

立法會
Legislative Council

LC Paper No. CB(2)2339/99-00

Ref : CB2/PL/CA

**Legislative Council
Panel on Constitutional Affairs**

**Minutes of special meeting
held on Monday, 8 May 2000 at 4:30 pm
in Conference Room B of the Legislative Council Building**

Members Present : Hon Andrew WONG Wang-fat, JP (Chairman)
Hon Emily LAU Wai-hing, JP (Deputy Chairman)
Hon Gary CHENG Kai-nam, JP
Hon Jasper TSANG Yok-sing, JP
Hon Howard YOUNG, JP
Dr Hon YEUNG Sum
Hon Ambrose LAU Hon-chuen, JP
Hon SZETO Wah

Members Absent : Hon LEE Wing-tat
Hon Margaret NG
Hon Ronald ARCULLI, JP
Hon CHEUNG Man-kwong

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr Jimmy MA
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

I. Confirmation of minutes of meetings

(LC Papers Nos. CB(2)1798, 1799 and 1802/99-00)

The minutes of the meetings held on 4 March, 20 March and 8 April 2000 were confirmed.

II. Employees of public-funded bodies taking up public offices

2. Ms Emily LAU referred to a letter dated 20 April 2000 from the Secretary for Health and Welfare concerning the arrangements for staff of subvented organizations in the welfare sector taking up remunerated public offices (LC Paper No. CB(2)1807/99-00(02)). She raised concern about the reference in the letter to autonomy and flexibility of individual subvented organizations in dealing with the matter under the Lump Sum Grant subvention. The meeting agreed that the matter should be followed up at the next regular meeting on 15 May 2000.

III. Written submissions on the "Development of the Hong Kong Special Administrative Region's political system"

(LC Papers Nos. CB(2)1076,1111,1130, 1133, 1141, 1151, 1211, 1284, 1290, 1405, 1422, 1432, 1610/99-00 - Written submissions received by the Panel)

(LC Paper No. CB(2)1624/99-00(01) - A summary of views received by the Panel)

3. The meeting continued to discuss the written submissions received by the Panel.

Submission from Kwun Tong Resident Association

(LC Paper No. CB(2)1141/99-00(07))

4. Dr YEUNG Sum sought the Legal Adviser's (LA) views on the submission from the Kwun Tong Resident Association (the Association) that the implementation of a ministerial system or a party government system would contravene the Basic Law (BL).

5. LA said that it was very difficult to give a definitive answer to the issue. He pointed out that the Association had provided no justifications on a constitutional basis for its view. It had merely stated that a ministerial system and party government system were systems for the sovereign states and should not be adopted by Hong Kong being a Special Administrative Region (SAR) of the People's Republic of China. If Hong Kong were to practise such systems, it would

lead people to think that Hong Kong was an independent or semi-independent political entity, hence threatening the principle of "one country, two systems". LA said that whether or not a particular political system complied with the BL would have to be judged in the context of the actual form and content of the system vis-à-vis the letter and spirit of the BL.

6. The Chairman said that he recalled that at a previous meeting a representative from the Hong Kong Bar Association (the Bar) had expressed a different view from that of the Kwun Tong Resident Association. According to the Bar, the BL was not devoid of flexibility with regard to the political and constitutional developments in Hong Kong. The Bar also held the view that it was a basic legal principle that anything that was not prohibited by the law was legal, and that the BL did not deviate from this principle.

7. The Chairman added that in the US, some states could elect their governors through direct election. In the UK, city mayors were also returned by direct election. He opined that the concern of the Kwun Tong Resident Association might stem from political, rather than constitutional, considerations, in that it feared that a ministerial and party government system with universal suffrage could lead to a scenario akin to the unilateral declaration of independence by Rhodesia in the 1960s.

8. Dr YEUNG Sum also sought LA's views on the comments made by some sectors in the community that election of the Chief Executive (CE) and Members of the Legislative Council (LegCo) by universal suffrage could lead to HKSAR becoming an independent political entity. LA responded that he saw no connection between the two. In fact, it was clearly stated in Articles 45 and 68 of the BL that both the CE and LegCo Members should be ultimately elected by universal suffrage.

Submission from Mr Anthony M W LAW, Lecturer of School of Law, City
University of Hong Kong

(LC Paper No. CB(2)1155/99-00(02))

9. Dr YEUNG Sum opined that it would not be feasible for LegCo Members to be appointed as Executive Council (ExCo) Members in turn, in view of the fact that LegCo Members came from different political parties and sectors of the community representing different interests. Ms Emily LAU also did not support the idea.

10. The Chairman opined that appointment of members to the ExCo should be made by the CE.

Submission from Dr J T H TANG, Head of Department of Politics and Public Administration, University of Hong Kong

(LC Paper No. CB(2)1155/99-00(03))

Direct election

11. Dr YEUNG Sum said that he generally agreed to the views of Dr J T H TANG. He said that a CE elected by universal suffrage could claim mandate from the people which could enhance the CE's ability to govern. He added that it was a common view shared by different political parties and groups that the problems and difficulties experienced by the executive branch of government resulted from a lack of a high degree of political legitimacy.

12. Mr TSANG Yok-sing said that he could not fully understand the view expressed by Dr TANG that the Executive would find it increasingly difficult to maintain an executive-led style of governance without risking its political credibility if it did not have institutionalized political support and higher degree of legitimacy.

13. Dr YEUNG Sum said that institutionalized political support should refer to a majority support in the legislature. He added that with the increasing number of directly elected seats in LegCo, it would be increasingly difficult for the Executive to get a majority support in LegCo.

14. The Chairman said that political legitimacy was related to the degree of acceptance of government policy by the community. He remarked that the credibility of the HKSAR Government was likely to suffer if it continued to count on the support of LegCo Members returned through functional constituencies and the Election Committee in pushing through policies.

Ministerial system

15. Ms Emily LAU agreed that a ministerial system would contribute to improving political accountability and executive-legislature relationship.

16. The Chairman said that so far the HKSAR Government had been successful in getting the support from the LegCo for implementing major policies because no one would wish to "rock the boat". He said that a problem with the existing executive-legislature relationship could be the existence of a minority in LegCo which always acted as an "opposition" body. He considered that the implementation of a ministerial system might not be able to completely remove this sort of conflict situation. However, a system under which ministers were appointed to take on political responsibility and accountability could help achieve

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a relatively more stable government, as experienced by some western European countries.

Submission from Dr LO Shiu-hing, Assistant Professor, Department of Politics and Public Administration, University of Hong Kong

(LC Paper No. CB(2)1155/99-00(04))

17. Members noted that Dr LO favoured giving more powers and responsibilities to District Council (DC) members. He considered that allowing DC members to become "ministers" in the 18 districts to take responsibility for the administration of certain district affairs would provide training of their political leadership.

18. Mr SZETO Wah said that such ministerial system at the district level would need to be studied in terms of what structural changes it would bring to the existing system. The Chairman pointed out that implementation of such a system might be inconsistent with BL97.

Submission from Hong Kong Bar Association
(LC Paper No. CB(2)1284/99-00(02))

Executive-legislature relationship

19. Dr YEUNG Sum said that he supported the Bar's view that there was no constitutional support for an executive-led government in the BL. On the contrary, BL64 provided that the HKSAR Government should be accountable to the LegCo.

20. Mr TSANG Yok-sing opined that the meaning of "executive-led government" might be viewed in the context of the powers and functions exercisable by the HKSAR Government under BL62. However, he could not see any implications from those powers and functions that the Executive should prevail over the Legislature.

21. On the matter of accountability of the HKSAR Government to LegCo, the Chairman drew members' attention to BL64 which stipulated that -

"The Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region: it shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; it shall answer questions raised by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure."

The Chairman said that the Bar had pointed out that while BL43 specified that the CE was accountable to the HKSAR, it did not set out how the CE should be accountable to the HKSAR. On the basis of this non-restrictive feature of BL43 regarding the CE's accountability, the Bar came to the conclusion that the situations set out in BL64 should not be exhaustive of the scope of accountability of the Executive to LegCo. The Chairman sought members' comments on the Bar's observation.

22. Mr TSANG Yok-sing did not agree with the Bar. He pointed out that BL43 provided that -

"...The Chief Executive of the Hong Kong Special Administrative Region shall be accountable to the Central People's Government and the Hong Kong Special Administrative Region in accordance with the provisions of this Law."

BL43 had clearly set out that CE's accountability to the HKSAR should be "in accordance with the provisions of this Law". In other words, contrary to the Bar's view, BL43 was not without restrictions as regards the CE's accountability. Therefore, it would be wrong for the Bar to rely on BL43 to substantiate its view that the matters set out in BL64 were not exhaustive of the HKSAR Government's accountability. Mr TSANG further opined that BL43 and BL64 appeared in different sections in Chapter IV of the BL dealing with different subject matters. He was doubtful whether the interpretation of one in fact bore any relevance to the interpretation of the other.

23. Mr CHENG Kai-nam and Mr Ambrose LAU expressed similar views. Mr CHENG added that the four aspects of responsibility of the HKSAR Government set out in BL64 were immediately preceded by a colon after the first sentence. In his opinion, this style of writing appeared to indicate that those areas were exhaustive of the accountability of the HKSAR Government to LegCo.

24. Mr SZETO Wah said that the reference to "in accordance with the provisions of this Law" in BL43 meant that the accountability of the CE was of a wide scope which had to be judged against the totality of the BL provisions. The Chairman opined that similar to BL43, the accountability of the HKSAR Government to LegCo under BL64 should not be interpreted with a narrow view.

25. LA said that the BL being a constitutional document could not be specific in every detail. According to the guiding principles given by the Court of Final Appeal for the interpretation of the BL, the Articles of the BL should be considered in context, having regard to the overall purpose of the Law.

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Sometimes, it was necessary to take a "generous" approach when matters concerning fundamental rights of Hong Kong residents were involved.

26. In response to the Chairman, LA advised that the preamble of a statute had no legal effect. However, it could be resorted to by the courts as an aid to statutory interpretation, particularly where there was ambiguity or doubt as to the meaning of provisions in the statute.

Sanction or removal from office of principal officials

27. Ms Emily LAU supported the view of the Bar that an effective system of accountability of principal officials required an effective mechanism for sanction or removal from office when the public had lost confidence in an official.

28. The Chairman said that under a system providing for security of tenure of office, it was unlikely that government officials would resign from office in any circumstances. He agreed that a mechanism for sanction or removal of principal officials deserved careful consideration. He added that under a representative system of government, accountability of the executive authorities to the legislature referred to a political, rather than a superior/subordinate, relationship. Hence, a vote of no confidence or censure in the legislature did not necessarily result in the removal from office of ministers or senior officers of government. He opined that it might be a matter for public discussion as to whether a vote of no confidence in LegCo should result in the mandatory removal of a principal official from office.

29. The Chairman reminded members that the option of developing parliamentary customs or traditions, or constitutional conventions, under which a minister or senior official would resign for a justifiable cause such as the commission of a serious personal or policy blunder, had been discussed at previous meetings.

30. LA pointed out that constitutional convention differed from a legal sanction in that it was not legally binding on the person concerned. He said that under universal suffrage and a ministerial system, the ultimate sanction would occur at a new election, when the person might be voted out of office.

Submission from The Frontier

(LC Paper No. CB(2)1405/99-00(01))

31. Ms Emily LAU said that the proposal of The Frontier that the LegCo should have the power to veto the CE's nomination for appointment of policy Secretaries would enhance the accountability of the executive authorities. Furthermore, the implementation of the proposal did not involve amending the BL.

32. The Chairman expressed concern about the long-term consequences of this proposal. He pointed out that under the US system, a majority vote in the Senate was sufficient to veto an appointment made by the President. Where a political party other than that to which the President belonged commanded a majority in the legislature, appointments of the President could face serious challenge for political reasons.

33. The Chairman added that a power of veto as proposed by The Frontier should not apply to the appointment of judges to avoid politicizing the issue.

34. Dr YEUNG Sum and Mr SZETO Wah said that if the CE and all Members of LegCo were elected by universal suffrage, disagreements between the two over the appointment of principal officials would be minimized.

Election of the CE and LegCo Members

35. Regarding the question of the election of the CE and LegCo Members by universal suffrage, Ms Emily LAU considered that the public should be extensively consulted on the following -

- (a) whether to follow strictly the time-table set out in Annex I and II of the BL;
- (b) whether to amend the BL to allow for early implementation of universal suffrage ahead of 2007; and
- (c) whether a review to consider the methods for the selection of the CE and the formation of the LegCo subsequent to 2007 should be undertaken well before 2007.

36. Mr Howard YOUNG expressed the view that a comprehensive review should be completed not later than 2006 to allow sufficient time for making the necessary arrangements to implement any decisions arising from the review, such as the preparation of all the requisite legislative amendments etc. Dr YEUNG Sum expressed similar views. He said that to overcome any time constraints, the Administration should proceed with a full scale review without further delay.

37. The Chairman sought LA's views on whether amendments to the provisions in Annex II of the BL on the method for the formation of the LegCo could be enacted before 2007 but to take effect after 2007.

38. In response, LA said that Annex II specifically set out the composition of the second and third terms of the LegCo. From a practical point of view, any legislative amendments to give effect to the method for forming the fourth term LegCo would have to be enacted well before the commencement of the term in 2008.

39. Mr Howard YOUNG said that the reference to the method for the formation of the LegCo after 2007 in Annex II of the BL should refer to the method applicable to the fourth term LegCo commencing in 2007, had the unforeseen "interregnum" of the Provisional Legislative Council in 1997/98 not occurred.

40. Mr Ambrose LAU pointed out that section III of Annex II of the BL contained the reference to "if there is a need to amend the provisions of this Annex". If a need was not established, the method for forming the third term LegCo in section I of Annex II should remain in effect.

IV. The way forward

41. The meeting agreed that the Secretariat should prepare a draft report to set out the views received by the Panel on the development of the HKSAR's political system and the major issues which had been discussed by the Panel. The draft report would be circulated for members' consideration before the end of May 2000.

42. Pending schedule of the special meetings to discuss the draft report, members agreed that the meeting originally scheduled for 13 May 2000 was no longer necessary and should be cancelled.

(Post-meeting note - Two closed-door meetings were scheduled for 29 May 2000 at 2:30 pm and 30 May 2000 at 8:30 am.)

43. There being no other business, the meeting ended at 6:35 pm.