

立法會
Legislative Council

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LC Paper No. CB(2)1827/11-12
(These minutes have been seen by
the Administration)

Panel on Constitutional Affairs

Minutes of special meeting
held on Tuesday, 24 May 2011, at 8:30 am
in the Chamber of the Legislative Council Building

- Members present** : Hon TAM Yiu-chung, GBS, JP (Chairman)
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Dr Hon Margaret NG
Hon CHEUNG Man-kwong
Dr Hon Philip WONG Yu-hong, GBS
Hon LAU Wong-fat, GBM, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Kwok-hing, MH
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon CHEUNG Hok-ming, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan
Hon WONG Kwok-kin, BBS
Hon IP Kwok-him, GBS, JP
Hon Mrs Regina IP LAU Suk-yea, GBS, JP
Hon Paul TSE Wai-chun
Dr Hon Samson TAM Wai-ho, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon Tanya CHAN
Hon WONG Yuk-man
- Members attending** : Hon Frederick FUNG Kin-kee, SBS, JP
Hon Vincent FANG Kang, SBS, JP

Members absent : Hon WONG Yung-kan, SBS, JP
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon LEE Wing-tat
Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
Dr Hon LAM Tai-fai, BBS, JP
Hon CHAN Kin-por, JP
Dr Hon Priscilla LEUNG Mei-fun

Public Officers attending : Mr Stephen LAM Sui-lung
Secretary for Constitutional and Mainland Affairs

Mr Joshua LAW Chi-kong
Permanent Secretary for Constitutional and Mainland Affairs

Mr Arthur HO Kin-wah
Deputy Secretary for Constitutional and Mainland Affairs

Ms Anne TENG Yu-yan
Principal Assistant Secretary
(Constitutional and Mainland Affairs)

Clerk in attendance : Miss Flora TAI
Chief Council Secretary (2)3

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

Ms Wendy KAN
Assistant Legal Adviser 6

Miss Ivy LEONG
Senior Council Secretary (2)3

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I. Arrangements for filling vacancies in the Legislative Council
[LC Paper Nos. CB(2)1787/10-11(01) and CB(2)1857/10-11(01)]

Briefing by the Administration

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At the invitation of the Chairman, Secretary for Constitutional and Mainland Affairs ("SCMA") briefed members on the Administration's paper setting out the background for the review of the current arrangement for filling a vacancy in the Legislative Council ("LegCo") through a by-election and the proposed replacement arrangement for filling a vacancy arising from resignation of LegCo Members and other situations [LC Paper No. CB(2)1787/10-11(01)]. Members noted that subject to LegCo's views, the proposal would be implemented from the Fifth LegCo on 1 October 2012.

(During SCMA's presentation, Mr WONG Yuk-man had interrupted SCMA a few times and the Chairman had reminded Mr WONG to wait for his turn to speak after the Administration's briefing.)

2. Members noted the background brief prepared by the LegCo Secretariat on "Arrangements for filling vacancies in the Legislative Council" [LC Paper No. CB(2)1857/10-11(01)].

Discussion

3. Mr WONG Yuk-man raised strong objection to the Administration's proposal which, he considered, sought to deprive electors of the right to vote in by-elections. He expressed strong dissatisfaction at the Administration's attempt to rush through the proposal without conducting any public consultation and queried the need to hold the special meeting urgently. The Chairman explained that it was the established practice for any Panel to convene special meetings for the Administration to give urgent briefings on important matters of wide public concern.

4. Mr WONG Kwok-hing, however, expressed support for the Administration's proposal which, he considered, could plug the loophole to prevent the electoral system from being abused. He was concerned that starting from the next term of LegCo, a District Council ("DC") (second) Functional Constituency ("FC") Member to be returned from the whole territory as a single constituency could by means of his resignation alone easily set in motion the need to conduct a by-election for political purpose. Mr WONG enquired if the proposed arrangement would be implemented before the LegCo election in 2012.

5. SCMA said that just around 500 000 electors voted in the by-elections held on 16 May 2010 to fill the vacancies in LegCo arising from the resignation of the five Members while the remaining 2.7 million registered electors had chosen not to participate in the poll. The low voter turnout

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rate clearly reflected that many members of the public did not support the act of the five resigned Members to trigger by-elections for the purpose of instigating a so-called "referendum". He stressed that it was incumbent on the Administration to maintain the integrity of LegCo by meeting the requirement on the number of seats in LegCo under the Basic Law with a view to ensuring its smooth functioning. On that basis, although the replacement mechanism was devised for the Fifth LegCo, the corresponding legislative amendments should be implemented as soon as possible in order to allow adequate time for all electors and potential candidates to understand the new arrangement before the next LegCo election in September 2012.

6. Mr IP Kwok-him said that the Democratic Alliance for the Betterment and Progress of Hong Kong ("DAB") had held thorough internal deliberations on the issue and there were divergent views. However, in view that maintaining the status quo might not deter recurrence of a similar situation, it was concluded that the DAB would support the Administration's proposal as it was believed that the proposed replacement mechanism could reflect the overall will of the electorate expressed during the general election and strike a right balance between maintaining the list system of proportional representation and addressing the concern of a Member handing over the seat to a successor of the same affiliation. Mr IP, however, pointed out that it was a common overseas practice for a vacancy to be filled by a candidate on the same list of the resigned Member.

7. Ms Emily LAU said that the Democratic Party did not support the proposed replacement mechanism which, she considered, had failed to take account of public views. In addition, much more time would be required for the community to deliberate on such a contentious issue. She criticized that the Administration had made reference to overseas practices in a selective manner and suggested that the full details of the overseas practices should be presented to the Panel. In her view, the proposed mechanism was modelled on the direct substitution practice adopted in the National People's Congress election.

8. Mr Paul TSE queried why the Administration had decided not to conduct any public consultation on a matter of such importance. He said that a mutually accepted option to suit the unique circumstances of Hong Kong should be sorted out through comprehensive public consultation.

9. SCMA stressed that the Administration had paid due heed to public views and the record low voter turnout rate for the 2010 by-election clearly reflected the general public views. The Administration would continue to

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listen to public views through the relevant scrutiny work by LegCo. He said that the overseas practice was set out in paragraphs 10 and 11 of the Administration's paper. However, the circumstances in Hong Kong were not the same in these overseas countries. For example, there was no referendum mechanism in Hong Kong. SCMA added that the proposed mechanism was different from those adopted in the National People's Congress election.

10. Ms Cyd HO said that under the list system of proportional representation adopted in overseas jurisdictions, a vacancy in LegCo should be filled by a candidate on the same list as the resigned Member so that small political parties would still maintain their seats in the legislature. Ms Cyd HO queried why the existing by-election system under the first-past-the-post system should be discontinued.

11. SCMA advised that the proposed replacement mechanism would be consistent with the list system of proportional representation for geographical constituencies ("GCs") which had been implemented since the First LegCo in 1998; and reference to the result of the preceding general election would reflect the preference of the electorate. SCMA further advised that under the proposed replacement mechanism, reference to the election result of the preceding general election would form the basis of returning a candidate to fill any mid-term vacancies.

12. Mr Frederick FUNG did not subscribe to the Administration's view that public resources were wasted merely because of a low turnout rate for the 2010 by-election. He considered that the proposed replacement mechanism was not well-thought-through and it was not appropriate for the Administration to introduce the replacement mechanism solely out of financial consideration. Mr FUNG considered that in the absence of any comprehensive review on the electoral system, the status quo should be maintained so as to protect fully the right to stand for election and the right to vote. Mr Paul TSE shared Mr FUNG's view, stressing that the Administration should have conducted a comprehensive review of the electoral system. SCMA explained that the low turnout rate for the 2010 by-election was only one of the considerations for the Administration to put forward the proposed replacement mechanism. The Administration had made reference to overseas arrangements where the list system of proportional representation was adopted. The Administration considered that adopting the first-past-the-post system for by-elections would deviate from the spirit of the list system of proportional representation.

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13. Mr Frederick FUNG disagreed with the Administration's view. He considered that the list system of proportional representation had been adopted in many European countries in order to enable representation of different ethnic groups in the legislature. However, the proposed replacement mechanism which did not seek to fill a vacancy by candidates on the same list of the resigned Member was both against the spirit of the list system of proportional representation and the wish of the electorate who cast their votes to support the list of candidates.

14. Mr WONG Yuk-man criticised the Administration for the distortions on which the proposed replacement mechanism was based. He expressed dissatisfaction that while very comprehensive public consultation exercise or referendum would be conducted in overseas jurisdictions over any important constitutional changes, the Government had worked behind closed doors in putting forward its proposal to LegCo. Mr WONG disagreed strongly with SCMA's remark that the remaining 2.7 million registered electors had chosen not to participate in the poll which could reflect that they did not support the "referendum" campaign and considered that it was totally misleading. If his logic were correct, one could have similarly argued that the 1.5 million registered voters who opted not to vote in the general election conducted in 2008 were opposed to the holding of that election.

(At that juncture, Mr WONG Yuk-man moved forward to the head table, grabbed the Chairman's name plate and threw it on the floor. Mr WONG then moved to SCMA's desk, grabbed SCMA's name plate and threw it away. The Chairman ordered Mr WONG to withdraw from the meeting. Mr WONG left the meeting venue with the assistance of security staff.)

15. Dr Margaret NG expressed great disappointment that the Administration had not followed the proper procedures by presenting the proposal to LegCo without conducting any public consultation, and sought to secure the passage of the proposal, despite its obvious loopholes, with the staunch support of some Members. In her view, the proposal was tantamount to penalizing the electorate by depriving their rights to stand for election and to vote in a by-election. It was unreasonable that the electorate had not been consulted on these important issues. Moreover, the proposed restriction was excessive for the intended purpose of plugging the alleged loophole in the electoral system.

16. SCMA responded that no favouritism to any political party would result from the proposed replacement mechanism. Citing the result of the general election held in September 2008 as an example, he pointed out that

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if the proposed replacement mechanism was implemented, the seats vacated by the five GC Members would have been filled by four members from the pan-democratic camp and one from the pro-establishment camp.

17. Mr Alan LEONG said that it was not logical to deprive the electors' rights solely out of financial consideration. Moreover, the proposed replacement mechanism would distort the will of the electorate. He pointed out that with the implementation of the proposed replacement mechanism, if Mr CHAN Kam-lam who belonged to DAB vacated his seat in Kowloon East Constituency, the vacant seat would be filled by Mr TO Kwan-hang who belonged to the League of Social Democrats. SCMA explained that the will of the electorate expressed at the general election would form the basis for determining candidates filling vacancies in future and in the example cited by Mr LEONG, the mechanism would prove to be effective in ensuring that the replacement would have sufficient public support as Mr TO Kwan-hang had obtained 28 000 votes in that election. The Chairman remarked that this example would help illustrate that the Administration's proposal was not tailor-made for DAB.

18. Mr LEUNG Kwok-hung expressed the view that an effective electoral system should not seek to undermine the basic rights of the citizens. However, the proposed replacement mechanism had sought obviously to deprive Hong Kong people their right to vote. He was concerned that if the proposed replacement mechanism was to be implemented, it would mean that proposed legislation on Article 23 of the Basic Law could be introduced into LegCo any time.

(At that juncture, Mr LEUNG Kwok-hung tore a Basic Law booklet into pieces and threw the pieces towards SCMA. The Chairman reminded Mr LEUNG to observe the Rules of Procedure and stop his grossly disorderly conduct. Mr LEUNG continued his conduct. The Chairman then ordered Mr LEUNG to withdraw from the meeting. Mr LEUNG left the meeting venue with the assistance of security staff.)

19. SCMA reiterated that the proposed replacement mechanism for filling vacancies in LegCo would be consistent with the list system of proportional representation and could reflect the overall will of the electorate expressed during the general election.

20. Mrs Regina IP said that the current by-election system was effective and provided additional opportunities for potential candidates to run for election. She noted that a by-election was not necessary for returning a

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candidate to fill a casual vacancy in some overseas countries. For example, no by-election would be conducted to fill a Senate seat vacated in the Illinois State in the United States. She enquired whether any useful insight could be gained from such an arrangement. SCMA advised that in the example cited, the State Governor had exercised his delegated authority to appoint a senator on behalf of the citizens and a by-election was not held to fill the seat so vacated. Mrs Regina IP further said that in applying the proposed replacement mechanism to the election results in 2008, Dr LO Wing-lok would have been the first unelected candidate with the largest number of remainder votes in the Hong Kong Constituency, she would find the result acceptable even though Dr LO was a candidate on a different list. SCMA remarked that the example would help illustrate that the replacement mechanism should be able to operate in a fair manner.

21. Mr CHEUNG Man-kwong objected to the proposed replacement arrangement for filling mid-term vacancies in LegCo. He said that in a general election, an elector was entitled to cast a single vote for the whole list of candidates and the total number of votes cast to the list of candidates would serve to quantify the number of seats to be allocated to that list. The Administration should not regard that once an incumbent Member from the list of candidates resigned, the votes should go with him as that Member had already used the quota of the votes to take up his seat. Mr CHEUNG opined that the proposed arrangement went against the will of the electors who voted for that list and the electorate would find it unacceptable. Mr Albert HO supported the views of Mr CHEUNG, adding that the filling of a vacancy by the candidate who had not yet been elected on the list with the largest number of remainder votes was not in line with the spirit of the list system of proportional representation. Mr Frederick FUNG said that under the list system of proportional representation, it was wrong for the Administration to assume that the last candidate on the same list as the resigned Member did not receive any vote from the electorate and hence he should not take up the vacant seat due to the lack of public support.

22. SCMA, however, maintained that it was reasonable to assume that without the presence of a well-known candidate who had resigned, his list might not receive the same level of support. The Administration therefore did not propose that a candidate from the same list should fill the vacant seat.

23. Dr Margaret NG considered that the proposed replacement mechanism had no public mandate. For example, the proposed application

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of the replacement mechanism to causal vacancies arising from death, serious illness or other involuntary circumstances was disputable and the public should be consulted on any significant changes to the electoral system. She shared the concern expressed earlier that if the Administration succeeded in introducing the proposed replacement mechanism, it was possible for the Administration to force through legislation on Article 23 of the Basic Law. SCMA advised that the will of the electorate was highly regarded by the Administration and therefore the election results of the general election would form the basis of returning a candidate to fill any mid-term vacancy. The Administration also considered it appropriate to apply the replacement mechanism to all situations where a vacancy arose mid-term in order to fully honour the will of the electorate expressed in the general election.

24. Mr Paul TSE said that he had failed to see the justification for the Administration to put forth the proposed replacement mechanism without conducting any public consultation. He was concerned about the representativeness of an unelected candidate receiving only very few votes successfully filling a vacant seat. He therefore suggested that a minimum threshold should be specified for the candidates who had not yet been elected to be eligible for filling a vacant seat. Responding to the enquiries of Mr Alan LEONG and Mr Paul TSE, SCMA said that under the list system of proportional representation, a list of candidates obtaining an absolute majority of the aggregate of the total number of votes would be allocated a greater number of seats; and that list would have a greater chance to fill a mid-term vacancy under the proposed replacement mechanism as it was likely for candidates from that list to have the highest number of remainder votes. SCMA further advised that on the basis of the past election results, a candidate who would fill the vacant seat should have a certain number of votes and the adoption of a threshold was not considered necessary; and that it was appropriate to apply the same replacement arrangement to all circumstances.

25. Ms Cyd HO maintained the view that it was totally unacceptable to deprive the public of the opportunity to express their views on the proposed change to the electoral system. She cautioned that the electors who voted in the 2008 general election to return GC Members were not aware that their votes would also have the effect of identifying candidates for filling vacancies under the proposed replacement mechanism. The Administration could not assume that electors would support its proposal solely because they did not vote in the 2010 by-election. SCMA, however, commented

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that LegCo was the most appropriate forum to give heed to public views and to deliberate the proposal as the views of Members who were returned by elections could represent the public.

26. Members agreed that in view of the significance of the Administration's proposal on the important rights of the general public, the Panel should hold a special meeting to receive views from the public, the date of which would be determined shortly. At the request of Dr Margaret NG, the Chairman directed the LegCo Secretariat to provide the following information:-

- (a) Information on replacement arrangement for filling vacancies in overseas legislatures;
- (b) results of the LegCo GC elections and by-elections held after the establishment of the Hong Kong Special Administrative Region; and
- (c) relevant minutes of meetings and any related information in respect of members' views as recapitulated in paragraph 13 of the background brief on "Arrangements for filling vacancies in the Legislative Council" prepared by the LegCo Secretariat.

(Post-meeting Note: On the instruction of the Panel Chairman, the special meeting was scheduled for 18 June 2011. The requisite information was issued vide LC Paper Nos. CB(2)2063/10-11 and 2099/10-11 on 14 and 16 June 2011 respectively.)

II. Any other business

27. There being no other business, the meeting ended at 10:45 am.

Council Business Division 2
Legislative Council Secretariat
25 April 2012