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Report of the Panel on Constitutional Affairs on constitutional issues relating to prorogation of the Council

Purpose

This paper reports on the deliberations of the Panel on issues relating to the prorogation of the Council.

Background

2. On the recommendation of the Committee on Rules of Procedure (CRoP), the House Committee, at its meeting on 23 April 2004, 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 LegCo President;
- (b) whether the power to determine the commencement and end dates of a LegCo session should be transferred from CE to the LegCo President; 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.

Constitutional, legal, and procedural provisions

Prorogation, commencement and end dates of Council

3. Section 6 of the Legislative Council Ordinance (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 be prorogued under section 6(3), CE must specify the date from which LegCo stands prorogued and give notice of that date in the Gazette.

4. 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 LegCo President is to decide on the time of meetings.

Operation of LegCo and its committees during prorogation and emergency

5. 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.

6. BL 72(5) empowers the LegCo President to “call emergency sessions on the request of the Chief Executive”. Section 11(1) of LCO provides that “[t]he 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”.

Deliberations of the Panel

Power of prorogation

7. The Administration has explained that the design of LCO has 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. 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 LCO whereby LegCo will, in effect, cease to transact any formal business during the period leading to an upcoming general election, although the Council continues to exist and all serving Members will continue to have such status. The Administration points out that in practice, prorogation will normally begin around the commencement of the nomination period of the election.

8. The Administration also considers that vesting the power of prorogation with CE would help maintain the impartiality of the office of the LegCo President, who being a serving Member, could seek re-election to a LegCo seat.

9. Members consider that, to tie in with the Basic Law which empowers LegCo to make laws and transact Council business on its own, LCO should be amended to transfer to the LegCo President the power to prorogue the Council.

10. The Administration has pointed out that since it is CE who specifies the date for election under section 6(1) of LCO, it follows logically that he should also specify the period for which LegCo stands prorogued.

11. Some members have queried why the Administration has to make reference to the arrangements of the old constitutional order and not to review the relevant provisions in LCO in light of the spirit of the Basic Law. They consider that after the reunification, the new constitutional order prescribed in the Basic Law clearly demarcates the powers and functions of the Executive and the Legislature.

12. These members point out that under BL 72, the power to convene and decide on the timing of meetings rests with the LegCo President. BL 73 further empowers 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 provides CE with such powers. All these Basic Law provisions reflect there is a clear division of responsibilities, co-operation, checks and balances between the Executive and the Legislature. Moreover, CE's powers over LegCo, such as dissolving the Council, are expressly provided in the Basic Law. It is therefore unconstitutional for CE to be vested with additional power which is not provided in the Basic Law. Given that LCO has not reflected the spirit of the roles and functions of LegCo as embodied in BL 72 and BL 73, these members hold the view that LCO should be amended to transfer the powers to prorogue the Council from CE to the LegCo President.

Power to specify commencement and end dates

13. The Administration has 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 mirror those adopted prior to reunification, i.e. while CE determines the commencement and end dates of a LegCo session, the LegCo President determines the date and time of meetings.

14. The Administration has further explained that from a practical angle, the LegCo President for a new term will not be elected until the first Council meeting is held. There will be no LegCo 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 date needs to be fixed in coordination

with the date of prorogation. These two aspects are dealt with by vesting in CE the authority to determine the relevant dates.

15. Some members consider that the commencement and end 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 empowers LegCo to make laws and transact business on its own. There are no valid grounds for requiring that the commencement and end dates of a LegCo session be specified by CE. Since BL 72(3) empowers the LegCo President to decide on the time of meetings, the commencement and end dates of a LegCo session could likewise be determined by the LegCo President.

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

17. 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 was postponed, or if there is an urgent but unforeseen need to advance the commencement).

Power to call emergency meetings during prorogation

18. The Administration has explained that under section 6(3) of LCO, CE may prorogue that Council to terminate its operation to enable a general election to be held. Under BL 72(5), the LegCo President shall, at the request of CE, call emergency meetings of the LegCo. In addition, the Council may, at an emergency meeting held during the prorogation, refer a specific issue for consideration of a relevant committee, but the issue should be of a nature as to warrant the holding of such an emergency Council meeting in the first place.

19. The arrangements for the LegCo 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 are similar to those adopted prior to reunification. If LegCo can 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, will be undermined. In the view of the Administration, it is appropriate that emergency meetings could be held during prorogation only at the request of CE.

20. Some members have pointed out that as far as calling of emergency sessions is concerned, CE's power is confined to making a request to the LegCo President. It remains the power of the latter to convene the emergency sessions. Some members have expressed concern that if the LegCo President is not empowered to call emergency meetings during prorogation, LegCo would not be able to perform its function if issues of great public interest arise during prorogation. They consider that vesting the power to call emergency meetings with CE is tantamount to depriving the LegCo President of such power.

21. A member has expressed reservation about empowering the LegCo President to call emergency meetings in the absence of a request from CE, as this power is not provided in the Basic Law.

22. The Administration disagrees that the existing arrangements take away certain powers from the LegCo President. The Administration points out that the date of prorogation is determined by CE in consultation with LegCo. The arrangements reflect 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 will call emergency meetings only if the situation warrants. It is appropriate to vest with him such power at times of emergency. There is no sign that CE has abused, or would abuse, the power.

The Administration's position

23. The Administration's position is summarised 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 operating during prorogation only at the request of the CE for convening emergency Council meetings.

Views of legal professional bodies and academia and the Administration's response

24. To facilitate its further consideration, the Panel has invited views on the relevant issues from the legal professional bodies and academia with expertise in constitutional law. The Panel has requested the Administration to reconsider its position in light of members' views and the written submissions received from Professor Yash Ghai of the University of Hong Kong, the Hong Kong Bar Association and the Law Society of Hong Kong.

25. The views of Professor Yash Ghai are summarised below –

- (a) the power of prorogation should be transferred to the LegCo President, or “automatic prorogation” could be introduced one month before the expiry of the LegCo term;
- (b) the power of determining the commencement and end dates of a LegCo session should be transferred to the LegCo President; and
- (c) the LegCo President should be authorised to recall LegCo during prorogation.

26. The Law Society of Hong Kong supports the suggestion made by Professor Yash Ghai that the law should provide for an automatic prorogation at a fixed period of time before the term of LegCo expires. The Law Society considers that such an arrangement provides clarity and consistency concerning electoral arrangements of LegCo, and does not affect the constitutional position of CE and LegCo as provided for under the Basic Law.

27. The views of the Hong Kong Bar Association are summarised as follows –

- (a) the 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;
- (b) the existing legal provisions relating to prorogation and fixing of the relevant dates of a LegCo session are not inconsistent with the Basic Law. On the other hand, 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. The Bar Association has floated the idea that the LegCo President may fix in advance the commencement date of the next term; and
- (c) 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.

28. With regard to the idea put forth by Professor Ghai and the Law Society of introducing “automatic prorogation”, the Administration has advised that the existing arrangements are consistent with the Basic Law. The power of prorogation of CE is constrained by the terms of section 6 of LCO i.e. it may only be exercised to enable a general election of LegCo to take place. There are also

other constitutional and legal provisions to govern the respective powers and functions of CE and LegCo. While the proposed arrangement of "automatic prorogation" may bring about certainty, in practice it may be unduly rigid and cannot accommodate unforeseeable or urgent business towards the end of a term.

29. The Administration has reiterated its view regarding the suggestion of the Bar Association for the LegCo President to fix the commencement date of the next term in advance (paragraph 17 above refers).

30. Having considered the submissions from Professor Ghai and the legal professional bodies, the Administration maintains the view that the existing arrangements are appropriate and consistent with the Basic Law and sees no reason to alter its position on the various issues as set out in paragraph 23 above.

Advice sought

31. Given the Administration's position, the Panel has agreed that it will report its deliberations to the House Committee and seek the views of the latter on whether the matter should be further pursued by the Panel.