

立法會
Legislative Council

LC Paper No. CB(2)626/99-00
(These minutes have been
seen by the Administration)

Ref : CB2/PL/CA

**Legislative Council
Panel on Constitutional Affairs**

**Minutes of meeting
held on Monday, 15 November 1999 at 2:30 pm
in Conference Room A of the Legislative Council Building**

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

Member Absent : Hon Ronald ARCULLI, JP

Member: Attending : Hon NG Leung-sing

Public Officers Attending : *Item I*

Mrs Carrie YAU
Director of Administration

Mrs Carrie LAM
Deputy Secretary for the Treasury

Mr Peter WONG
Senior Assistant Solicitor General
Department of Justice

Mr Jacky LUM
Assistant Director of Administration

Item II

Mrs Carrie YAU
Director of Administration

Mr Jonathan DAW
Legal Adviser, Legislative Affairs
Department of Justice

Mr Jacky LUM
Assistant Director of Administration

Item III

Mrs Carrie YAU
Director of Administration

Mr Robin IP
Deputy Secretary for Constitutional Affairs

Mrs Apollonia LIU
Assistant Director of Administration

Mr M J BISHOP
Assistant Director (Investigation Branch/4)
Operations Department, ICAC

Mr Joseph TO
Senior Government Counsel
Department of Justice

Mr Peter WONG
Senior Assistant Solicitor General
Department of Justice

Mr Paul TSANG
Government Counsel (Basic Law Unit)
Department of Justice

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

Staff in Attendance : Mr Jimmy MA
Legal Adviser

Mrs Eleanor CHOW
Senior Assistant Secretary (2)7

Action
Column

I. Articles 50 and 51 of the Basic Law
(LC Paper Nos. CB(2) 2558/98-99(03) and 377/99-00(02))

The Chairman said that at the meeting on 19 July 1999, the Panel had agreed with the Administration's interpretation that the word "budget" in the context of Articles 50 and 51 of the Basic Law should refer to the Appropriation Bill. The deliberations of the Panel were reported to the House Committee on 8 October 1999. At that meeting, Mr LEE Wing-tat expressed concern that this interpretation would give rise to legal disputes. The House Committee agreed that the Panel should further deliberate the matter as it involved important and complex issues.

2. Deputy Secretary for the Treasury (DST) said that the Administration had not changed its position which was set out in its previous paper (LC Paper No. CB(2) 2558/99-00(03)). She said that taking into account the legal requirements governing the management of public finance and the established practices over the years in seeking the legislature's approval of expenditure, the Administration was of the view that the word "budget" in the context of Articles 50 and 51 referred to the expenditure side only, i.e. the Appropriation Bill. However, it should be noted that the term appeared in other Articles of the Basic Law where it might carry a wider meaning and the term should be interpreted in the context of each of the Articles in which it appeared.

3. DST pointed out that while the same word "budget(s)" was used in the English text of Articles 48(3), 50, 51, 52(3), 62(4), 73(2) and 107 of the Basic Law, different Chinese terms namely "財政預算" and "財政預算案" were used in the respective Articles. It appeared that the Chinese term "財政預算案" referred to the expenditure side of the budget whereas "財政預算" carried a wider meaning covering both revenue and expenditure. For instance, in the context of Article 107 which referred to a balanced budget, the term "財政預算" should already carry a wider meaning encompassing both revenue and expenditure, as balancing a budget required the interaction of revenue and expenditure.

4. Mr LEE Wing-tat said that he did not agree with the Administration's interpretation because the word used in Articles 50 and 51 was "budget", not "Appropriation Bill". He said that the Administration's interpretation was arbitrary and had the effect of limiting LegCo's power in monitoring revenue proposals. He held the view that the term "budget" in Articles 50 and 51 should cover both the Appropriation Bill and the Revenue Bill, as in the case of Article 107. Mr SZETO Wah concurred and said that a budget without the revenue element could not be regarded as a budget. He said that the Administration's interpretation was in breach of the Basic Law.

5. Miss Margaret NG also held the view that the word "budget" in Articles 50 should not be limited to expenditure only. She pointed out that Articles 50 and 107 were unrelated because the former dealt with bills while the latter was concerned with the policy in drawing up HKSAR's budget.

6. DST responded that it was not a matter of the Administration trying to interpret Articles 50 and 51 arbitrarily or to undermine the power of LegCo. As she had said earlier, the interpretation was based on the established practices over the years and the legal requirements governing the management of public finance, seen against the context of the Basic Law provisions. As to why the word "budget" instead of "Appropriation Bill" was used in Articles 50 and 51, she was not in a position to explain. Likewise, she could only point out that the Chinese term "budget" in the context of Articles 50 and 51 was different from that of Article 107. She said that interpreting the word "budget" as the Appropriation Bill would not preclude application of Article 50 to revenue proposals, given that under certain circumstances a revenue bill could be regarded as "any other important bill" as referred to in Article 50. In case of disputes over whether a particular revenue bill was an important bill, it was a matter for the court to decide.

7. Mr LEE Wing-tat said that the phrase "any other important bill" in Article 50 was contentious. He asked the Administration who and how to determine whether a bill was important. He held the view that all revenue bills were important. He added that in FS's consultations on the annual Budget, both expenditure and revenue proposals would be covered. The Budget Speech made by the Financial Secretary when moving the Second Reading of the Appropriation Bill covered both expenditure and revenue proposals, although the motion being voted on was the Appropriation Bill. The fact that the Appropriation Bill was passed by the Council did not mean that LegCo would support all the revenue proposals to be introduced at a later stage. He suggested that the Administration should consider introducing the Revenue Bill and the Appropriation Bill into LegCo at the same time in order to be consistent with Article 50. As regards the different Chinese terms used in various Articles, Mr LEE enquired about the difference between Article 73(2)

and (3); the former referred to "budgets introduced by the Government" and the latter referred to "taxation and public expenditure".

8. DST explained the different procedures for dealing with estimates of revenue and expenditure under the Public Finance Ordinance (Cap. 2) (PFO). The estimates of revenue and expenditure for the next financial year were prepared for the consideration of LegCo. The estimates of expenditure was required to be tabled at the time with the introduction of the Appropriation Bill. Upon enactment of the Appropriation Ordinance, the estimates of expenditure for the financial year for which the Ordinance related were deemed to be approved. However, there was no mechanism for LegCo to approve the estimates of revenue. In fact, except in sections 3 and 5(1), PFO made no particular reference to revenue. Nor did it provide a detailed set of procedures for the control and management of revenue similar to that provided for expenditure. The reason was that on revenue, except for new proposals, it was not necessary for the Government to seek LegCo's approval every year because the legal basis for the Government to raise or receive moneys which would form part of the general revenue was already provided for in various existing legislation, for example, rates under the Rating Ordinance, salaries tax and profit tax under the Inland Revenue Ordinance.

9. Quoting the example of the 1998 Budget, DST said that it required 12 legislative instruments including amendment bills, resolutions, etc. to give effect to the various revenue proposals. The practical effect of construing "budget" in Article 50 as to cover both revenue and expenditure could be that LegCo might be dissolved in the event that it refused to pass any one of the 12 legislative proposals in question. DST added that Article 51 which was sequential to provision in Article 50 referred only to application for provisional short-term appropriations in the event of refusal of LegCo to pass the "budget". On Mr LEE Wing-tat's earlier suggestion, she said that the Administration had not considered introducing an omnibus bill covering both revenue and expenditure proposals, given that the existing arrangement was working well. From the legal point of view, the PFO would need to be amended if that idea was to be pursued.

10. Miss Margaret NG considered that the revenue and expenditure sides of the budget were equally important. Should the word "budget" in Article 50 be construed as to mean both expenditure and revenue, then revenue bills would not fall under "any other important bills" of Article 50. She disagreed to the view that LegCo would have to be dissolved as a result of its refusal to pass any revenue bills because Article 50 provided for consensus to be reached by way of consultations.

11. Senior Assistant Solicitor General of the Department of Justice (SASG/DJ) said that the Administration's interpretation of Article 50 was based

on two important legal principles. Firstly, the principle of continuity as identified by the Court of Appeal in David MA's case [1997] HKLRD 761. Secondly, interpretation should have regard to the context and the purpose of the provision concerned and not just its literal meaning. The final decision, in the Hong Kong context, of whether a bill was important rested with the court which would take into account, inter alia, the impact of the bill on the operation and financial position of the Government. In the case where a revenue proposal was made up of a number of bills and one of these bills was not passed by LegCo, the court would ascertain the effect it would bring about in order to decide whether such a bill was important.

12. Miss Margaret NG doubted whether the principle of continuity still existed after the Government had resorted to seeking an interpretation from the Standing Committee of the National People's Congress to overturn the Court of Final Appeal's interpretation of the relevant provisions of the Basic Law on the right of abode issue. She said that continuity was important but not paramount because policies should change with circumstances and time. The principle of continuity should not be rigid to the extent that the Administration was restricted from introducing changes to its practices. She considered that the court should not be asked to interpret whether a bill was important. Rather, it was for the Administration to justify whether a bill was important.

13. The Chairman said that the drafting of the Basic Law was poor. He considered that the term "estimates of revenue and expenditure" was more appropriate to describe the nature of a budget, while the term "bill on estimates of expenditure" or the Appropriation Bill should be used in the context of Articles 50, 51 and 52. He suggested the Administration to consider premising its argument on Article 48(3), i.e. the passage of "財政預算案" referred to the Appropriation Bill and the term "財政預算、決算" that followed referred to the annual "budgets" and "final accounts" which included both the revenue and expenditure.

14. The Chairman further said that he personally accepted the Administration's interpretation of the word "budget" in the context of Articles 50, 51 and 52. However, the Administration had to convince members that its interpretation would not be subject to challenge in court. He agreed with Mr LEE Wing-tat that all revenue bills were important. He considered that the Administration's argument about the principle of continuity was flimsy.

15. Mr LEE Wing-tat said that in the event that LegCo was not dissolved by the Chief Executive (CE) after it had refused to pass a revenue bill which was regarded as an important bill, LegCo could bring the case to court because CE had failed to comply with Article 50. SASG/DJ said that the view that CE had a constitutional responsibility to dissolve LegCo under Article 50 required further deliberation. The example cited by Mr LEE would not necessarily

result in the dissolution of the Council by CE because Article 50 had provided a consultation mechanism for LegCo to reach consensus with the Administration.

16. Miss Margaret NG said that the court might not handle legal disputes arising from Article 50 because the provision itself was political. In addition, the words "important", "consensus" and "consultation" used in the Article were not legal terms which could be easily interpreted by the court. She suggested that a practical approach should be taken to deal with the matter.

17. DST responded that she doubted whether all revenue bills could be treated as important bills, regardless of its content and financial implications. She gave the example of the proposal to increase parking meter charges from \$2 to \$4, one of the proposals of the omnibus Revenue Bill introduced in 1999, which was voted down by LegCo. As the proposal would only bring in additional revenue of about \$200 million, against a total government revenue of \$200 billion, it would be difficult to convince the public that the proposal, if introduced as an individual revenue bill, was important to the extent that it would trigger off the procedure under Articles 50 and 52.

18. The Chairman said that some members were not convinced by the Administration's interpretation on "budget". He requested the Administration to respond to the following queries at the next meeting -

Adm

- (a) to put forward stronger justifications in support of its interpretation that the word "budget" in Articles 50, 51 and 52 referred to the expenditure side of budget only;
- (b) whether "LegCo refuses to pass a budget" referred to in Article 50 covered the situation where the Appropriation Bill was passed with amendments made by LegCo;
- (c) the basis and authority for determining whether a bill fell under "any other important bill" referred to in Articles 50 and 52, e.g. when a bill would be decided as important by the Government, i.e. prior to its introduction or after it had been voted down, and whether the Revenue Bill was considered as an important bill;
- (d) the Administration's interpretation of the term "budget" and its Chinese versions "財政預算" or "財政預算案" referred to in various Articles of the Basic Law; and
- (e) the Administration's interpretation of Article 73(2) and (3).

II. Designation of officials to attend LegCo meetings
(LC Paper Nos. CB(3) 1216/98-99 and 168/99-00(04))

19. Referring to Article 62(6) of the Basic Law which provided that the Government of the Hong Kong Special Administrative Region (HKSAR) should designate officials to sit in on the meetings of the LegCo and to speak on behalf of the Government, Director of Administration (D of Adm) said that having sought legal advice, some persons included in the instrument dated 26 June 1998 had been excluded in the instruments dated 31 December 1998. The reasons was that the statutory bodies in which these persons represented were separate from and independent of the Administration by virtue of their separate legal personalities or independent status as indicated, either expressly or by implication, in the statute under which they were established.

20. Legal Adviser (Legal Affairs) of the Department of Justice (LA/DJ) supplemented that the real thrust of Article 62(6) was to deal with the formal proceedings of the Council rather than committee and panel business. The designation procedure came about in 1994 when the Government no longer had any seats in LegCo. The question then was to establish a mechanism to ensure that the officials who conducted Government's formal business in LegCo (e.g. introducing bills, replying to motions) were doing so with authority. The list of designated officers was not in any way intended as limiting the scope of Government's accountability to LegCo, although there could be differences of opinion over whether CE should or should not designate certain persons. LA/DJ added that there were other provisions within the Basic Law and the Rules of Procedure of the Legislative Council (RoP) which made it clear that in all matters of public affairs, there was an appropriate procedure to ensure full accountability of any person who was taking part in the conduct of public affairs.

21. Members agreed with LA/DJ in principle that Article 62(6) was limited to formal LegCo proceedings. Dr YEUNG Sum expressed concern about the situation where persons who were involved in the making of public policies but who were not public servants, refusing to appear before LegCo committee meetings, e.g. the Chairpersons of the Hospital Authority and the Housing Authority.

22. The Chairman advised that the Administration considered that the Secretary for Housing was responsible for the policy aspects of housing matters and was therefore the appropriate person to attend meetings of the Council and its committees to speak on behalf of the Government on housing matters.

23. LA/DJ said that LegCo had the formal power under Rule 80 of the RoP to order the attendance of any persons at committee meetings. The power was also vested in the Legislative Council (Powers and Privileges) Ordinance (Cap.

382). The power was not limited to public servants. The provision was drafted and put into practice in the knowledge that in assisting the legislature, an invitation to a person connected with public affairs would secure that person's attendance in most cases. If a person was reluctant to attend, it was not necessary to resort immediately to compulsory power. The middle ground was the process of the balance of politics. Ultimately, LegCo had the power to summon.

24. Legal Adviser (LA) said that Article 73(10) of the Basic Law had provided LegCo with the power to summon persons concerned to testify or give evidence when exercising its powers and functions. When the subject of designation of officers to attend Council meetings was discussed by the House Committee at previous meetings, members held the view that the principle of including or not including a person in the designation instrument should be consistent. Pointing out that Articles 57 and 58 which stipulated that the Independent Commission Against Corruption (ICAC) and the Commission of Audit were both accountable to CE, he asked why the Commissioner of ICAC was on the list of designation instrument but the Director of Audit was not. He also asked about the capacity in which the Commissioner of ICAC and the Director of Audit represented when attending meetings of LegCo.

25. D of Adm responded that CE was empowered to decide on the list of designated officers. Although the list generally included policy secretaries who were best placed to speak on behalf of the Government on matters relating to their respective policy areas, there were other factors which the general rule could not be applied. For instance, the Commissioner of ICAC was accountable to CE and therefore he, rather than the Secretary for Security, was designated as the official to speak on matters relating to ICAC. Another example was the inclusion of the Chief Executive of the Hong Kong Monetary Authority in the designation instruments for reasons set out in paragraph 7 of LC Paper No. CB(2) 168/99-00(04).

Adm 26. The Chairman held the view that the Commissioner of ICAC should not speak on behalf of the Government or CE since ICAC was an independent body. He also enquired whether there were any statutory provisions on designation of "Controlling Officers" to attend LegCo committee meetings on matters relating to propriety of certain expenditure items and whether such a list could be provided for members' reference. The Administration agreed to look into the matter.

27. LA asked why there were two schedules attached to the designation instruments. D of Adm explained that Schedule 1 provided a list of designated officials for attendance at meetings of committees and subcommittees of the Council and Schedule 2 listed out the officials authorized by CE to direct designated officials to attend meetings of committees and

subcommittees of the LegCo. She clarified that Schedule 2 was circulated for internal use and copied to LegCo for reference only.

28. Miss Margaret NG said that Article 62(6) was not applicable to LegCo committees and Schedule 2 of the designation was not binding on LegCo. By virtue of Article 73(1) - (9), LegCo was at liberty to invite relevant persons to attend committee meetings. Should a person refuse to attend, LegCo could resort to Article 73(10) to summon that person. She added that it was rather misleading to include Schedule 2, which was unrelated to Article 62(2), in the designation.

29. LA/DJ agreed with Miss Margaret NG's view. He assured members that in terms of balance of power, Members were not in any way deprived of their constitutional functions by the current list of designation. He said that most of the persons involved in the conduct of public affairs would derive some authority from some ordinances which were passed by LegCo. The Government could not and would never wish to deny LegCo's role in inviting and summoning a person to whom statutory powers and functions had been given under one of the ordinances passed by LegCo.

30. Ms Emily LAU echoed the view of Dr YEUNG Sum in paragraph 21 above. She pointed out that apart from the Public Accounts Committee, it was very rare for the chairpersons of independent statutory bodies to attend meetings of LegCo committees. She said that it was undesirable for LegCo committees to frequently resort to its power provided under Article 73(10). For the interest of the public, chairpersons of independent statutory bodies had the responsibility to brief Members on important policy issues. In fact, it should become a practice for these persons to appear before LegCo committees. She asked the Clerk to obtain relevant statistics on the attendance of the Chairpersons of the Hospital Authority and the Housing Authority at LegCo committee meetings in the past five years. Mr CHEUNG Man-kwong said that it was a question of whether the relevant committees had attempted to invite these chairpersons to attend their meetings. Miss Margaret NG said that to be fair to these persons, information on whether they had been invited to attend LegCo committee meetings in person should also be provided.

(Post-meeting note : The information was provided to members vide LC Paper No. CB(2)472/99-00))

III. Review of certain provision of the Prevention of Bribery Ordinance (Cap. 201) (POBO) to CE and related issues
(LC Paper Nos. CB92) 1249/98-99(02), 168/99-00(03) and 377/99-00(03))

31. D of Adm referred members to LC Paper No. CB(2)377/99-00 on

similar exemptions of CE from the application of other Ordinances which was prepared in response to members' request made at the last meeting. As regards the review of POBO, D of Adm said that the Administration was now working out options that could extend the provisions of POBO which currently apply to government officers and public servants to similarly apply to CE as far as possible while respecting the constitutional position of CE under the Basic Law. The Administration would revert to the Panel as soon as practicable.

32. Deputy Secretary for Constitutional Affairs (DSCA) said that the Administration noted members' concerns raised at the last meeting about regulating CE elections. He said that the Bills Committee on Elections (Corrupt and Illegal Conduct) Bill (ECIC Bill) would discuss at the meetings to be held on 7 and 10 December 1999 the Administration's proposal to apply the provisions of the ECIC Bill to the election of CE.

33. Some members expressed concern about the legal vacuum before enactment of the ECIC Bill and the bill on CE elections. They pointed out that any new legislation would not have retrospective effect on corrupt and illegal activities already committed. They urged the Administration to provide a legislative timetable for members' reference.

34. DSCA said that the Constitutional Affairs Bureau (CAB) was currently engaged in arrangements for the 1999 District Councils election and the 2000 LegCo election. He was not in a position to give a concrete timetable at this stage. However, the Administration noted the urgency of introducing legislation in respect of the arrangements for and regulation of the elections of CE. He assured members that the necessary legislation would be introduced at an appropriate time.

35. Some members were dissatisfied with the Administration's reply. They said that stalling on the matter would likely project a negative image on HKSAR internationally. For the dignity of CE, HKSAR and the Basic Law, the Administration should accord top priority to the matter. Ms Emily LAU said that if it was purely a question of manpower resources, she would consider to support any proposed creation of a supernumerary post, say, for a period of three months to deal with this urgent matter. As a fast-track approach, the Chairman suggested the Administration to consider applying the Corrupt and Illegal Practices Ordinance to the election of CE by resolution of LegCo.

36. Members agreed that the Secretary for Constitutional Affairs should be invited to attend the next meeting to brief members on the matter and that by then, the Administration should also come up with a legislative timetable that was acceptable to members. DSCA said that the legislation governing CE elections had to be given careful consideration. He would relay members' views to CAB.

IV. Items for discussion at the next meeting

(LC Paper No. CB(2)377/99-00(01))

37. As the meeting ran short of time, members agreed that the item relating to engagement in public offices originally scheduled for this meeting be deferred to the next meeting to be held on 20 December 1999. Members also agreed that the following items be discussed at the next meeting -

- (a) Articles 50, 51 and 52 of the Basic Law;
- (b) Review on the application of certain provisions of POBO to CE and related issues; and
- (c) Mechanism for amending the Basic Law.

(Post-meeting note : The Administration has proposed three urgent agenda items relating to the 2000 LegCo election for the next meeting. With agreement of the Chairman, items (b) and (c) above would be deferred to a future meeting.)

38. The meeting ended at 4:27 pm.

Legislative Council Secretariat

14 December 1999