

立法會 *Legislative Council*

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Information Note for All Members of the Legislative Council

Quorum for the Legislative Council Meeting

At the meeting of the House Committee on 29 January 2010, Legal Adviser was asked to provide his advice on the quorum for meetings of the Legislative Council ("LegCo") following the resignation of five Legislative Council members which took effect on 29 January 2010.

The Basic Law

2. Article 75 of the Basic Law provides that the quorum for the meeting of LegCo shall be not less than one half of "all its members" ("全體議員" in the Chinese authentic text).

3. In the Basic Law, the expression "全體議員" also appears in other provisions¹ which concern LegCo, but it is not defined. Although the Legislative Council Ordinance (Cap. 542) (LCO) provides in section 17 that a vacancy in the membership of LegCo does not affect its power to transact business or the validity of its proceedings, the effect of a vacancy on the quorum for a LegCo meeting is not provided for. There is, therefore, a need for the President to interpret Article 75 for the purpose of conducting a LegCo meeting.

4. The principles governing the interpretation of the Basic Law have been authoritatively laid down by the Court of Final Appeal in the cases of *Ng Ka Ling v Director of Immigration* (1992) 2 HKCFAR 4 and *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211. In interpreting the Basic Law, a purposive approach is to be applied. To ascertain what is meant by the language used, the language of its text is to be considered in the light of its context and purpose. The purpose of a provision in question may be ascertainable from its nature or other provisions of the Basic Law. The context is to be found in the Basic Law itself as well as the relevant extrinsic materials. Assistance can also be gained from any traditions and usages that might have given meaning to the language used. In the recent case of *Cheng Kar Shun and others v Hon Li Fung Ying and others* (HCAL79/2009), these principles were affirmed and applied in determining whether Article 73(10) of the Basic Law, on its proper interpretation, only empowers LegCo (as a full body) to summon witnesses to testify or to give evidence before it.

5. In the abstract, the expression "全體議員" is capable of meaning the full membership of LegCo (at present, 60) or the total membership in office. Which of these meanings is admitted by an individual provision would depend on the context of that provision.

¹ Articles 49, 52(2), 67, 73(9), 75 and 159 of, and Article 7 of Annex I and Article III of Annex II to the Basic Law.

6. In the context of certain Articles of the Basic Law, e.g. Articles 71 and 74, both of which deal with the LegCo in operation, "members" obviously mean those members in office as they alone may participate in the election of the President or introduce bills. A member who has resigned is no longer a member and should not be regarded as within the meaning of "members" in those Articles. Consistent with this meaning, the LCO, which is an ordinance to give effect to the provisions of the Basic Law relating to LegCo, defines "Member" as a person elected as a Member of the Legislative Council.

7. Article 75 has a context similar to Articles 71 and 74. It is about the LegCo in operation. The additional reference to "全體" indicates that the number of members is material because it is the basis on which the quorum has to be calculated. In the absence of any other circumstances that would point to a different interpretation, the expression of "全體議員" should be taken to mean the total number of members in office in accordance with such other provisions as Articles 71 and 74, which have a similar context.

8. It is relevant to compare Article 75 for this purpose with Article 67, which provides that the elected members with the right of abode in foreign countries shall not exceed 20 percent of "全體議員". In contrast, the term "全體議員" is used in a context different from that of Article 75, because it relates to how LegCo should be formed as regards the permissible proportion of members with a right of abode elsewhere. "全體議員" should in this context mean the total membership of LegCo rather than the number of members in office as the 20 percent limit is a pre-condition to be complied with before the members are elected. This is also borne out by the way Article 75 is implemented by LCO. Examples of other Basic Law provisions in which "議員" should mean members in the prospective sense are Article 68 and Article I of Annex II to the Basic Law.

Other jurisdictions

9. References have been made to legislative bodies in other jurisdictions on the meanings of "quorum" or "members". In United Kingdom, the quorum of the House of Commons is fixed at forty members (Standing Order No. 41). In Australia, sections 22 and 39 of the Constitution state that, until the Parliament otherwise provides, the presence of at least one-third of the whole number of Members of the House of Representatives and the senators shall be necessary to constitute a quorum for sittings of the House of Representatives and the Senate. By ordinary legislation, the quorum for the House of Representatives and the Senate was subsequently amended to one-fifth and one-quarter respectively. In United States, the House of Representatives and the Senate each have a quorum of a simple majority of their respective members. The Senate has the additional requirement in Rule VI of its standing rules of a "majority of the members duly chosen and sworn".

10. It is noted that there is a line of cases from some jurisdictions which may be used as references. In *Tokataake v Attorney-General of Kiribati* [2004] NZAR 100, a similar issue was raised as to the meaning of "all the members" in a confidence vote provision in the Constitution of Kiribati, an island nation located in the central tropical Pacific Ocean. The Court of Appeal of Kiribati found that a "member" refers to an individual and therefore should mean an individual entitled to vote. The maximum number of "seats" provided for under Kiribati's constitution was not the correct determinant and vacant seats could not be taken into account for the purposes of calculation in a confidence vote. The *Tokataake* case applies the cases of *Carlot v Attorney-General* [1988] VUCA 5 and *Attorney-General v Willy Jimmy* [1996] VUCA 1.

Conclusion

11. In accordance with the principles of interpretation of the Basic Law, Legal Adviser's view is that after considering the context of Article 75 with reference to other Basic Law provisions and the LCO and the limited case authorities that are relevant, the quorum for LegCo meetings should be not less than one half of all its members in office.

12. It is noted that Rule 17(1) of the Rules of Procedure provides that the quorum of the Council and of a committee shall be not less than one half of all its Members including the President or Chairman. As explained at the House Committee meeting, Article 72(1) of the Basic Law confers on the President the power and function, among other things, to preside over meetings. In exercising such power and function in accordance with the Rules of Procedure, if any legal questions arise in relation to the business or administration of the Council, the President may seek the advice of Counsel to the Legislature, who may provide such advice direct or via the Clerk to the Legislative Council.

13. At the request of the Secretary General, Legal Adviser provided written advice on the interpretation of Article 75 of the Basic Law to the Secretary General on 28 January 2010 on the basis of the views set out in paragraphs 2 to 11 above.

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