

立法會 *Legislative Council*

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Panel on Constitutional Affairs

Background brief for meeting on 18 July 2005

Constitutional issues relating to the prorogation of the Council

Purpose

On the recommendation of the Committee on Rules of Procedure (CRoP), the House Committee has referred the following constitutional issues relating to the prorogation of the Legislative Council (LegCo) to the Panel for consideration –

- (a) whether the power to prorogue the Council should be transferred from the Chief Executive (CE) to the President of LegCo;
 - (b) whether the power to determine the commencement and ending dates of a LegCo session should be transferred from CE to the President of LegCo; and
 - (c) whether the Council and its committees can resume operation during prorogation in circumstances other than at the request of CE for convening emergency Council meetings.
2. This paper summarises the deliberations of the CRoP and the Panel on these issues.

Deliberations of CRoP

Prorogation, commencement and end dates of the Council

Relevant statutory provisions

3. Under the electoral system before reunification, it was an established practice to dissolve LegCo before nominations started for a general election. The rationale was that incumbent LegCo Members seeking re-election should not be perceived to be enjoying undue advantage over non-incumbent rivals by conducting their

campaigns in the capacity of serving members. Following reunification, to maintain the “level playing field” philosophy, a prorogation arrangement is put in place under the Legislative Council Ordinance (LCO) (Cap. 542). Prorogation is an arrangement whereby LegCo ceases to transact any formal business during the period leading up to an upcoming election, although the Council continues to exist and all serving Council Members are still in office. In practice, prorogation normally begins around the commencement of the nomination period of the election.

4. Section 6 of LCO provides that CE has the power to specify dates for holding general elections of LegCo. To enable such a general election to be held, CE may prorogue the Council to terminate its operation before the end of a term of office of LegCo under section 6(3) of LCO. Section 6(4) further provides that if LegCo is to prorogue under section 6(3), CE must specify the date from which LegCo stands prorogued and give notice of that date in the Gazette.

5. Section 9(2) of LCO also provides that CE must publish in the Gazette the dates on which an ordinary session of LegCo is to begin and end. Article 72(3) of the Basic Law (BL 72(3)) provides that one of the powers and functions of the President of LegCo is to decide on the time of meetings.

Views of CRoP

6. In the course of examining the issues relating to the prorogation of the Council, some CRoP members noted that prior to the reunification, the commencement and ending dates of a LegCo session were specified by the Governor because he was the constitutional representative of the British monarch and was responsible for making laws, while LegCo only played a role of advising the Governor. However, the Basic Law now empowered LegCo to make laws and transact business on its own. These members considered that there were no valid grounds for requiring that the commencement and ending dates of a LegCo session be specified by CE. Since BL 72(3) empowered the President of LegCo to decide on the time of meetings, the commencement and ending dates of a LegCo session could likewise be determined by the President.

7. These members also pointed out that, while the Basic Law did not provide for the prorogation of LegCo by CE before the end of a term of office of LegCo, LCO had made such provisions. These members considered that, to tie in with the Basic Law which empowered LegCo to make laws and transact Council business on its own, LCO should be amended to transfer to the President the power to prorogue the Council.

Operation of LegCo and its committees during prorogation and emergency

Relevant statutory and procedural provisions

8. Rules of Procedure (RoP) of LegCo are silent on the status of bills committees and select committees when the Council is prorogued. Section 9(4) of LCO and Rule 11(4) of RoP provide that the consideration of any bill or other business of the Council is to lapse at the end of a term of office or on dissolution of the Council. Rule 78(5) of RoP provides that at the end of a term every select committee of the Council shall be dissolved.

9. BL 72(5) empowers the President of LegCo to “call emergency sessions on the request of the Chief Executive”. Section 11(1) of LCO provides that “The President must, at the request of the Chief Executive, convene an emergency session of the Legislative Council during the period after the end of the term of office or the dissolution of the Legislative Council but, before the date (if more than one, the first date), specified for the holding of a general election for all the Members of the Legislative Council”.

Views of CRoP

10. In considering whether LegCo and its committees should continue to operate during prorogation, CRoP has made reference to the practices and arrangements in overseas territories for the operation of their legislatures and committees during prorogation, and consulted the Administration. The Administration held the view that given that the power to prorogue before the end of a term of office of LegCo was to be exercised by CE for the purpose of enabling a general election of LegCo Members to be held, termination of the operation of LegCo would necessarily include the termination of the operation of its committees.

11. Taking into account the overseas practices and arrangements, the Administration’s views and the related statutory requirements, CRoP is of the view that –

- (a) although the status of any bills committees or select committees will not be affected by the prorogation because the Council’s term has not yet ended, the Council and its committees should cease to operate during the prorogation of the Council and should not normally carry on with the work on any bills committees or select committees;
- (b) although the Council and its committees cease to operate during prorogation, where the President calls emergency Council meetings as requested by CE under BL 72(5), the Council should be able to authorize its committees to continue their operation if need be. For instance, if there is a bill which has to be dealt with at emergency

Council meetings to complete its legislative procedure, the bills committee concerned may continue to operate; and

- (c) consideration should be given to whether the operation of the Council and its committees can resume operation during prorogation in circumstances other than at CE's request for convening emergency Council meetings.

Deliberations of the Panel at its meeting on 21 February 2005

The Administration's position

12. The Administration advised the Panel of its position on the issues set out in paragraph 1 as follows –

- (a) the existing legal provisions and arrangements with regard to the prorogation of LegCo were appropriate and should remain unchanged;
- (b) the existing legal provisions and arrangements with regard to the determination of the commencement and end dates of a LegCo session were appropriate and should remain unchanged; and
- (c) the Council and its committees could resume operating during prorogation only at the request of CE for convening emergency Council meetings.

Power of prorogation

13. The Administration explained that the design of LCO had taken into account the arrangements prior to reunification and the new constitutional order after reunification. Before reunification, the Governor was given the power, as specified in the Royal Instructions, to dissolve LegCo before nominations started for a general election. After reunification, LCO reflected the spirit of that arrangement. Section 6 of LCO empowered CE to specify dates for holding general elections of LegCo and prorogation of the Council. The rationale for the Council to prorogue was to provide a level playing field for a general election. Consideration had also been given to the President, who being a serving Member, could also seek re-election to a LegCo seat. To retain the power of prorogation in CE would help maintain the impartiality of the office of the President.

14. Some members queried why the Administration had to make reference to the arrangements of the old constitutional order and not to review the relevant provisions in LCO in the light of the spirit of the Basic Law. They considered that after the reunification, the new constitutional order prescribed in the Basic Law

clearly demarcated the powers and functions of the executive and the legislature. Under BL 72, the power to convene and decide on the timing of meetings rested with the President. BL 73 further empowered LegCo to make laws and transact business on its own. Neither BL 48 (on the powers and functions of CE) nor any other provisions of the Basic Law provided CE with such powers. All these Basic Law provisions reflected that there was clear division of responsibilities, co-operation, checks and balances between the executive and the legislature. If CE had a certain power over LegCo, such as dissolving the Council, it was expressly provided in the Basic Law. It was therefore unconstitutional for CE to be vested with additional power which was not provided in the Basic Law. Given that LCO had not reflected the spirit of the roles and functions of LegCo as embodied in BL 72 and BL 73, members held the view that LCO should be amended to transfer the powers to prorogue the Council from CE to the President.

Power to specify commencement and end dates

15. The Administration explained that before reunification, the Governor was given the power, as specified in the Royal Instructions, to determine the commencement and end dates of a LegCo session. After reunification, the arrangements basically mirrored those adopted prior to reunification: CE determined the commencement and end dates of a LegCo session, while the President decided on the time of meetings. From a practical angle, the President for a new term would not be elected until the first Council meeting was held. There would be no President as such to fix a commencement date for the first legislative session of a LegCo term. With regard to fixing an end date of the last legislative session in a term, the end dates needed to be fixed in coordination with the date of prorogation. There two aspects were dealt with by vesting in CE the authority to determine the relevant dates.

16. Some members reiterated the view that LCO had not reflected the spirit of the roles and functions of LegCo as embodied in BL 72 and BL 73. They considered that LCO should be amended to transfer the powers to determine the commencement and end dates of a LegCo session from CE to the President. In view of the Administration's concern about the practical difficulty for the President to fix a commencement date for the first session in a LegCo term, members suggested that a mechanism could be put in place for fixing in advance the commencement date of the session.

Power to call emergency meetings during prorogation

17. The Administration explained that the arrangements for the President to call special sessions during recess and emergency sessions during prorogation at the request of CE under BL 72(4) and BL 72(5) respectively were similar to those adopted prior to reunification. If LegCo could decide on its own to resume operation during the period of prorogation, the purpose of prorogation, i.e. provide a

level playing field for a general election of LegCo Members, would be undermined. In the view of the Administration, it was appropriate that emergency meetings could be held during prorogation only at the request of CE.

18. Some members pointed out that as far as calling of emergency sessions was concerned, CE's power was confined to making a request to the President. It remained the power of the latter to convene the emergency sessions. Some members expressed concern that if the President was not empowered to call emergency meetings during prorogation, LegCo would not be able to perform its function if issues of great public interest arose during prorogation. They considered that the power to call emergency sessions vested only with CE was tantamount to depriving the President the right to exercise that power.

19. The Administration disagreed that the existing arrangements took away certain powers from the President. It pointed out that the date of prorogation was determined by CE in consultation with LegCo. The arrangements reflected the system of check and balance, as well as cooperation, between the Executive and the Legislature in handling the affairs of Hong Kong. In addition, CE would call emergency sessions only if the situation warranted. It was appropriate to vest with him such power at times of emergency. There was no sign that CE had abused, or would abuse, the power.

Way forward

20. To facilitate its further consideration, the Panel invited views from academics with expertise in constitutional law and the legal professional bodies on the relevant issues. The two written submissions received from the Hong Kong Bar Association and Professor Yash GHAI have been issued to the Panel and the Administration for consideration (LC Paper Nos. CB(2)1477/04-05(01) and (02) issued on 6 May 2005). The Panel requested the Administration to reconsider its position in the light of members' views and the two written submissions.

Relevant papers

21. A list of the relevant papers which are available on the LegCo website is in the **Appendix**.

Constitutional issues relating to the prorogation of the Council

Relevant Papers/Documents

<u>Council/Committee meeting</u>	<u>Meeting Date</u>	<u>Papers/Motion/Council Question</u>
House Committee	23 April 2004	Paper on "Calling of emergency meetings and operation of the Legislative Council and its committees during the prorogation of the Council" prepared by the Committee on Rules of Procedure [LC Paper No. CROP30/03-04]
		Minutes of meeting [LC Paper No. CB(2)2156/03-04]
Panel on Constitutional Affairs	21 February 2005	Paper on "Issues pertaining to prorogation" provided by the Administration [LC Paper No. CB(2)862/04-05(03)]
		Minutes of meeting [LC Paper No. CB(2)1245/04-05]
Panel on Constitutional Affairs	30 May 2005	Submission from Professor Yash GHAI, Sir YK Pao Professor of Public Law, The University of Hong Kong on "Issues relating to prorogation of the Legislative Council" [LC Paper No. CB(2)1477/04-05(01)]
		Submission from The Hong Kong Bar Association on "Issues relating to prorogation of the Legislative Council" [LC Paper No. CB(2)1477/04-05(02)]