

**Issues relating to prorogation of the Legislative Council**

*Submission to the Panel on Constitutional Affairs*

The principal focus of this paper is on the political system established by the Basic Law. My recommendations and suggestions are based on the implications, as I see it, of the relationship between the Executive and the Legislature.

*The Basic Law*

Hong Kong's political system does not fall under any of the well recognized types. It is not a parliamentary system, since the LegCo neither appoints nor can it dismiss the Chief Executive in whom are vested the powers of the government. The Chief Executive does not have a general power to dissolve LegCo, which has a fixed term of four years. The political system is somewhat closer to the US presidential system, with a clear separation of the legislature and the executive. The Chief Executive has greater powers to intervene in the legislative process than in the US, and has limited powers to dissolve the LegCo, if a controversy between the Chief Executive and the LegCo cannot be resolved (art. 50). On the other hand, the Chief Executive is accountable to the LegCo and must seek its approval for taxation and public expenditure (art. 64). LegCo's functions include the scrutiny of the policies and work of the government and it has the power to pass a motion of impeachment against the Chief Executive (art. 73). The Legco is more representative of the people than the Chief Executive.

The political system assumes a certain degree of tension between the Legco and the Chief Executive (which is critical for accountability and responsiveness). Neither is subordinate to the other; rather they are co-ordinate. The management of the business of the Legco is the responsibility of its members, under the guidance and sometimes the direction of the President who is elected by the members themselves (arts. 71 and 72). The proper operation of the relationship between the Legco and the Chief Executive requires that each of them must be 'masters of their own house'.

I wish to draw attention to the implications of the political system described above. The first is that the system is quite different from that during Hong Kong's colonial period as well from the British parliamentary tradition. The rules on the convening and proroguing of the Legco are drawn largely from the colonial and that parliamentary tradition, which assume very different relationships between the executive and the legislature than under the Basic Law. Applying them to Hong Kong can seriously distort the nature of that relationship.

The second implication is that the rules must be re-examined in the light of this relationship. Rules on the convening and proroguing of the legislature play an important role in the mediation of the relationship between the executive and the legislature, and

have a major impact on the independence and authority of the legislature. The rules as they are expressed in the Legislative Council Ordinance and the Rules of Procedure subordinate the Legco to the Chief Executive. They seem to assume that the Chief Executive is neutral as between political parties and politicians, able to ensure 'level playing fields'. This assumption is not justified, either in the formal provisions or in practice. The role of the Chief Executive will get increasingly more politicized; many proposals on constitutional reform advocate the abolition of the rule requiring the Chief Executive to resign from a political party, and leaders of political parties have shown considerable interest in standing in elections for that post.

The Basic Law provides for fixed four year terms for the Legco (except in the rare case when the Chief Executive dissolves it pre-maturely). It assumes an orderly process for the transition from one Legco to another. Rules of procedure assume a degree of flexibility which are justified in Britain, but which could upset this orderly scheme of the Basic Law, and by opening up the prospect of a gap in time between the dissolution of one Legco and the convening of the other, the advantage of a clear four year sequence can be jeopardised. The scheme of the Basic Law facilitates a set of rules with greater 'automaticity' than the current rules exhibit.

It is also well known that the Chief Executive is much more beholden under the Basic Law to the Central Authorities than **to** the Legco. The Hong Kong administration has failed in several respects in upholding the autonomy of Hong Kong. If the rules of procedure subordinate the Legco to the Chief Executive, Hong Kong's autonomy could be affected negatively.

*Ways in which rules of convening and proroguing can affect the relationship*

The submission by the Administration is that the rules have worked well. I have no reason to believe otherwise. However, there is no guarantee that they will continue to work well in the future; I have already indicated above the tensions between the Legco and the Chief Executive (implicit in the Basic Law provisions), which may become aggravated. For example, a future chief executive with a more aggressive style than Mr. Tung Chee-wah may seek confrontation with the Legco.

These rules have both symbolic and practical consequences. The symbolic is that the public will perceive the Chief Executive to be superior to the Legco. This will undermine the prestige and standing of the Legco., and detract from the Basic Law assumption that the two bodies are co-ordinate.

Practically, the rules could be abused to undermine the functions of the legislature. This is well demonstrated by the experience of several countries where the head of government or state has refused to convene a meeting of a new legislature in which the government has lost its majority. Sometimes a legislature which seeks to perform its functions vigorously to the embarrassment of the government is adjourned or prorogued (even in the midst of a debate!) and not re-convened for a long period thereafter. There are examples of states in the Asian region where the country was run without a parliament for years. In several countries the government has ensured that legislators are

not allowed to meet when it suspects that a vote of no confidence would be introduced or carried. Sometimes governments have delayed convening a sitting merely because they have not got their act together—have not done the homework necessary for the conduct of the business of the legislature.

The Basic Law and legislation in Hong Kong do of course restrict possibilities of such abuse, by prescribing rules on the meetings of the LegCo and the calling of elections, but they do not completely eliminate them (for example there seems to be no rule that the LegCo must meet for a minimum number of days per year or per session). One way to reduce opportunities for abuse would be to build in greater automaticity into the rules so that they operate without the decision of either the Chief Executive or the President of the LegCo (as happens in many countries). Another is to give the responsibility for some decisions to an independent body (such as the Electoral Commission with regard to dates of elections).

With this general introduction, I now turn to the specific questions raised by the Panel on Constitutional Affairs.

*(a) Whether the power to prorogue the Council should be transferred from the Chief Executive to the President of the LegCo.*

The function of prorogation is to terminate the business of the LegCo in preparation for elections for a new Council (this specific and restricted function of prorogation is different from many parliamentary systems). Thus prorogation will only take place towards the end of the fourth year of the life of a LegCo. But the LCO does not actually require the Chief Executive to prorogue, nor does it specify a range in time when he may prorogue. If no prorogation takes place, the LegCo stands dissolved on the expiry of four years. Exactly when elections take place is left to the discretion of the Chief Executive. These rules add up to an unsatisfactory situation.

The Panel may wish to consider the following. Since the term of the LegCo is fixed, the law could provide for an automatic prorogation one month before the expiry of four years. Elections must be held towards the end of that month (the actual date to be fixed by the Electoral Commission). There may be some residual power in the President, acting with the consent of members, to make a slight adjustment if compelling circumstances require that. But the aim should be that the new LegCo is able to meet at the expiry of the formal term of its predecessor.

If this proposal is not acceptable, then I would recommend that the power of prorogation should lie with the President. I have seen no justification why the Chief Executive should have this responsibility; I am not persuaded by the ‘fair playing field’ argument (for reasons I have given above).

*(b) Whether the power to determine the commencement and end dates of a LegCo session should be transferred from the Chief Executive to the President of LegCo*

For reasons I have given above, the power should lie with the President. The President is likely to be more responsive to the wishes of the members. Collectively, they have a

better idea of the time needed for the conclusion of their business. The President may (and probably would) consult with the Chief Executive, but the decision must be that of the LegCo itself operating through the President and the Business Committee.

As far as the first meeting of a new LegCo is concerned, the law should provide for a fixed date, say one week, after the announcement of the election results. The oldest member would take the chair and the Council would proceed immediately to electing the President.

*(c) Whether the Council and its committees can resume operation during prorogation in circumstances other than at the request of the Chief Executive for convening Council meetings*

Under the LCO, the period of prorogation is for the purpose of elections, and comes at the end of its effective life. This is different from some other countries where a parliament may be prorogued several times before its dissolution. Given the case in Hong Kong, there would normally be little justification for calling the LegCo or its committees back. But there can be exceptional circumstances—it is these which justify Chief Executive powers under article 72(5). It is likely that the government may more reason for an emergency session, to request some authority from the LegCo, but there may well be situations, like extremely high handed action on the part of the government, when LegCo should be able to meet. Therefore the rule authorizing the recall of LegCo during prorogation should be extended to a decision of the President, either on her own initiative or on request of a specified number of LegCo members.

#### *Conclusion*

The current rules on convening and prorogation are a hangover from the colonial period. They also to an extent reflect British parliamentary practice. But British rules are exceptional among even parliamentary systems, and rarely occur in presidential type systems. Many countries make the legislature the master of its own programme and procedures. There are also considerable advantages in having convening and prorogation dealt with under a fixed timetable. This is also the preference in many countries. By fixing the term of the legislature, the Basic Law has opened up this possibility for Hong Kong and I would recommend that the Panel should consider it.

This paper has been written in a hurry and I would be willing later to elaborate my points if necessary and do some research on the law and practice in other countries.

Yash Ghai  
Sir YK Pao Professor of Public Law  
University of Hong Kong

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