

Legislative Council Panel on Constitutional Affairs

Prorogation

Introduction

At its meeting on 21 February 2005, the LegCo Panel on Constitutional Affairs (CA Panel) discussed issues relating to prorogation of the Legislative Council (LegCo). On 6 May 2005, the Administration received from the LegCo Secretariat the following written submissions :

- (a) Professor Yash Ghai's submissions dated 15 April 2005 (CB(2)1477/04-05(01));
- (b) Hong Kong Bar Association's submissions dated 29 April 2005 (CB(2)1477/04-05(02)).

2. As requested by the Panel, this paper sets out the Administration's response to the two submissions.

Background

3. Under Section 6 of the Legislative Council Ordinance (LCO) (Cap.542), the Chief Executive (CE) may, before the end of a term of office of the Legislative Council (LegCo), prorogue the Council to terminate its operation to enable a general election to be held. Under Section 9 of the LCO, the CE determines the commencement and end dates of a LegCo session.

4. The subject was originally raised at the LegCo Committee on Rules of Procedure (CRoP) in 2003. Having considered the report by the CRoP, the LegCo House Committee decided in April 2004 to refer the following issues to the CA Panel for consideration :

- (a) whether the power to prorogue the Council should be transferred from the CE to the President of the Council;
- (b) whether the power to determine the commencement and end dates of a LegCo session should be transferred from the CE to the President of the Council; and

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

5. At the CA Panel meeting of 21 February 2005, the Administration presented a paper (CB(2)862/04-05(03)) setting out our position on the issues as follows :

- (a) the existing legal provisions and arrangements with regard to the prorogation of the LegCo are 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 are appropriate and should remain unchanged; and
- (c) the Council and its committees can resume operation during prorogation only at the request of the CE for convening emergency Council meetings.

6. While the Administration has clearly explained our position on the issues at the Panel meeting, some Members were of the view that the matter should be further pursued, and that constitutional law experts should be invited to give their opinion on the matter. On 6 May 2005, the Administration received from the LegCo Secretariat the submissions from Professor Yash Ghai and the Hong Kong Bar Association.

Submission of Professor Ghai

7. Professor Ghai has referred to the Administration's view that "the rules have worked well" and stated that he has "no reason to believe otherwise" (3rd last paragraph at p.2). Nevertheless, he remarked that "the [current] rules could be abused to undermine the functions of the legislature" (last paragraph, p.2).

8. At the same time, Professor Ghai has acknowledged that "[t]he 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". However, he has also commented that "they do not completely eliminate them (2nd tiret, p.3).

9. The Administration considers that there is no basis to assume that the power of the CE to prorogue the Council will be abused. The power of prorogation is constrained by the terms of section 6 of Cap. 542, i.e. it may only be exercised to “enable such a general election to be held”. There are also other constitutional and legal provisions to govern the respective powers and functions of the CE and LegCo.

10. Professor Ghai has put forth the idea of introducing “automatic prorogation” one month before the expiry of the LegCo term (5th tiret, p.3). The Administration considers that, whilst the proposed arrangement can bring about certainty, when put into practice it may be unduly rigid and cannot accommodate unforeseeable or urgent business towards the end of a term.

11. Professor Ghai has further suggested transferring to the LegCo President the power of prorogation and the power to determine the commencement and end dates of a LegCo session (last two tirets, p.3).

12. As explained in an earlier paper by the Administration (CB(2)862/04-05(03)), the policy rationale for prorogation is that incumbent LegCo Members should not be perceived to be enjoying undue advantage over non-incumbent rivals. The LegCo President himself or herself is a LegCo Member. To retain the power of prorogation in the CE will help maintain the impartiality of the office of the LegCo President. Therefore, the existing arrangements with regard to prorogation are appropriate.

13. With regard to fixing the commencement and end dates of a LegCo session, the Administration considers that the current arrangement has been operating smoothly are also consistent with the provisions of the Basic Law. We do not see any compelling reasons for introducing any alternative arrangements.

14. Finally, Professor Ghai suggested that the LegCo President should be authorized to recall LegCo during prorogation (4th tiret, p.4).

15. As pointed out in the submission of the Bar Association, if the LegCo President were authorized to recall LegCo during prorogation, the purpose of prorogation i.e. to provide a level playing field among incumbent Members seeking re-election and non-incumbent rivals, would be undermined. If there is an urgent matter which requires LegCo to address during prorogation, the CE would carefully consider the need to request the LegCo President to call an emergency meeting.

Submission of the Hong Kong Bar Association

16. The Bar Association noted that “The CE’s powers and duties vested under the BL in relation to the legislative process are those exercisable under Article 48(3), 48(4), 48(10), 49, 50, 51, 56(2), 72(5) and 74 of the Basic Law. ... The CE was also not vested under the BL with the express power to determine the relevant dates of a session of LegCo or to prorogue LegCo,” (paragraphs 24–26). At the same time, the Bar Association also noted that “[t]he position in relation to the Basic Law, however, does not mean that the CE cannot be conferred with other powers by HKSAR legislation enacted in accordance with the Basic Law. The CE may have such powers in so far as there is no inconsistency with the provisions of the Basic Law” (paragraph 30).

17. In its concluding observations (paragraph 47(a)), the Bar Association noted that “[t]he Basic Law does not in its provisions either expressly or impliedly make provision for the vesting of the power to order the commencement or prorogation of a session of LegCo upon a designated person”. It also noted that “[t]he powers conferred upon the CE under the Ordinance and the RoP for fixing the relevant dates of a LegCo session or for the prorogation of LegCo do not appear to offend any provisions of the Basic Law” (paragraph 47(b)).

18. The above is in line with the Administration’s position that the existing arrangements are consistent with the Basic Law.

19. The Bar Association also noted that “it can be within the scope of the self-regulation of LegCo of the law-making process for its President to have such powers (of fixing the dates of commencement and end dates of LegCo session and of prorogation), though such powers should preferably be provided by way of primary legislation” (paragraph 47(b)). The Association also floated an idea that the LegCo President may fix in advance the commencement date of the next term (paragraph 44).

20. As noted by the Bar Association, the existing legal provisions relating to prorogation and fixing of the relevant dates of a LegCo session are not inconsistent with the Basic Law. The existing arrangements have been operating smoothly and the Administration see no compelling reasons for change. On the proposal for the LegCo President to fix the commencement date of the next term in advance, the Administration is of the view that this may prove to be unduly rigid under certain circumstances (e.g. if the polling of the LegCo general elections were postponed, or if there is an urgent but unforeseen need to advance the commencement).

21. Finally, the Bar Association agree that “the objective of prorogation will be frustrated if LegCo is allowed to resume its business in a circumstances other than the one prescribed by law” (paragraph 46). The Bar Association concluded that “LegCo cannot resume operation during prorogation in circumstances other than at the request of the CE for convening an emergency session in the light of the constraints imposed by the provisions of the Basic Law” (paragraph 47(c)).

22. The above is in line with the Administration’s position as stated in paper CB(2)862/04-05(03).

Conclusion

23. Having considered the two submissions from, respectively, Professor Ghai and the Bar Association, the Administration maintains the view that the existing arrangements are consistent with the Basic Law and sees no reason to alter the position on the various issues as set out in our earlier paper (CB(2)862/04-05(03)).

Constitutional Affairs Bureau
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