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Legislative Council

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Panel on Constitutional Affairs

Meeting on 20 November 2006

Background Brief on The question of "important bill" under Article 50 of the Basic Law

Purpose

This paper summarises the past discussions held by Members of the Legislative Council (LegCo) on the question of "important bill" under Article 50 of the Basic Law (BL 50).

Background

2. Arising from the discussions on the interpretation of the word "budget" referred to in BL 50 and BL 51, the Panel on Constitutional Affairs (the Panel), at its meeting on 20 December 1999, expressed concern about the meaning of "important bill" referred to in BL 50, and the circumstances under which LegCo might be dissolved by the Chief Executive (CE). The Panel subsequently discussed the issue at its meetings on 19 June 2000, 7 and 21 May 2001, and 18 July 2005. In the course of its discussion, the Panel had made reference to the French and English practices detailed in the Research Report on "Parliamentary Handling of Non-Ordinary Bills" (RP10/00-01) prepared by the Research and Library Division of the LegCo Secretariat.

Purpose of BL 50

3. BL 50 provides that -

"If the Chief Executive of the Hong Kong Special Administrative Region refuses to sign a bill passed the second time by the Legislative Council, or the Legislative Council refuses to pass a budget or any other important bill introduced by the government, and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council.

The Chief Executive must consult the Executive Council before dissolving the Legislative Council. The Chief Executive may dissolve the Legislative Council only once in each term of his or her office."

4. The Administration has explained to the Panel that the fundamental purpose of BL 50 is to provide a special measure to resolve a grave constitutional impasse between the executive and legislature. BL 50 is not intended as a provision to facilitate CE to dissolve LegCo. Rather, it serves to protect the operation of the legislature from unnecessary and unreasonable interference. There are safeguards against arbitrary use of the power as demonstrated by the following -

- (a) BL 50 may be resorted to only once in each term of office of CE;
- (b) BL 50 requires CE to seek consensus after consultations before taking the decision to dissolve LegCo;
- (c) BL 50 also requires CE to consult the Executive Council (ExCo) before taking the decision to dissolve LegCo; and
- (d) the dissolution of LegCo may eventually lead to the resignation of CE. Under BL 52, CE must resign under three circumstances. Two of the circumstances were -
 - (i) when, after LegCo is dissolved because he twice refuses to sign a bill passed by it, the new LegCo again passes the original bill in dispute, but he still refuses to sign it; and
 - (ii) when, after LegCo is dissolved because it refuses to pass a budget or any other important bill, the new LegCo still refuses to pass the original bill in dispute.

Discussions of the Panel

What constitutes an "important bill"

5. In view of the constitutional implications of BL 50, members considered that CE should have reference to a set of criteria, to be agreed upon by the executive and the legislature, for the purpose of determining whether a bill was an "important bill".

6. The Administration had explained that CE would not invoke BL 50 lightly, because of the possible political consequences and other safeguards built into the provision. In practical terms, factors that had to be taken into consideration to determine whether a bill was an "important bill" would vary from case to case. It

would be difficult to set out in advance a set of specific criteria which could cater for all the likely circumstances. The Administration was of the view that it would not be appropriate to add further requirements or restrictions on the term "important bill" beyond the current provision of the Basic Law.

Who determines whether a bill is important

7. Members considered it undesirable for CE alone to decide whether a bill was an "important bill", as the defeat of such a bill might result in the dissolution of LegCo. As the Basic Law provided a checks and balance system between the executive and the legislature, some members suggested that the party responsible for determining whether a bill was an "important bill" could be the executive, the legislature, or the executive and the legislature upon reaching a consensus.

8. The Administration explained that CE had the constitutional obligation of implementing the Basic Law. In the absence of any further elaboration in BL 50 on the meaning of "important bill", it was a matter for CE to decide whether a particular bill was important. 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. The Administration advised the Panel that the Administration had come to this view after consulting the Department of Justice which had conducted a careful study on the issue. The Administration had kept the Central Authorities informed of the progress and the result of the study. The Central Authorities agreed to the views formed by the Administration in relation to BL 50.

When to determine whether a bill is important

9. The Administration advised that the term "法案 (bill)" referred to in BL 50 covered ordinary bills introduced by the Government and such bills as amended by Committee Stage amendments.

10. Some members pointed out that a bill could become an "important bill" after certain clauses had been amended. Some members considered that LegCo should be informed in advance if an "important bill" was introduced, given that the refusal of LegCo to pass such a bill could lead to its dissolution. In addition, whether the bill was important could be one of the considerations for Members to decide whether to pass the bill. Some other members considered that labeling a bill as "important" in advance would be perceived as a threat imposed on the LegCo to pass the bill.

11. The Administration advised that any major decision of the Government was made in consultation with ExCo. If CE considered that a bill was so "important" that BL 50 might be invoked, it was expected that CE would consult ExCo. 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.

Procedures and parties involved in the consultations under BL 50

12. Members had also sought clarification about the procedures and parties involved in consultations under BL 50.

13. The Administration had replied that while BL 50 provided that CE must consult ExCo before dissolving LegCo, there was no procedural requirement stipulated in the Basic Law. BL 50 also contained no explanation on the procedures and parties to be involved in the process of "consultations" in order to reach consensus. The purpose of consultations was to provide an opportunity for the executive and legislative authorities to resolve their differences on the budget or the relevant important bill, before CE decided whether or not the power to dissolve LegCo should be exercised. It was believed that depending on the actual need and circumstances pertaining, both sides would consider using all possible communication channels between the executive and legislative authorities for the purpose.

Legal issues arising from the term of office of CE

14. BL 50 stipulates that CE may dissolve LegCo only once in each term of his or her office. Hon LEE Wing-tat raised a written question at the Council meeting on 15 June 2005 to seek clarification on whether -

- (a) "each term of his or her office" referred to in the article means the term of office of the Chief Executive stipulated in Article 46 of the Basic Law, that is, five years, or the term of office of any person each time he is elected as the Chief Executive in a Chief Executive election, or has other interpretations; and
- (b) the Chief Executive elected to fill a vacancy in the office of the Chief Executive which has arisen before the expiry of a five-year term has the power to dissolve the Legislative Council once under the article; if so, whether such power is affected by whether or not his/her predecessor(s) in the same term of office has (have) dissolved the Legislative Council.

The Administration agreed to address these issues in the context of the review for the method for selecting CE in 2007 and report its position to LegCo.

15. The Administration had considered the issues and set out its views in the Fifth Report of the Constitutional Development Task Force on "Package of Proposals for the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008" published in October 2005 as follows -

- (a) the legislative intent of BL 46 was that CE might only serve for not more than two consecutive terms and might not serve for more than 10 years. BL 53 provided that in the event that the office of CE became vacant, a new CE should be selected within six months in accordance with BL 45. According to the Interpretation of the Standing Committee of the National People's Congress (NPCSC) on 27 April 2005, a new CE elected to fill a vacancy under BL 53 should serve the remainder term of the preceding CE, which was counted as "a term". The Chief Executive Election Ordinance was amended to that effect in May 2005; and
- (b) a new CE elected in a BL 53(2) situation had the power to dissolve LegCo once during his term of office, i.e. during the remainder term, whether or not the outgoing CE had already exercised such power during his term of office. This was to uphold the integrity of the powers vested in the new CE under the Basic Law.

Amendments to Annex I and Annex II to the Basic Law

16. The question of whether the amendments to the methods of selecting CE in 2007 and forming LegCo in 2008 (the "two methods") would be introduced in the form of a bill, and whether such a bill would be classified as an "important bill" was raised at the Panel meeting on 18 July 2005. The Administration had replied that the amendments to Annex I and Annex II to the Basic Law might be introduced in the form of a "special bill", and the Administration would advise Members after consultation with the Department of Justice.

17. The Fifth Report of the Constitutional Development Task Force published in October 2005 put forth a package of proposals for the "two methods". The amendments to the "two methods" were presented to LegCo in the form of two motions on 21 December 2005. The Administration had explained that the amendments appended to the two motions were the "bills" referred to in the Interpretation of the NPCSC on 6 April 2004. The amendments should have effect only after they had the endorsement of a two-thirds majority of all LegCo Members and the consent of CE, and after they had been reported to the NPCSC for approval or record. As the amendments were legislative proposals that required decision by the NPCSC to be given legislative effect, it was appropriate for them to be introduced into, and to be endorsed by, LegCo by way of motions. It was inappropriate for them to be introduced into LegCo or promulgated by way of local bills, because the purpose of a local bill was to make law by way of local ordinances.

Decision of the Panel at the meeting on 18 July 2005

18. Given that the issue of BL 50 had been discussed by the Panel on several

occasions and the position of the Administration was very clear, the Panel Chairman sought members' views on the way forward.

19. Hon Audrey EU considered that the Panel had reached no conclusion on the issue. She suggested and members agreed that the item should remain on the outstanding list and be discussed by the Panel in future if considered necessary.

20. The Administration's paper provided for the meeting and an extract of the minutes of the meeting are in **Appendices I and II** respectively.

Relevant papers

21. A list of the relevant papers which are available on the LegCo website is in **Appendix III**.

Council Business Division 2
Legislative Council Secretariat
15 November 2006

Legislative Council Panel on Constitutional Affairs

Article 50 of the Basic Law

Purpose

This paper sets out the Government's position on the scope covered by the term "important bill" in Article 50 of the Basic Law (BL).

Background

2. BL 50 provides that —

"If the Chief Executive of the Hong Kong Special Administrative Region refuses to sign a bill passed the second time by the Legislative Council, or the Legislative Council refuses to pass a budget or any other important bill introduced by the Government, and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council.

The Chief Executive must consult the Executive Council before dissolving the Legislative Council. The Chief Executive may dissolve the Legislative Council only once in each term of his or her office."

3. At previous meetings of the Constitutional Affairs Panel, Members exchanged views with the Administration on what would constitute an "important bill" under BL50. The Administration undertook to study the matter further and revert to the Panel in due course.

Constitutional Arrangements for Resolution of Conflicts between Executive and Legislative Authorities

4. BL50 is part of a series of constitutional provisions provided for resolving major conflicts between the executive and legislative authorities. To understand in a more thorough manner how the whole arrangement works, BL50 should be considered together with Articles 49 and 52 of the BL.

5. BL49 provides that if the Chief Executive (CE) considers that a bill passed by the Legislative Council (LegCo) is not compatible with the overall interests of Hong Kong, he may return it to the LegCo within three months for

reconsideration. If the LegCo passes the original bill again by not less than a two-thirds majority, the CE must sign and promulgate it within one month or act in accordance with the provisions of BL50.

6. BL50 provides that if the CE refuses to sign a bill passed the second time by the LegCo, or the LegCo refuses to pass a budget or any other important bill introduced by the government, and if consensus still cannot be reached after consultations, the CE may dissolve the LegCo. The CE must consult the Executive Council (ExCo) before dissolving the LegCo. The CE may dissolve the LegCo only once in each term of his or her office.

7. BL52 provides that the CE must resign under three circumstances. Two of the circumstances are:

- (1) when, after the LegCo is dissolved because he twice refuses to sign a bill passed by it, the new LegCo again passes the original bill in dispute, but he still refuses to sign it; and
- (2) when, after the LegCo is dissolved because it refuses to pass a budget or any other important bill, the new LegCo still refuses to pass the original bill in dispute.

8. According to the above BL provisions, on the one hand CE is vested with the power to dissolve the LegCo under certain specified circumstances. On the other hand, CE must resign under certain specified circumstances involving the LegCo. This reflects the principle as enshrined in the BL that the executive and legislative authorities should cooperate while keeping each other in check. The dissolution of LegCo by CE and the resignation of CE involving LegCo are governed by stringent requirements in the BL. The mechanism is not easily triggered. When CE decides to dissolve LegCo, he will need to consider the possibility that this may result in his resignation eventually. If LegCo passes again the bill returned to it by CE for reconsideration or if it refuses to pass a budget or any other important bill introduced by the government, LegCo will also have to consider the possibility of dissolution. This arrangement of checks and balances ensures that CE will not exercise his power to dissolve LegCo lightly; likewise, LegCo will not lightly pass again the bill returned for reconsideration or refuse to pass a budget or any other important bill.

What constitutes an “important bill”

9. There has been suggestion that CE should have reference to a set of criteria for the purpose of determining whether a bill is an “important bill”.

10. CE has the constitutional obligation of implementing the BL. In the absence of any further elaboration in BL50 on the meaning of “important bill”, it is a matter for CE to decide whether a particular bill is an “important bill”. However, CE will not invoke BL50 lightly, because of the possible political consequence explained above and other safeguards built into the provision — prior consultation with ExCo is required and the bill has to be important enough to justify the dissolution of LegCo. CE may dissolve LegCo only once in each term of office. In practical terms, factors that have to be taken into consideration to determine whether a bill is an “important bill” would vary from case to case. It would be difficult to set out in advance a set of specific criteria which could cater for all the likely circumstances. Therefore, we are of the view that it would not be appropriate to add further requirements or restrictions on the term “important bill” beyond the current provision of the BL. In determining whether a bill is an “important bill”, we expect that the CE will consider the circumstances of each case and the overall interests of Hong Kong.

Constitutional Affairs Bureau
July 2005

**Extract from minutes of meeting on
Panel on Constitutional Affairs on 18 July 2005**

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II. The term "important bill" referred to in Article 50 of the Basic Law

(LC Paper No. CB(2)2255/04-05(01) – Background brief prepared by LegCo Secretariat on "The term "important bill" referred to in Article 50 of the Basic Law")

LC Paper No. CB(2)2255/04-05(02) – Paper provided by the Administration on "Article 50 of the Basic Law")

6. SCA briefed members on the Government's position on the scope covered by the term "important bill" in Article 50 of the Basic Law (BL 50) as set out in the Administration's paper.

Who and how to determine whether a bill was "important"

7. Mr LEE Wing-tat said that paragraph 10 of the Administration's paper which summarised its position on who and how to determine whether a bill was "important" was non-conclusive. He asked whether the conclusion drawn in paragraph 10 was a result of the discussion between the Administration and the Central Authorities. He also asked whether there were any exchange of views and correspondences/papers between the two sides.

8. SCA said that CE had the constitutional obligation of implementing the Basic Law. In the absence of any further elaboration in BL 50 on the meaning of "important bill", it was a matter for CE to decide whether a particular bill was important. In practical terms, factors that had to be taken into consideration to determine whether a bill was an "important bill" would vary from case to case. 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. SCA further said that the above views were formed by the Administration after consulting the Department of Justice which had conducted a careful study on the issue. The Administration had kept the Central Authorities informed of the progress and the result of the study. The Central Authorities agreed to the views formed by the Administration in relation to BL 50. SCA added that in accordance with past practice, the Administration would not divulge details on the communication between the HKSAR Government and the Central Authorities.

9. Mr Albert HO asked about the basis of the Administration's view that it was for CE, and not other authorities such as LegCo and the court, to decide whether a particular bill was important. He had reservation about this view. He also asked whether CE who was serving the remainder of the term of the preceding CE could dissolve LegCo if it refused to pass an "important bill".

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10. SCA explained that CE, as the head of the Government of HKSAR, had to lead the Government to exercise its functions, one of which was to introduce bills for scrutiny and passage by LegCo. Based on this understanding and in the absence of any further elaboration in BL 50 on the meaning of "important bill", the Administration concluded that it was a matter for CE to determine whether a particular bill was an "important bill".

11. SCA further said that the meaning of the "term of office" of CE referred to in BL 46 and BL 50 required further study by the Administration. BL 50 provided that CE could dissolve LegCo only once in each term of his office. As the former CE, Mr TUNG Chee-hwa had not invoked BL 50 in his second term of office, there was in any case no restriction for the new CE, who was to serve the remainder of the second term of office, to exercise his power to dissolve LegCo if it refused to pass an "important bill". However, CE would not invoke BL 50 lightly, as this might result in his having to resign from office eventually.

When to determine whether a bill is important

12. Mr LAU Kong-wah pointed out that it would be unfair to LegCo if it was not informed in advance whether a bill introduced into LegCo was an "important bill", given that the refusal of LegCo to pass such a bill could lead to its dissolution. In addition, whether the bill was an important one could be one of the considerations for Members to decide whether to pass the bill. Mr LAU asked whether the Executive Council (ExCo) would know in advance whether a bill to be introduced into LegCo was an "important bill".

13. Mr Albert HO said that although some people might consider that labelling a bill as "important" in advance would be perceived as a threat imposed on LegCo to pass a bill, he preferred such an arrangement because Members should know from the very beginning the rule of the game. He said that in some countries, the nature of a bill or resolution would be declared by the Government in advance, as the passage of which could be considered as a vote of confidence on the Government.

14. SCA said that any major decision of the Government of HKSAR was made in consultation with ExCo. If CE considered that a bill was so "important" that BL 50 might be invoked, it was expected that CE would consult ExCo. 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.

Procedures and parties involved in consultations under BL 50

15. Dr Fernando CHEUNG asked about the mechanism for conducting consultations in order to reach consensus under BL 50. SCA explained that BL 50 contained no provision on the procedures and parties to be involved in the process of "consultations" in order to reach consensus. The purpose of consultations was to

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provide an opportunity for the executive and legislative authorities to resolve a grave constitutional impasse by reaching a consensus. It was envisaged that, depending on the actual need and circumstances pertaining, both sides would consider using all possible communication channels for the purpose. This might include the relevant bills committee which involved Members and Government officials.

16. SCA further pointed out that there were safeguards against arbitrary use of the power to dissolve LegCo as demonstrated by the following -

- (a) BL 50 could be resorted to only once in each term of office of CE;
- (b) BL 50 required CE to seek consensus after consultations before taking the decision to dissolve LegCo;
- (c) BL 50 also required CE to consult ExCo before taking the decision to dissolve LegCo; and
- (d) the dissolution of LegCo might eventually lead to the resignation of CE under BL52.

Whether amendments to Annexes I and II would be classified as an "important bill"

17. Ms Audrey EU said that if there was a need to amend the methods for selecting CE and forming LegCo (the "electoral methods") after 2007, amendments would be made to Annexes I and II to the Basic Law respectively. Such amendments must be made with the endorsement of a two-thirds majority of all LegCo Members and the consent of CE and be reported to the Standing Committee of the National People's Congress (NPCSC) for approval. Ms EU sought clarification on the following -

- (a) whether the term "法案 (bill)" in BL 50 referred to a bill or other legislative instruments such as a resolution;
- (b) whether amendments to Annexes I and II to the Basic Law would be introduced in the form of a bill or a resolution;
- (c) whether the legislative proposal to amend the "electoral methods", if introduced in the form of a bill, would be classified as an "important bill"; and
- (d) whether the legislative proposal to amend local electoral laws to prescribe the detailed arrangements for the revised "electoral methods" would be introduced into LegCo in the form of a bill.

18. SCA responded with the following comments -

- (a) the term "法案 (bill)" referred to in BL 50 covered ordinary bills introduced by the Government and such bills as amended by Committee

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Stage amendments;

(b) the interpretation promulgated by NPCSC on 6 April 2004 had stated that bills (法案) on the amendments to the "electoral methods" should be introduced by the Government of HKSAR to LegCo. However, these bills would have to be passed by a two-thirds majority of the LegCo Members, receive the consent of the CE and be endorsed by the Central Authorities. The amendments to Annexes I and II to the Basic Law might be introduced in the form of a special bill, but the Administration would advise Members after consultation with the Department of Justice;

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(c) the mainstream proposal for the "electoral methods" had yet to be formulated. After such a proposal had been formulated, it would be for CE to determine whether the bill concerned was an "important bill". However, SCA considered that BL 50 would not be invoked lightly. The Administration would endeavour to gain the support of Members on the mainstream proposal and would not lightly take a decision to classify the bill concerned as an "important bill"; and

(d) the legislative proposal to amend local electoral laws to prescribe the detailed arrangements for the revised "electoral methods" would be introduced into LegCo in the form of an amendment bill.

Way forward

19. The Chairman said that the issue of "important bill" referred to in BL 50 had been discussed by the Panel on several occasions and the position of the Administration was very clear. He sought members' views on the way forward.

20. Ms Audrey EU said that the Panel had reached no conclusion on the item. Some members did not agree that CE should be the authority to determine whether a bill was "important". Some members had requested the Administration to inform LegCo in advance if a bill was determined by CE as an "important bill". However, SCA had not made any commitment in this respect. She suggested and members agreed that the item should remain on the list of outstanding items of the Panel and should be further discussed by the Panel in future if considered necessary.

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The question of "important bill" under Article 50 of the Basic Law

Relevant papers

<u>Meeting</u>	<u>Meeting Date</u>	<u>Papers/Motion Passed</u>
Panel on Constitutional Affairs	20 December 1999	Paper provided by the Administration on "Basic Law Articles 50 & 51" [LC Paper No. CB(2)623/99-00(03)] Minutes of meeting [LC Paper No. CB(2)1394/99-00]
	19 June 2000	Paper provided by the Administration on "Article 50 of the Basic Law" [LC Paper No. CB(2)2383/99-00(01)] Minutes of meeting [LC Paper No. CB(2)2565/99-00]
	7 May 2001	Research Report on "Parliamentary Handling of Non-Ordinary Bills" [RP10/00-01] Minutes of meeting [LC Paper No. CB(2)1978/00-01]
	21 May 2001	Paper provided by the Administration on "Article 50 of the Basic Law - Meaning of Important Bill" [LC Paper No. CB(2)1601/00-01(01)] Minutes of meeting [LC Paper No. CB(2)2208/00-01]
	18 July 2005	Background brief prepared by LegCo Secretariat on "The term "important bill" referred to in Article 50 of the Basic Law" [LC Paper No. CB(2)2255/04-05(01)] Paper provided by the Administration on "Article 50 of the Basic Law"

<u>Meeting</u>	<u>Meeting Date</u>	<u>Papers/Motion Passed</u>
		[LC Paper No. CB(2)2255/04-05(02)] Minutes of meeting [LC Paper No. CB(2)2694/04-05]
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	21 December 2005	Report of the Subcommittee to the Council [LC Paper No. CB(2)673/05-06]