

**Paper for the Bills Committee on
Legislative Council (Amendment) Bill**

Background

A member of the Bills Committee has expressed concern over the constitutionality of removing the constituents of functional constituencies (FCs) of the Urban Council and Regional Council during the term of office of their respective returned Member while retaining their Legislative Council membership during the remaining term of the first Legislative Council.

Composition of the first Legislative Council

2. Annex II of the Basic Law states that the first Legislative Council is to be formed according to the Decision of the NPC on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR. Consequently, a decision was adopted by the 7th NPC at its 3rd Session on 4 April 1990 regarding the matter (“the Decision”).

3. The Decision requires the establishment of a Preparatory Committee for the HKSAR which shall be responsible for preparing the establishment of the Region and shall prescribe the specific method for forming the first Government and the first Legislative Council in accordance with the Decision. The Decision further states that the first Legislative Council shall be composed of 60 Members, with 20 Members returned by geographical constituencies through direct elections, 10 Members returned by an election committee, and 30 Members returned by FCs. The Decision does not specify details of the composition of the FCs.

4. The Specific Method for the Formation of the First Legislative Council of the SAR of the PRC was adopted at the Ninth Plenum of the Preparatory Committee of the HKSAR under the NPC on 23 May 1997 (“the Specific Method”). Article 5 of the Specific Method provides that the FCs shall return 30 seats and specifies names of 21 groups to occupy 21 seats respectively. The Specific Method goes on to specify another 15 groups stating that the remaining 9 seats shall be divided among 9 groups to be chosen by the HKSAR from the 15 groups. It is sufficient for the present purpose to state that the Urban Council and Regional Council are the 2 groups among the 21 specified groups to return 2 seats respectively for the FCs.

The Provisional Urban Council and the Provisional Regional Council

5. The electoral provisions in the former Urban Council Ordinance and Regional Council Ordinance were considered by the Standing Committee of the NPC to be in contravention of the Basic Law and hence not adopted as part of Hong Kong law upon the change in sovereignty. Instead, the Provisional Urban Council Ordinance (Cap. 101) and Provisional Regional Council Ordinance (Cap. 385) have been enacted. By virtue of which, the Chief Executive may appoint members on the 2 Provisional Councils for a term of office not later than 31 December 1999. Consequently, the Chief Executive has appointed the incumbent members of the 2 Councils on the Provisional Councils. The legal effect of which is that without further appointment by the Chief Executive, the term of office of members of the Urban Council and Regional Council will expire by 31 December 1999.

Arrangement for Urban Council and Regional Council FCs in the Legislative Council Ordinance (Cap. 542)

6. Annex II of the Basic Law prescribes that the delimitation of functional sectors and corporate bodies, their seat allocation and election methods shall be specified by electoral law introduced by the Government of the HKSAR and passed by the Legislative Council. For the first Legislative Council, section 20 of and Schedule 1 to the Legislative Council Ordinance establish the FCs. Schedule 1 prescribes that members of the Provisional Urban Council are electors of the Urban Council FC and that members of the Provisional Regional Council are electors of the Regional Council FC. They are the constituents of the 2 FCs. Section 20 and Schedule 1 are proposed to be repealed by clauses 12 and 42 of the Legislative Council (Amendment) Bill 1999 (“the Amendment Bill”) and replaced by FCs which do not include the Urban Council FC or the Regional Council FC. According to the Administration, these 2 clauses will not commence operation until the term of the first Legislative Council has expired.

The Provision of Municipal Services (Reorganization) Bill

7. The Provision of Municipal Services (Reorganization) Bill was introduced into the Legislative Council at its meeting held on 28 April 1999. One of its objects is to repeal the Provisional Urban Council Ordinance and the Provisional Regional Council Ordinance on a day to be appointed by the Secretary for Constitutional Affairs by notice in the Gazette (clauses 1(2) and 3 of the Bill). The target appointed date, according to the Administration, is 1 January 2000. The 2 Provisional Councils established under the Provisional Urban Council Ordinance and the Provisional Regional Council Ordinance will then be dissolved upon repeal of the Ordinances.

Arrangement for filling vacancy in membership of Legislative Council

8. In normal circumstance, a by-election will be held to fill vacancy in membership of Legislative Council. Although there is no legislative provision prescribing the time within which a by-election is to be held, taking all the formalities to be followed into account before the by-election, section 36(2) of the Legislative Council Ordinance provides that no by-election is to be held within the 4 months preceding the end of that Council's current term of office.

9. The point to note here is that the Legislative Council Ordinance allows a vacancy in membership of Legislative Council albeit Annex II of the Basic Law provides that the Legislative Council shall be composed of 60 Members in each term, and in particular, both the Decision and the Specific Method provide that the first Legislative Council shall be composed of 60 Members. If the vacancy in membership occurs in a FC within the 4 months preceding the end of that Council's current term of office, the Legislative Council Ordinance allows, the practical effect of the FC being left unrepresented during the period. Such legislative arrangement may be compatible with the constitutional requirement of having a specified number of seats in the Legislative Council on various grounds including the ground that such arrangement (although not provided for in the constitutional documents) is reasonable in the light of the lack of cost effectiveness in holding a by-election within such short period of time.

Arrangement for removal of constituents of a FC during the term of office of its returned Member

10. There is no provision in the Legislative Council Ordinance or the constitutional documents to provide arrangement for removal of constituents of a FC during the term of office of its returned Member. However, it should be clear as a matter of legislative intent that the FCs should remain intact as far as possible in case a by-election is necessary.

11. Clause 45(1) of the Amendment Bill proposes that the 2 incumbent Members returned by the Urban Council and Regional Council FCs in the 1998 Legislative Council election should serve out their term of office in the first Legislative Council. Under the proposed arrangement, the Members will still be subject to the existing provisions which govern when a Member ceases to hold office, for example, death, resignation and disqualification. But the Members are not considered to have positively done anything to breach their respective promissory oath to cease to have a substantial connection with their respective FC. Clause 45 (2) of the Bill further proposes that no by-election will be held to fill their vacancies if such vacancies arise after 31 December 1999 when the term of office of the Provisional Urban Council and Provisional Council expires.

12. If it is constitutional to allow a seat returned by a FC to be left vacant during the 4 months preceding the end of that Council's current term of office, on the reverse, is it constitutional to remove the constituents of a FC which returned a particular Member during the term of office of that Member? A FC may consist of natural persons or corporate electors or both. Regarding the subsistence of a corporation, the general legal principle is that a corporate body may go defunct by operation of law, for example, winding up of the corporation or legislative measures passed by the legislature affecting the legal entity of the corporation. Unless otherwise provided for by law, the general legal principle is equally applicable to a corporate body which is a constituent of a FC, be it the sole constituent or otherwise. Regarding the first Legislative Council, the Decision provides that 30 Members are to be returned by the FCs. The Specific Method provides that the Urban Council and Regional Council are 2 of the specified groups to return 2 seats respectively for the FCs. They regulate the method for returning FC Members. For reason that there may be need for a by-election during the term of the first Legislative Council, there is strong presumption that the Decision and the Specific Method expect the FCs specified will remain during the entire term. Nevertheless, neither the Decision nor the Specific Method guarantees the continuous subsistence of the FCs during the term of office of the first Legislative Council after the FCs have returned their respective Member. From a legal point of view, it appears that the removal of the constituents of a FC or its non-continuation during the term of office of its returned Member is in order. The question about the constitutionality of such removal or non-continuation does not appear to be at issue because none of the relevant constitutional documents under examination has provided for such situation. However, there may be an argument that such removal or non-continuation would contravene the spirit of the constitutional documents unless it is justified by strong compelling public grounds (both in terms of the removal or non-continuation and the timing for such removal or non-continuation).

13. The ensuing question concerning removing the constituents of a FC during the term of office of its returned Member is whether or not its returned Member could still be on the Legislative Council without constituents of the FC. Again, none of the constitutional documents under examination has addressed this issue expressly. As explained in paragraph 11 above, the Bill proposes that the 2 incumbent Members returned by the Urban Council and Regional Council FCs in the 1998 Legislative Council election should serve out their term of office in the first Legislative Council. Under the proposed arrangement, the Members will still be subject to the existing provisions which govern when a Member ceases to hold office, for example, death, resignation and disqualification. But the Members are not considered to have positively done anything to breach their respective promissory oath to cease to have a substantial connection with their respective FC. Members are also aware that the policy intent of introducing the concept of "substantial connexion" to FCs, as explained by speech of the Chief Secretary at the Legislative Council sitting on 13 March 1985 (extract from paper provided by the Administration and

circulated to members vide LC Paper No. CB(2)2028/98-99(01)), is that “candidates for election to the Legislative Council are properly qualified, that is to say, competent by virtue of their own personal experience, to represent the interests of the particular constituencies in which they stand but with the ultimate purpose, of course, of serving the interests of the community as a whole”. Thus, under the proposed legislative arrangement, the 2 incumbent Members returned by members of the Provisional Urban Council and Provisional Regional Council, upon dissolution of the 2 Provisional Councils, may still serve the ultimate purpose of serving the interests of the community as a whole.

Conclusion

14. To leave the vacancies in the constituents of the Urban Council and Regional Council FCs unfilled by not continuing to appoint persons to the membership of the 2 Provisional Councils during the term of office of their respective returned Member may well be legally in order. But from a policy point of view, it will be a question for members to decide the need and the appropriate timing for such removal or non-continuation of existence of the constituents.

15. Regarding the proposal for retaining Legislative Council membership by the 2 incumbent Members returned by members of the Provisional Urban Council and Provisional Regional Council upon the removal of the constituents of the 2 FCs, we are satisfied that it is also legally in order to the extent that even without clause 45(1), section 15 of the Legislative Council Ordinance would not operate against the 2 Members. At the Bills Committee meeting held on 3 June 1999, the Administration echoed our view by agreeing to add the words to the effect that clause 45(1) is only required for the avoidance of doubt.

Prepared by

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