

立法會
Legislative Council

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LC Paper No. CB(2)791/05-06
(These minutes have been seen
by the Administration)

**Subcommittee to Study the Administration's Proposals
for the Methods for Selecting the Chief Executive in 2007
and for Forming the Legislative Council in 2008**

**Minutes of the seventh meeting
held on Tuesday, 22 November 2005 at 8:30 am
in the Chamber of the Legislative Council Building**

Members present :

- Hon TAM Yiu-chung, GBS, JP (Chairman)
- Hon Howard YOUNG, SBS, JP (Deputy Chairman)
- Hon James TIEN Pei-chun, GBS, JP
- Hon Albert HO Chun-yan
- Dr Hon David LI Kwok-po, GBS, JP
- Hon Fred LI Wah-ming, JP
- Dr Hon LUI Ming-wah, SBS, JP
- Hon James TO Kun-sun
- Hon CHEUNG Man-kwong
- Hon CHAN Yuen-han, JP
- Hon CHAN Kam-lam, SBS, JP
- Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
- Hon LEUNG Yiu-chung
- Hon WONG Yung-kan, JP
- Hon Jasper TSANG Yok-sing, GBS, JP
- Dr Hon YEUNG Sum
- Hon Miriam LAU Kin-ye, GBS, JP
- Hon Emily LAU Wai-hing, JP
- Hon CHOY So-yuk, JP
- Hon Andrew CHENG Kar-foo
- Hon Abraham SHEK Lai-him, JP
- Hon LI Fung-ying, BBS, JP
- Hon Tommy CHEUNG Yu-yan, 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 Daniel LAM Wai-keung, BBS, JP

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 Fernando CHEUNG Chiu-hung
Hon CHEUNG Hok-ming, SBS, JP
Hon WONG Ting-kwong, BBS
Hon Patrick LAU Sau-shing, SBS, JP
Hon TAM Heung-man

**Members
absent** : Ir Dr Hon Raymond HO Chung-tai, S.B.St.J., JP
Hon LEE Cheuk-yan
Hon Martin LEE Chu-ming, SC, JP
Hon Margaret NG
Hon Mrs Selina CHOW LIANG Shuk-yee, GBS, JP
Hon Bernard CHAN, JP
Hon SIN Chung-kai, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon LAU Kong-wah, JP
Hon LAU Wong-fat, GBM, GBS, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon Frederick FUNG Kin-kee, JP
Hon MA Lik, GBS, JP
Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
Hon KWONG Chi-kin

**Public Officers
attending** : Mr Stephen LAM
Secretary for Constitutional Affairs

Ms Elsie LEUNG
Member, Constitutional Development Task Force

Mr Clement MAK Ching-hung
Permanent Secretary for Constitutional Affairs

Mr Joseph LAI
Deputy Secretary for Constitutional Affairs

Mr Raymond TAM
Principal Assistant Secretary for Constitutional Affairs

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

Staff in attendance : Mr Jimmy MA
Legal Adviser

Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Mrs Eleanor CHOW
Senior Council Secretary (2)4

Ms Fanny LO
Legislative Assistant (2)3

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I. Questions referred from the Committee on Rules of Procedure

(LC Paper No. CB(2)345/05-06(07) – List of questions referred from the Committee on Rules of Procedure

LC Paper No. CB(2)368/05-06(01) – Administration's response to the questions referred from the Committee on Rules of Procedure)

Secretary for Constitutional Affairs (SCA) introduced the paper which set out the Administration's response to the questions referred from the Committee on Rules of Procedure (CRoP) regarding the procedure for dealing with the motions on the amendments to the methods for selecting the Chief Executive (CE) and forming the Legislative Council (LegCo) (the "two methods") in 2007 and 2008 respectively.

Draft motions concerning amendments to the "two methods"

2. Mr LEE Wing-tat said that according to clause 3 of the interpretation of Article 7 of Annex I and Article III of Annex II to the Basic Law made by the Standing Committee of the National People's Congress (NPCSC) on 6 April 2004 (the NPCSC Interpretation), bills on the amendments to the "two methods" for 2007 and 2008 should be introduced by the Government of Hong Kong Special Administrative Region (HKSAR) into LegCo. As in the Fifth Report of the Constitutional Development Task Force (the Task Force) the Administration had introduced motions rather than a bill to effect the amendments to Annex I and Annex II to the Basic Law, he asked about the status of these motions.

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3. SCA said that as explained in paragraphs 1 to 6 of the Administration's paper, it was appropriate to use motions rather than a bill to effect the amendments to Annex I and Annex II to the Basic Law. Paragraph 7.02 of the Fifth Report also stated that the Draft Amendments appended to the motions were the "bills" referred to in the NPCSC Interpretation.

4. Legal Adviser (LA) informed members that in studying the procedures for dealing with the motions concerning the amendments to the "two methods" in 2007 and 2008, CRoP had raised two main concerns, namely, whether using motions rather than a bill to effect the amendments to Annex I and Annex II to the Basic Law was consistent with clause 3 of the NPCSC Interpretation, and if so, the procedures for dealing with these motions in the Council. The Administration, apart from setting out its view in paragraph 7.02 of the Fifth Report, had also clarified at the special meeting of the Panel on Constitutional Affairs on 21 October 2005 that in Chinese law, "motion (議案)" included "bill (法案)" and the two terms were interchangeable.

5. Ms Emily LAU said that to prevent the risk of judicial review, it was important to ensure that the amendments to the "two methods" in Annex I and Annex II to the Basic Law were effected according to proper procedure. SCA responded that the Administration had exchanged views with the relevant departments of the Central Authorities on the wording of the proposed amendments to the "two methods" and the legal instrument for presenting the amendments to the Council. The Administration was confident that the arrangements complied with the relevant procedures prescribed in the NPCSC Interpretation.

6. Mr Alan LEONG asked whether the provisions in the Draft Amendments in the Appendices to Annex B and Annex C of the Fifth Report (the Draft Amendments) sought to replace the relevant provisions in Annex I and Annex II to the Basic Law.

7. SCA explained that after the Draft Amendments were endorsed by a two-thirds majority of LegCo Members, received the consent of CE, and were approved or accepted by NPCSC for the record, they would become an integral part of Annex I and Annex II to the Basic Law. There was no need to repeal any provisions in Annex I and Annex II to the Basic Law. The Draft Amendments, which amended the methods for the formation of the third term CE in 2007 and the fourth term LegCo in 2008 respectively, would overtake some of the existing provisions in Annex I and Annex II to the Basic Law once they took effect, e.g. the provisions relating to the composition of the Election Committee for the second term CE and the composition of the third term LegCo. Other provisions would continue to be in force.

8. Ms Audrey EU pointed out that if the method for forming LegCo in 2008 was amended, and if consensus could not be reached by LegCo, CE and NPCSC on the electoral method for 2012 or thereafter, the electoral method would revert to that for the third term, given that the Draft Amendment in Annex C to the Fifth Report had provided for the formation of the fourth term LegCo in 2008 only, and that the provision in Article I (1) of Annex II provided that LegCo "shall be composed of 60

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members in each term”. She said that from the legal point of view, there was all the more the need for the Administration to provide a timetable for universal suffrage so as to ensure that constitutional development would be taken forward subsequent to the year 2012 or thereafter.

9. In response to members, LA said that the existing provisions in Annex I and Annex II to the Basic Law, including the provision that LegCo “shall be composed of 60 Members in each term” in Annex II would remain as an integral part of the Basic Law unless they were amended by way of the amendment mechanism provided in Article 159 of Basic Law (BL 159). The situation might be addressed in relation to the composition of the fourth term LegCo formed in 2008 if the principle of “subsequent enactment prevailing over previous one” was applicable.

10. SCA said that the Administration had thoroughly examined these issues and had exchanged views with the relevant departments of the Central Authorities. The two sides had come to the view that the “two methods” in 2012 or thereafter should continue to be dealt with in accordance with the provisions of BL 45 and BL 68, the provisions of Article 7 of Annex I and Article III of Annex II to the Basic Law, and the relevant provisions in the NPCSC Interpretation. If consensus could not be reached by the three parties on the “two methods” in 2012 or thereafter, the two methods would not go backwards and the status quo would remain. In other words, in the event that there was no consensus on making any amendments, the “two methods” would follow the prevailing provisions.

11. Ms Audrey EU said that she was not convinced of the Administration’s explanation. From the legal point of view, it was crystal clear that if there were no consensus on the “two methods” in 2012 or thereafter, it was necessary to revert to the “two methods” in 2002 and 2004 respectively. In addition, the NPCSC Interpretation did not provide for the “two methods” for 2007 and 2008 to be applicable to the terms in 2012 or thereafter.

12. Mr Howard YOUNG suggested two ways to resolve the issue. First, if a consensus could not be reached on the method for forming the fifth term LegCo in 2012, a motion to the effect that the number of LegCo seats should remain at 70 could be moved for endorsement by LegCo. Second, the words “before the third term” could be added after “The LegCo of HKSAR shall be composed of 60 members in each term” in Article 1 of Annex II to the Basic Law by way of an amendment.

13. SCA said that it was the view of the Central Authorities that the Draft Amendments, in their present form, were appropriate and suffice for dealing with the electoral arrangements subsequent to 2012. He would, nevertheless, reflect members’ concerns to the Central Authorities for reference.

Endorsement by LegCo

14. Ms Audrey EU said that under Annex I and Annex II to the Basic Law, proposed amendments to the “two methods” must be made with the endorsement of a two-thirds majority of all the Members of LegCo and the consent of CE, and they should be reported to NPCSC for approval (in the case of amendments to Annex I) or for the record (in the case of amendments to Annex II). Ms EU asked the Administration to explain why it was stated in the last sentence of paragraph 3 of the Administration’s paper that after the amendments to the “two methods” were reported to NPCSC for approval or for the record, they were not “local legislation”. She also enquired about the minimum number of Members required to fulfill the “two-thirds majority” requirement for endorsement of the proposed amendments, on the basis that the composition of LegCo was 60 members and 70 members respectively.

15. SCA explained that the last sentence of paragraph 3 sought to distinguish between the procedures for amending local legislation and the Basic Law. Endorsement of the amendments to Annex I and II to the Basic Law by LegCo alone would not have any legislative effect, because such amendments were not local legislation although if they were eventually approved by or reported to the NPCSC for the record they would become part of the law of the HKSAR. SCA advised that the minimum number of Members required for the endorsement of the amendments to the “two methods” were 40 (in the case of a 60-member LegCo) and 47 (in the case of a 70-member LegCo).

Reporting arrangements to NPCSC

16. Mr LEE Wing-tat said that the Administration’s paper stated that any proposed amendments to Annex II to the Basic Law had to be “reported to and accepted by NPCSC for the record”. This requirement was different from the expression “reported to NPCSC for the record” in Annex II to the Basic Law.

17. Ms Elsie LEUNG, Member of the Task Force, explained that NPCSC had the power not to accept the proposed amendments for the record, if after scrutiny it considered that the proposed amendments did not accord with the actual situation in Hong Kong or conform to the principle of gradual and orderly progress stipulated in BL 68. She added that Mr QIAO Xiaoyang, Deputy Secretary General of NPCSC, had confirmed at a press conference held in Hong Kong after the NPCSC made its Interpretation on 6 April 2004 that the power of NPCSC under Annex II to the Basic Law was a substantive one. She undertook to provide a copy of Mr QIAO’s statement for members’ reference.

(Post-meeting note : A press clipping of 7 April 2004 regarding the statement made by Mr QIAO Xiaoyang at the press conference was issued to members vide LC Paper No. CB(2)508/05-06 on 25 November 2005.)

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18. Mr LEE said that the original intention of Annex II to the Basic Law was to provide more flexibility for the Government of HKSAR to amend the method for forming LegCo, as compared to that for selecting CE which required the “approval” of NPCSC. In his view, if the expression “reported to NPCSC for the record” was interpreted to mean “reported to and accepted by NPCSC for the record”, this was a new interpretation of the Basic Law which contravened the legislative intent of Annex II to the Basic Law. Mr LEE further pointed out that under BL 17, laws enacted by the legislature of HKSAR must be “reported to NPCSC for the record”. He requested the Administration to explain the difference between reporting to NPCSC for “approval” in Annex I and for the “record” in Annex II, and whether the expression “reported to NPCSC for the record” in BL 17 and Annex II carried the same meaning and if not, the rationale behind.

19. Ms LEUNG responded with the following points –

- (a) she disagreed that the arrangement for proposed amendments to Annex II to be "reported to and accepted by NPCSC" was inconsistent with Annex II. Decisions relating to the development of the political structure of Hong Kong rested with the Central Authorities, and the arrangement sought to clarify that point;
- (b) under Annex II, there was only one reason for NPCSC to refuse to accept the proposed amendments for the record, i.e. the proposed amendments did not comply with BL 68. Under Annex I, NPCSC could refuse to give approval to the proposed amendments for wider reasons, such as the proposed amendments were not in the best interests of the country or Hong Kong. Although different reporting arrangements to NPCSC were adopted for the proposed amendments to the “two methods”, the requirement for any amendments to conform to the principles and provisions of the Basic Law was the same; and
- (c) the requirement for reporting to NPCSC for the record in BL 17 and Annex II was different in that the former applied to local legislation, whereas the latter applied to amendments to provisions to Annex II to the Basic Law which were constitutional in nature. Under BL 17, the reporting to NPCSC for the record would not affect the entry into force of the relevant legislation. Under Annex II, the proposed amendments would have no legislative effect if they were not accepted by NPCSC for the record.

20. LA said that clause 3 of the NPCSC Interpretation stated that any proposed amendments to the “two methods” could only take effect if they had the consensus of the three parties, including the approval or recording ultimately given or made by NPCSC in accordance with law. He asked the Administration to provide information on the “law” referred to in the paragraph. SCA explained that the “law” referred to the Constitution of the People’s Republic of China and the Basic Law. In

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accordance with the Constitution, NPC enacted the Basic Law, prescribing the systems to be practised in HKSAR to ensure the implementation of the basic policies of the Central Authorities regarding Hong Kong. The role of the Central Authorities in HKSAR's constitutional development was expressly provided for in Annex I and Annex II to the Basic Law.

Legal issues arising from the term of office of CE

21. Mr Albert HO noted that the Administration held the view that a new CE elected under BL 53(2) could only serve for one further term after the expiry of the remainder term, and the remainder term was counted as "a term". On the vacancy of the office of CE, the Administration considered it not necessary to hold a by-election if the vacancy arose within six months before the expiry of the term of CE. Mr HO queried whether the understanding of the Administration was consistent with BL 46 and BL 53(2). He cautioned that it was inappropriate for the Administration to improve clarity of the main provisions of the Basic Law by way of amending provisions in annexes to the Basic Law or local legislation. The proper procedure was to amend the relevant articles of the Basic Law using the mechanism provided in BL 159.

22. SCA said that Chapter 6 of the Fifth Report had set out in detail the Administration's views regarding the two issues. As proposed in the Appendix to Annex B of the Fifth Report, the provision regarding the term of office of CE would be placed alongside the provision on the term of office of the Election Committee. After the amendment was endorsed by the three parties, it would become an integral part of Annex I to the Basic Law. As regards vacancy in the office of CE, although BL 53(2) provided that a new CE should be selected within six months in accordance with BL 45, the requirement did not apply to a vacancy arising within the last six months of a five-year term. This was because a new term CE would have been elected within six months to fill the vacancy in compliance with BL 53(2). The Administration had therefore proposed that if an election for a new term CE would be held within six months after a vacancy in the office of CE had arisen, it would not be necessary to hold a by-election, and the Acting CE would assume the duties of CE before the new term CE took up his office. The proposals would be implemented through amending local legislation, as the by-election arrangements for CE were specified in the Chief Executive Election Ordinance (CEEEO).

BL 50 regarding important bill

23. Mr LEE Wing-tat asked whether proposed amendments to Annex I and Annex II would be classified as an "important bill". SCA said that as the proposed amendments were not local legislation, BL 50 was not applicable.

24. Mr LEE Wing-tat and Ms Emily LAU asked whether the amendment bills to effect changes to the "two methods" would be classified as an "important bill" and if so, when and how the Administration would determine such bill was an "important" bill.

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25. SCA said that he had already explained on different occasions that it was a matter for CE to decide whether a particular bill was important. Some members had previously suggested that there should be objective criteria to determine whether a bill was “important”. The Administration, however, considered it inappropriate to add further requirements or restrictions on the term “important bill” beyond the current provision of the Basic Law. In determining whether a bill was an “important bill”, it was expected that CE would consider the circumstances of each case and the overall interests of Hong Kong. He assured members that CE would not lightly take a decision to classify a bill as an “important bill”. If CE considered that a bill was so “important” that BL 50 might be invoked, it was expected that CE would consult the Executive Council. If CE determined that a bill was an “important bill”, or that a bill had become an “important bill” after certain clauses had been amended, LegCo would be advised of the Administration’s position in the first instance.

26. The Chairman said that the issue had been thoroughly discussed by the Panel on Constitutional Affairs in the last session. He instructed the Secretariat to issue the relevant documents for members’ reference.

(Post-meeting note : The relevant documents were issued to members vide LC Paper CB(2)493/05-06 on 24 November 2005.)

II. Method for selecting the Chief Executive in 2007

(The Fifth Report of the Constitutional Development Task Force

Questions (a) to (d) of LC Paper No. CB(2)283/05-06(01) – Paper provided by the Administration in response to the issues raised by the Panel on Constitutional Affairs at the special meeting on 21 October 2005

LC Paper No. CB(2)345/05-06(05) – Paper provided by the Administration on "Some Detailed Arrangements Regarding the Method for Selecting the Chief Executive")

27. SCA briefed members on the Administration’s paper on "Some Detailed Arrangements Regarding the Method for Selecting the Chief Executive" (LC Paper No. CB(2)345/05-06(05)).

Composition of the Election Committee

28. Ms Emily LAU said that she would not support the Administration’s proposal to increase the number of members of the Election Committee from 800 to 1 600. In her view, the electorate base of the Election Committee should be substantially expanded to enhance its representation. Some members concurred with Ms LAU.

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29. Mr Albert HO echoed the view of Ms LAU and said that “small circle” election was a means for CE to self-perpetuate his position. Since the Administration had proposed to expand the electorate base of the District Council (DC) subsector, it could likewise expand the electorates of all other subsectors. Mr CHEUNG Man-kwong concurred and said that the functional constituency (FC) system had created a privileged class who could enjoy more political rights than others.

30. Ms LI Fung-ying pointed out that under the Administration’s proposal, the additional number of seats allocated to the four sectors in the Election Committee was not even. While the first three sectors only had their membership increased by 50%, the membership of the Fourth Sector was increased by 250%. She held the view that the proposal was not consistent with the principle of “balanced participation”.

31. SCA said that the proposal to include all DC members in the Election Committee was put forth after wide public consultation and careful consideration. As a result of inclusion of all DC members, the electorate base of the Election Committee was broadened to three million voters in Hong Kong. More than 80% of DC members were returned by elections, and they had a public mandate. In addition, DC members themselves came from different strata of the community. Of the appointed and elected DC members, around one-fourth were from the industrial and commercial sectors, around one-fifth from the professional and managerial ranks, whilst the others included teachers, social workers, representatives of trade unions, housewives, etc. The composition of DCs could be said to be a microcosm of the community at large. It epitomized the spirit of “balanced participation” and gave full effect to the principle of “looking after the interests of different sectors of the community”.

32. Ms Audrey EU questioned why the Agriculture and Fisheries subsector, which represented only 159 associations, was given as many as 40 seats and the reason for further increasing the number of members of the subsector to 60. Mr Albert HO pointed out that there was clear indication that the Agriculture and Fisheries subsector was in support of CE. SCA said that the question raised by Ms EU could be discussed in more detail when the bill to amend CEEO was introduced into LegCo. In response to Mr HO, SCA said that it was for individual subsectors to decide whether to support any candidates for the office of CE. The CE election was monitored by the media and public.

33. Ms Audrey EU expressed concern about “vote planting” as it was for CE to decide who should be appointed as DC members. SCA responded that the power of CE to appoint DC members was provided under the DC Ordinance.

Transitional arrangement for the seats to be allocated to LegCo Members in the Fourth Sector

34. Ms Audrey EU questioned the need to consider the transitional arrangement for the Fourth Sector of the Election Committee at this stage.

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35. SCA said that as explained in paragraphs 5 and 6 of the Administration's paper, the membership the Fourth Sector, which comprised Hong Kong deputies to NPC, Members of LegCo, Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference (CPPCC), members of Heung Yee Kuk and DC, would be increased from 200 to 700 in 2007. However, according to the proposals put forth in the Fifth Report, the number of LegCo seats should only be increased from 60 to 70 after the formation of the fourth term LegCo in 2008. Hence, during the transitional period between 2007 and 2008, the 10 seats earmarked for LegCo members had to be allocated to other subsectors. The transitional arrangement would come to an end upon the formation of the fourth term LegCo. Initially, consideration could be given to allocating the 10 seats to the Heung Yee Kuk or CPPCC subsectors during the transitional period.

36. Ms LI Fung-ying pointed out that the transitional arrangement was disrespectful to the Heung Yee Kuk and CPPCC subsectors as their members were required to fill up the seats during the interim.

Replacing corporate voting by individual voting

37. Ms Emily LAU said that in the reports published by the Task Force, there were many views that corporate voting should be replaced by individual voting. There was expectation from the community that the proposal for individual voting would be implemented. The Fifth Report, however, had ruled out this proposal. She expressed dissatisfaction that the Administration had not respected the views of the people.

38. SCA said that the second, third and fourth report of the Task Force had merely set out the public views collected during consultation and had not put forth any proposals for amending the "two methods". In the Fifth Report, the Task Force had made two major decisions, i.e. the number of seats for DC FC would be increased and there would be no increase in traditional FC seats. SCA said that there were divided views in society as to whether corporate voting should be replaced. In the view of the Administration, enhancing the participation of DC members was a more effective way to realize a higher level of democratic representation. He further said that the intention of setting up FCs was to balance the interests of different sectors and strata of the community. If corporate voting were replaced by individual voting, and if all the employees of FCs were included in the electorate, the Task Force was of the view that under the circumstances, most of the FCs would become, in practice, "employee constituencies". This would not be consistent with the original intention of setting up FCs.

III. Date of next meeting

39. Members noted that the next meeting would be held on 28 November 2005 at 8:30 am. Members agreed that two additional meetings should be scheduled for 29 November 2005 at 8:30 am and 1 December 2005 at 4:30 pm.

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40. The meeting ended at 10:47 am.

Council Business Division 2
Legislative Council Secretariat
3 January 2006