stage would restrict rather than encourage political party development. He said that while SCA had publicly expressed support for political party development on many occasions, CE and other principal officials (POs) seldom made such remarks. He said that favourable comments from them would help change the public's perception about political parties.

21. SCA said that CE and POs had affirmed the importance of political parties in constitutional development in many ways. Following the implementation of the accountability system, CE had appointed individuals with political party background as POs and non-official Members of the Executive Council (ExCo). SCA explained that the subject was under his policy portfolio, and he had openly expressed support for the development of political parties. In addition, from the experience of his previous postings in UK and Canada, he was aware of the important role played by political parties in a political system. Political parties could help reflect and advance the interests of different sectors of the community on a wide range of issues. These issues could sometimes become the policy agenda of the Government after discussion with the parties concerned. In addition, political parties also help groom political talents. SCA added that electors in Hong Kong exercised their voting right wisely and seldom put all eggs in one basket, i.e., they would vote for independent candidates and candidates with political party background in an election.

22. Mr Howard YOUNG said that in general, political parties would register as companies under the Companies Ordinance or societies under the Societies Ordinance. Starting from the 2004 LegCo election, a prescribed political body or non-political body could apply to the Electoral Affairs Commission (EAC) for registration of the name and emblem of the body. He suggested that the registration system should be formalised so that only political parties could apply for registration of particulars on the ballot paper. In addition, he suggested that in requesting for printing of particulars on the ballot paper, a candidate should indicate whether he was or was not a member of a political party. In his view, it was inappropriate for a candidate, who was affiliated with a political party, to describe himself as an independent candidate on the ballot paper.

23. SCA said that he would put on record Mr YOUNG's suggestions. He said that in implementing the schemes on financial assistance and printing of particulars relating to candidates on the ballot paper for the 2004 LegCo election, EAC's foremost concern was to establish a proper mechanism for registration of particulars of candidates printed on the ballot paper and for processing applications for financial assistance from candidates. In 2004, a total of 36 prescribed bodies had their names and/or emblems registered with EAC.

Action

Although this registration requirement only related to the printing of names and emblems on the ballot paper, it was a step towards developing a register of organizations which were interested in participating in elections.

24. Mr Albert CHENG said that the issue of political party development should be handled in an open, accommodating and objective manner. Given that 60% of the voters in the 2004 LegCo election had voted for pan-democratic Members who were returned by geographical constituency (GC) elections, the Administration should improve the electoral system by abolishing functional constituency (FC) elections which were conducted in the form of small-circle elections.

25. SCA said that while he had noted that pan-democratic Members had reservation about increasing the number of FC seats in the 2008 LegCo election, he hoped that they would also keep an open mind and adopt an objective attitude towards the mainstream proposal to be put forth for the “electoral methods”. He said that the magnitude of the increase in FC seats and their electorates, if any, had yet to be determined. Members should not at this stage form a pre-conceived view on the proposal. He reiterated that the design of the electoral system for LegCo election, as laid down in the Basic Law, embodied the principle of balanced participation of Members returned by both GC and FC.

26. Ms Emily LAU said that the financial assistance scheme introduced for the 2004 LegCo election was for candidates, and not political parties. She said that consideration should be given to providing financial assistance to political parties based on the number of votes they received in an election. Ms LAU also expressed concern about the source of funding of political parties. She asked whether the Administration would introduce measures to enhance the financial transparency of political parties.

27. SCA said that the Administration would conduct a review to assess the effectiveness of the financial assistance scheme launched for the 2004 LegCo election. Although the financial assistance scheme was not intended to benefit solely political parties, the scheme would, to some extent, relieve the financial burden of political parties in supporting their members to participate in elections. In conducting the review, the effect of the scheme on political parties would be assessed and areas for improvement would also be identified. SCA further said that although there was at present no law to regulate the source of funding of political parties, all candidates running at an election were required to declare their election expenses and donations received. So far the system had been working well.

28. Mr Ronny TONG said that under common law, what was not forbidden in the law was permissible. As political parties in Hong Kong were still at a developmental stage, imposing statutory control on them would not help their development. He also disagreed with the view of Ms Emily LAU that political parties should be allowed to register on a voluntary basis following the enactment of a political party law. In the circumstances, the legal regulatory

Action

framework would serve no useful purpose. He was of the view that enacting a political party law would not be the best means of encouraging political party development. Mr TONG added that political parties could consider providing a “wish list” to set out the kind of assistance they required for the consideration of the Administration. He personally would propose the following non-legislative measures for the consideration of the Administration –

- (a) to enhance participation of persons with political party background in advisory and statutory bodies (ASBs). The Administration should consider appointing more pan-democratic Members to serve on ASBs, given that 60% of the voters in the 2004 LegCo election had voted for them;
- (b) to abolish the requirement that the CE elect must relinquish his political affiliation;
- (c) to improve the executive-legislature relationship;
- (d) to promote public awareness of political parties and their contribution to the society through civic education; and
- (e) to treat political parties as non-profitable organizations so that profits generated from investment would not be subject to taxation.

29. Dr YEUNG Sum supported the measures proposed by Mr TONG and supplemented with the following points –

- (a) the Administration was belittling political parties if the requirement for the CE elect to relinquish his political affiliation was not abolished. As the third term CE had to appoint a team of POs to assist him, whether and how many of these POs had political party background would affect the development of political parties;
- (b) the Democratic Party would not support an increase in FC seats for the purpose of grooming political talents. The Administration should consider appointing persons with dissenting views from the Government to serve on ASBs if it was serious about providing opportunity for political parties’ succession team to participate in public affairs;
- (c) as a means to encourage political party development, donations to political parties should be tax deductible; and
- (d) with limited resources and insufficient funding, it was difficult to operate a political party in Hong Kong. It was hence unfair for candidates with political background to be given the same air-time as individual candidates in election broadcasting through

Action

electronic means.

30. Mr LEE Wing-tat said that political parties were asking for recognition and not just lip service from the Government. He asked SCA to provide a paper setting out the measures proposed by the Administration to encourage political party development and the implementation timetable. He suggested that, for example, a percentage of seats in ASBs could be allocated to persons with political party background and a percentage of air-time of APIs (Government Announcements in Public Interest) could be allocated to political parties.

31. SCA said that political parties had been developing steadily in Hong Kong and their influence could be seen at each election. He anticipated that the influence of political parties would be further enhanced in the 2007 and 2008 elections. He further said that the Administration intended to deal with political party development at three levels at this stage—

- (a) the issue of political party development would be addressed in the context of discussion on the method for selecting CE in 2007. The Constitutional Development Task Force would consider whether the requirement that the CE elect must relinquish his political affiliation should be abolished. Irrespective of whether or not the third term CE had political background, it was for him to decide on the composition of the POs appointed to assist in his work. The background of these POs and the persons to be appointed as ExCo Members had a bearing on governance and the executive-legislature relationship;
- (b) in reviewing the “electoral methods” for 2007 and 2008, the Administration would consider ways to make room for political talents to participate in public affairs. Apart from the suggestion of increasing the number of LegCo seats in the 2008 election, increasing the membership of the Election Committee and broadening the scope and size of its electorate were possible alternatives to enhance participation of political parties and groups in public affairs; and
- (c) the Administration would explore other financial schemes to facilitate political party development. Subject to the outcome of the review of the financial assistance scheme provided to candidates for the 2004 LegCo elections, the Administration would be prepared to listen to views on whether similar arrangements would apply to future District Council (DC) elections, in the context of the review of DCs which would be conducted at the end of 2005.

32. On the measures proposed by Mr Ronny TONG, Dr YEUNG Sum and Mr LEE Wing-tat, SCA made the following points –

- (a) under existing legislation, only charitable organizations were

Action

eligible for tax exemption. Mr TONG and Dr YEUNG's proposals concerning tax exemption should more appropriately be raised in a different forum, e.g. when the budget was considered;

- (b) the arrangement of Radio Television Hong Kong to allocate air-time for candidates of political parties to promote their election platform had enhanced public awareness of political parties. As regards the request for allocation of APIs for political parties, SCA expressed difficulty in acceding to the request as the available air-time for APIs was not enough even for government departments. He said that in UK, the British Broadcasting Corporation provided air-time free of charge to political parties to make statements and to give views on topical issues. Hong Kong could consider adopting similar approach when its political system had become more mature; and
- (c) the Administration had affirmed the policy to tap the best talents from a wide spectrum of the community to serve on ASBs, irrespective of their political background. While the Administration would endeavour to create an environment to attract political talents, it was for political parties to decide how to groom their succession teams. As regards the views of Mr Ronny TONG, Dr YEUNG Sum and Mr LEE Wing-tat concerning ASBs, SCA said that he would relay them to the Home Affairs Bureau for consideration.

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33. Dr KWOK Ka-ki asked about the timetable for any of the political parties to assume the role of a ruling party and the measures taken by the Administration to encourage persons with political party background to participate in public affairs. He held the view that an organization required the support of a strong electorate base before it could describe itself as a political party.

34. SCA said that while small political groups and individual candidates might not have a strong electorate support when compared with major political parties, they too had their supporters in an election. SCA further said that he did not have a crystal ball and therefore could not tell when political parties in Hong Kong could assume the role of a ruling party. The constitutional system in Hong Kong was at the developmental stage, and electoral policy would evolve along with the prevailing political development. For instance, in the first term CE election, candidates with political party background were prohibited from running in the election. In the second term CE election, a candidate with political background was allowed to run in the election, although he was required to relinquish his political affiliation once elected. Progress had been made in the electoral arrangements for the election of CE, and the arrangement for the third term CE election was now open for discussion.

35. Mr LAU Kong-wah asked whether the Administration would consider means other than appointments to ASBs to groom talents with political party

Action

background, such as appointing them as deputy bureau secretaries or administrative assistants. SCA said that he would put Mr LAU's proposal on record. He explained that it took sometime for POs and civil servants to get used to the new working arrangements under the accountability system. Introducing new changes to the accountability system at this stage might upset the balance that had been achieved by the concerted effort of parties involved. He said that apart from appointing political talents to serve on ASBs, DCs and LegCo also provided good forums for political talents to participate in politics.

36. Mr LEUNG Kwok-hung said that given that none of the political parties in Hong Kong could become the ruling party, there was not much room for political party development. He asked the Administration whether it had considered adopting the following measures to encourage political party development –

- (a) to introduce a law on political party similar to that of Germany;
- (b) to study the constitutional system of Indonesia with a view to adopting its measures for political party development where appropriate; and
- (c) to study the multi-party co-operation system of China with a view to adopting its measures for political party development where appropriate.

37. SCA said that although political parties in Hong Kong could not become a ruling party, their members had participated actively in public affairs and some of them had been appointed as POs, LegCo and/or ExCo Members and took part in the formulation of public policies. While the constitutional development of Hong Kong might lag behind that of the western democratic countries, it was making progress. He further said that under the "One Country, Two Systems", Hong Kong would develop its own constitutional model based on the framework laid down in the Basic Law.

V. Constitutional issues relating to prorogation of the Council

(LC Paper No. CB(2)862/04-05(02) – Paper of the Committee on Rules of Procedure for the House Committee meeting on 23 April 2004

LC Paper No. CB(2)862/04-05(03) – Paper provided by the Administration on "Issues pertaining to prorogation")

38. Ms Emily LAU referred to the paper prepared by the Committee on Rules of Procedure (CRoP) and asked whether it was the consensus of members of CRoP that –

- (a) the power to determine the commencement and end dates of a LegCo session should be transferred from CE to the President of LegCo (the President);

Action

- (b) the power to prorogue the Council should be transferred from CE to the President; and
- (c) the Council and its committees could resume operation during prorogation in circumstances other than at the request of CE for convening emergency Council meetings.

39. Mr Jasper TSANG, Deputy Chairman, who was also the Chairman of CRoP, clarified that some members of CRoP had raised the above issues in the last session and CRoP did not arrive at any conclusion. Given that these were constitutional issues which would affect the relationship between the executive and the legislature, CRoP decided that they should be referred to this Panel for further deliberation.

40. SCA briefed members on the Administration's position on the constitutional issues pertaining to prorogation as set out in the paper. To sum up, the Administration's position on the issues was that –

- (a) the existing legal provisions and arrangements with regard to the prorogation of LegCo were appropriate and should remain unchanged;
- (b) the existing legal provisions and arrangements with regard to the determination of the commencement and end dates of a LegCo session were appropriate and should remain unchanged; and
- (c) the Council and its committees could resume operating during prorogation only at the request of CE for convening emergency Council meetings.

41. Dr YEUNG Sum said that he fully supported the view of CRoP in paragraph 9 of its paper. Given that the Basic Law empowered LegCo to make laws and transact business on its own after reunification, there were no valid grounds for CE to specify the commencement and end dates of a LegCo session. Since Article 72(3) of the Basic Law (BL 72(3)) provided the President with the power to decide on the time of meetings, the commencement and end dates of a LegCo session should likewise be determined by the President.

42. SCA explained that the design of the Legislative Council Ordinance (LCO) had taken into account the arrangements prior to reunification and the new constitutional order after reunification. Before reunification, the Governor was given the power, as specified in the Royal Instructions, to dissolve LegCo before nominations started for a general election. The Governor also determined the commencement and end dates of a LegCo session. After reunification, LCO reflected the spirit of those arrangements. Section 6 of LCO empowered CE to specify dates for holding general elections of LegCo and prorogation of the Council, while section 9(2) of LCO provided CE with the power to “publish in the Gazette the dates on which an ordinary session of the Legislative Council is

Action

to begin and end”. The rationale for the Council to prorogue was that incumbent LegCo Members seeking re-election should not be perceived to be enjoying undue advantage over non-incumbent rivals by conducting their campaigns in the capacity of serving Members. The arrangement was conducive to achieving open and fair elections.

43. SCA further said that the arrangements for the President to call special sessions during recess and emergency sessions during prorogation at the request of CE under BL 72(4) and BL 72(5) respectively were similar to those adopted prior to reunification. The existing arrangements reflected the co-operation between the executive and the legislature before and after reunification.

44. Dr YEUNG Sum said that the arrangement under the new constitutional order was for LegCo to operate independently. Given that BL 72(4) empowered the President to call special sessions during the recess, there was no reason to have a different arrangement during prorogation. Mr Jasper TSANG explained that recess was different from prorogation in that LegCo would cease to transact any formal business during prorogation. SCA supplemented that prorogation occurred once every four years, and the arrangement for calling emergency sessions during prorogation was different from that for calling special sessions during the recess. He said that LCO had incorporated the requirements concerning prorogation under the new constitutional order, and LegCo had full deliberation of the matter before LCO was enacted.

45. Ms Margaret NG indicated that she was disappointed at SCA’s reply. She said that the Administration had always used the Basic Law as a tool to defend its policy. However, when the spirit of certain provisions in the Basic Law did not suit its purpose, the Administration chose to ignore it. It appeared that the prime concern of the Administration was to preserve its executive power. Ms NG further said that before reunification, the Governor, who was the constitutional representative of the British monarch, was vested with legislative and executive powers, while LegCo only played a role of advising the Governor. After reunification, the new constitutional order prescribed in the Basic Law clearly demarcated the powers and functions of the executive and the legislature.

46. Ms NG pointed out that under BL 72, the power to convene and decide on the timing of meetings rested with the President. BL 73 further empowered LegCo to make laws and transact business on its own. Neither BL 48 (on the powers and functions of CE) nor any other provisions of the Basic Law provided CE with such powers. Concerning the calling of emergency sessions, while BL 72(5) stipulated that it was the power of CE to make a request to the President, it remained the power of the latter to convene the emergency sessions. All these Basic Law provisions reflected that there was clear division of responsibilities, co-operation, checks and balances between the executive and the legislature. If CE had a certain power over LegCo, such as dissolving the Council, it was expressly provided in the Basic Law. It was therefore unconstitutional for CE to be vested with additional power which was not provided in the Basic Law. Given that LCO had not reflected the spirit of the

Action

roles and functions of LegCo as embodied in BL 72 and 73, Ms NG was of the view that LCO should be amended to transfer the power relating to prorogation from CE to the President.

47. SCA said that a few years before reunification, the Governor had ceased to preside over Council meetings and determine the dates and time of Council meetings, and yet the authority to appoint the commencement and end dates of a LegCo session and to dissolve LegCo continued to be vested in the Governor. It was considered at that time that LegCo had been operating smoothly under the Royal Instructions and Standing Orders of LegCo and that there should be continuity of the arrangements to ensure smooth transition after the change of sovereignty. The existing arrangements for CE to determine the commencement and end dates of a LegCo session and for the President to decide on the time of meetings basically mirrored those adopted prior to reunification. As regards the division of powers and functions of CE and the President during prorogation and recess of the Council, BL 72(4) & (5) provided that CE could request the President to call emergency sessions during prorogation, while the President could call special sessions during the recess. The arrangements were considered to be consistent with the Basic Law and were reflected in LCO which had been deliberated and passed by LegCo.

48. Ms NG said that she could not understand why the Administration had to make reference to the arrangements of the old constitutional order and not to review the relevant provisions in LCO in the light of the spirit of the Basic Law. She pointed out that the power of CE was confined to making a request to the President for convening emergency meetings during prorogation.

49. Mr Albert HO echoed Ms NG's view and said that it would be a laughing stock if the arrangements in the Royal Instructions continued to apply to the new constitutional order after reunification. Mr HO pointed out that under BL 72(6), the President could exercise other powers and functions as prescribed in the Rules of Procedure (RoP) of LegCo. He asked whether amending RoP to empower the President to prorogue the Council would override section 6(3) of LCO which empowered CE to prorogue the Council. Pointing out that prorogation of the Council was part of the operation of LegCo, Mr HO also asked about the basis for the assumption that CE, and not the President, had the power to prorogue the Council.

50. SCA responded that the first question was a hypothetical one. He reiterated that the power exercised by CE relating to prorogation was consistent with the Basic Law and LCO. He expected that in proposing any amendments to RoP, LegCo would respect the statutory arrangements stipulated in the existing constitutional and local laws. As regards the second question, SCA reiterated that the existing arrangements provided in sections 6 and 11 of LCO had taken into the account the relevant requirements in the Basic Law and the established practice before reunification. LCO was enacted after passage by LegCo and the enactment of LCO was reported to the Standing Committee of the National People's Congress for record.

Action

51. Ms Emily LAU referred to paragraph 6 of the Administration's paper which stated that "Since it is the CE who specifies the date for election, it follows logically that he should also specify the period for which LegCo stands prorogued, given in particular that the latter is 'to enable such a general election to be held'." Ms LAU said that the argument lacked basis. She expressed concern that if the President was not empowered to call emergency meetings during prorogation, LegCo would not be able to perform its function if issues of great public interest arose during prorogation. She said that the Administration's view that the power to call emergency sessions vested only with CE was tantamount to depriving the President the right to exercise that power.

52. Mr LEUNG Kwok-hung said that the Administration's paper did not tell the whole truth. BL 72(5) was an insult to LegCo given its President could only call emergency sessions upon the request of CE. He added that proper check could not be exercised by LegCo on CE under the existing arrangements.

53. SCA disagreed that the existing arrangements took away certain powers from the President. He said that by convention, the commencement and end dates of a LegCo session was determined by CE while the President of LegCo decided on the time of meetings. The date of prorogation was determined by CE in consultation with LegCo. The arrangements reflected the system of check and balance, as well as cooperation, between the executive and the legislature in handling Hong Kong affairs.

54. SCA further said that it was appropriate for CE to retain the power to prorogue the Council to ensure that LegCo elections would be open and fair as explained earlier (paragraph 42 above refers). CE was also required under the law to publish the date of prorogation in the Gazette to ensure transparency. SCA assured members that CE would call emergency sessions only if the situation warranted. It was appropriate to vest with him such power at times of emergency. He said that the practice had been in place for many years and had been working well. There was no sign that CE had abused, or would abuse, the power.

55. Ms Miriam LAU said that if the concern about incumbent Members having undue advantage over non-incumbent rivals in a LegCo election could be addressed, consideration should be given to transferring the power to prorogue the Council and to call emergency meetings from CE to the President. As regards the practical difficulty for the President to fix a commencement date for the first session in a LegCo term, as pointed out in paragraph 11 of the Administration paper, Ms LAU considered that this could be overcome by putting in place a mechanism for fixing in advance the commencement date of the session. She said that the strained relationship between the executive and legislature was a result of numerous disputes between the two institutions over minor issues. She urged the Administration to address the issues raised flexibly with a view to achieving consensus.

Action

Adm 56. SCA said that he appreciated the constructive views put forth by Ms LAU and would relay them to CE for consideration. He added that he would put on record Ms LAU's proposal concerning fixing the commencement date of the session in advance, so that the issue would be considered together with other amendments to LCO in future. At this stage, it was the position of the Administration that the existing legal provisions and arrangements with regard to prorogation and related issues were appropriate and should remain unchanged.

57. Ms Margaret NG said that she had reservation about empowering the President to call emergency meetings in the absence of a request from CE as this power was not provided in the Basic Law. She said that the issues under discussion were legal rather than political in nature. She proposed and members agreed to follow up the matter by requesting –

Adm (a) the Administration to provide documents relating to its consideration and discussions with LegCo on the proposed arrangements for CE to prorogue the Council and determine the commencement and end dates of a LegCo session under LCO;

(b) academics with expertise in constitutional law and legal professional bodies to provide written views on the relevant issues, and to appear before the Panel to exchange views with members if they so wished; and

LSD (c) the Legal Services Division of the Secretariat to give views on the relevant issues.

(Post-meeting note : In relation to paragraph 57 (b), invitation letters were issued on 24 February 2005.)

58. Ms Margaret NG said that in the event that the legal profession considered that the relevant provisions in LCO contravened the spirit of the Basic Law, and the Administration refused to introduce amendments to LCO, LegCo could seek judicial review as a last resort.

VI. Any other business

59. The Chairman reminded members that a special meeting would be held on Saturday, 26 February 2005 from 9:30 am to 1:00 pm to receive views on the "Role and development of political parties" from deputations.

60. The meeting ended at 5:30 pm.