

**Extract from the Progress Report
of the Committee on Rules of Procedure
for the period July 1998 to April 1999**

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The procedure for the censure of a Member under Article 79(7)

2.39 Article 79(7) provides for the censure of a Member for misbehaviour or breach of oath by a vote of two-thirds of the Members of the Legislative Council present, and has the same effect as Article 79(6) of disqualifying a Member from office. However, unlike the case of Article 79(6) the application of which depends on existence of a conviction and sentence to imprisonment for a criminal offence, the circumstances under which Article 79(7) may be triggered off depend on an evaluation of whether the condition of either “misbehaviour” or “breach of oath” is satisfied.

2.40 In view of the serious and complicated nature of the subject, the Committee has conducted its study in two dimensions:

- (a) what behaviours should be regarded as falling within the meaning of “misbehaviour” or “breach of oath” and which are serious enough as to justify the censure of a Member and his disqualification from the office of a Member of the Legislative Council; and
- (b) what mechanism should be established to deal with an allegation of such behaviours.

In the course of its studies on the procedural rules for implementing Article 79(7), the Committee has made reference to practices in overseas

legislatures and local professional bodies. A consultation exercise among Members was also conducted.

Defining “misbehaviour” and “breach of oath”

Misbehaviour

2.41 In determining the scope of “misbehaviour” in the context of Article 79(7), the Committee has examined the relevant provisions in the Legislative Council Ordinance, Legislative Council (Powers and Privileges) Ordinance and the Rules of Procedure of the Council, and discussed whether such “behaviours” should be confined strictly to the conduct of Members in their capacity as such and which has brought the Council into disrepute.

2.42 The Committee notes that by virtue of section 15(3) of the Legislative Council Ordinance (Cap. 542), the kind of “misbehaviour” for which a Member may be censured under Article 79(7) includes, but is not limited to, a breach of an oath given under section 40(1)(b)(iii) of the Legislative Council Ordinance (Cap. 542). Section 40(1)(b)(iii) requires a person, when nominated as a candidate for election to the Council, to give a promissory oath to the effect that, if elected, he will not do anything during his term of office that would result in his:

- (a) becoming a prescribed public officer, or an officer of the Legislative Council or a member of staff of The Legislative Council Commission;
- (b) being sentenced to death, convicted of treason or corrupt practices;
- (c) being disqualified from being elected as a Member at an

election because of the operation of Cap. 542 or any other law;

- (d) becoming a representative or salaried functionary of a government of a place outside Hong Kong;
- (e) becoming a member of any legislature outside Hong Kong (other than a people's congress or people's consultative body of the People's Republic of China) or a member of the armed forces of the Central People's Government or any other country; or
- (f) in the case of a Member elected for a functional constituency, ceasing to have a substantial connection with the constituency.

2.43 In the course of deliberation, however, some members of the Committee have expressed doubt on the appropriateness for classifying breach of the promissory oath as a kind of "misbehaviour" for which a Member may be censured under Article 79(7). This view has been referred to the Legislative Council Panel on Constitutional Affairs, and the Administration has subsequently advised that the matter will be taken up in the context of the Legislative Council (Amendment) Bill 1999.

2.44 As regards the Legislative Council (Powers and Privileges) Ordinance, while the Ordinance provides for certain powers, privileges and immunities for Members in the conduct of Council business, such as the freedom of speech and debate and immunity from legal proceedings for words spoken before the Council, Members are on the other hand expected to behave at a certain standard so as not to bring discredit upon the Council.

2.45 In the Rules of Procedure, there are provisions which govern the conduct of Members during meetings and set out the requirements of

certain conduct of Members the non-compliance of which may attract some form of penalties. Sanctions for certain “misbehaviour” are provided for, for example, under Rule 45 (Order in Council and Committee), Rule 81(2) (Premature Publication of Evidence) and Rule 85 (Sanctions relating to Interests). However, such “misbehaviour” may not necessarily fall within the ambit of “misbehaviour” under Article 79(7).

2.46 In view of the unprecedented nature of the subject, the Committee has also studied the practices in overseas legislatures, including UK, Australia, Canada and the USA. In these places, the conduct of Members of Parliament (MPs) is set out in one form or another to provide a framework against which acceptable conduct should be judged, e.g., a Code of Conduct/Official Conduct, resolutions of the House, statements of the Speaker, or in a Parliamentary Act. In general, the requirements for MPs’ conduct are for them to act in the interests of the nation and conduct themselves creditably as MPs. MPs should not abuse their privilege or act in such manner as to bring the Parliament into disrepute.

2.47 In none of the overseas legislatures has it been possible to draw up an exhaustive list of misconduct, or indeed the types of sanction which may be imposed. Each case is judged by the House according to the degree of seriousness involved. Two general features of these cases are, firstly, that such acts are related invariably to the conduct of MPs in the performance of their duties as Member of the legislature and, secondly, the sanctions applicable range from apology to denial of right, fine, reprimand, censure, suspension of service or expulsion. The major consideration is whether the misbehaviour has brought about such serious disrepute to the House as to constitute a contempt. It is also noted that these overseas legislatures uphold the guiding principle that the House should exercise its penal jurisdiction as sparingly as possible and only when satisfied that it is

essential to do so in order to provide reasonable protection for the House and its Members.

Breach of Oath

2.48 The Committee considers that the “oath” referred to in the context of Article 79(7) is the oath/affirmation taken by Members of the Council at the swearing-in ceremony. The same principle has also been applied by overseas legislatures. Nevertheless, the Committee notes that while the oath itself is explicit, how an act of a Member will constitute a breach of the oath requires consideration.

2.49 After deliberation, the Committee has come to the view that it would be more appropriate for the Council of the day to make a decision on the kind of behaviours which would be regarded as a “misbehaviour” or “breach of oath” leading to the disqualification of a Member from office under Article 79(7). It is, therefore, not necessary for the scope of behaviours to be pre-determined or for a Code of Conduct to be drawn up for the purpose of the Article.

2.50 However, having regard to the serious consequence of an allegation made under the Article, the Committee considers it essential for a mechanism to be established for investigating and assessing such an act upon a motion being moved in the Council. This mechanism should be kept separate from that for handling a complaint against a Member which may lead to a lesser form of punishment.

Mechanism for dealing with alleged cases

2.51 In drawing up the mechanism for dealing with an allegation made under Article 79(7), the Committee has agreed on the following

principles:

- (a) A motion moved under Article 79(7) will not be debated or voted upon before the matter which is the subject of the motion has been investigated. If it is decided by the Council that no investigation is required, the motion will not be proceeded with; and
- (b) The investigation process should be fair to both the Member moving the motion and the Member under complaint; a committee given the responsibility to investigate the matter should only be required to establish the facts and give views on the behaviours under allegation. The decision on whether the Member should be disqualified under Article 79(7) should be made by Members of the Council in accordance with the requirement of the Basic Law.

Moving of a motion under Article 79(7)

2.52 For the moving of a motion under Article 79(7), the Committee considers it necessary for a more stringent requirement to be laid down so as to deter frivolous allegations against Members. The Committee takes the view that the motion should be sponsored by three other Members of the Council apart from the mover of the motion. This requirement is similar to the arrangement in the former Legislative Council before July 1995 when a motion moved by non-Government Members of the Council required the signature of no less than four Members. The Committee considers that the requirement for a total of four Members to initiate the motion is appropriate, as it should deter abuse of the mechanism, and at the same time would not bar minority Members of the

Council from initiating action under Article 79(7).

2.53 As for other procedures, the Committee considers that the normal rules governing the giving of notice and the debate of a motion in Part G (Motions) and Part H (Rules of Speaking) of the Rules of Procedure should apply. However, to avoid ambiguity over the intention of the motion, the Committee deems it appropriate for the wording of the motion to be prescribed in the Rules of Procedure. Particulars of the reasons or circumstances to support the censure proposed in the motion should be given in a schedule attached to, and which forms part of, the motion. The motion is not subject to amendment.

2.54 The Committee is aware of the restrictions on the handling of the motion once it is moved, and has examined the possibility of referring the matter to a committee immediately upon the receipt of the notice of the motion. However, to avoid abuse of the mechanism, the Committee considers that the motion should be moved before any formal proceedings are taken on the matter.

2.55 The debate on the motion, once moved, will stand adjourned in accordance with the proposed Rules of Procedure and be referred to an investigation committee to be appointed by the President. Any Member who disagrees with the referral may move without notice that no investigation is required. If this motion of not referring the matter to an investigation committee is agreed to by the Council, the original motion will not be proceeded with. The reason for not proceeding with the original motion is to ensure that no motion for the censure of a Member under Article 79(7) is debated without an investigation into the allegation being undertaken. The provision to dispense with the investigation is to allow the Council an opportunity to dispose of frivolous allegations.

Formation of investigation committee

2.56 The Committee considers that investigation committees should be established on an ad hoc case-by-case basis, and the scope of investigation will be confined to the particulars set out in the schedule of each motion. Unlike other jurisdictions in which major parties have controlling influence in the parliament and where there are well established practices to deal with disciplinary matters, it would not be easy for Members in the Hong Kong Legislature in the present setting to agree on the membership of a standing committee responsible for investigating into the conduct of individual Members. Nevertheless, in view of the ad hoc nature of the membership of the investigation committee, the Committee considers it necessary to stipulate the manner in which the committee is formed and the way it conducts its business.

2.57 The Committee is of the view that the investigation committee should have seven members, including a chairman and a deputy chairman, appointed by the President who will take into account the recommendations of the House Committee. To avoid conflict of interest, the Members moving and sponsoring the motion and the Member alleged of misbehaviour or breach of oath should not be appointed to the investigation committee. The size of the investigation committee should, however, be subject to periodic review to allow for a fair representation of different political groups or interests in the Council. The investigation committee may have the power to determine its own procedure for conducting the investigation subject to the Rules of Procedure.

2.58 To encourage maximum participation in meetings of the investigation committee, the quorum should be five members including the

chairman or the member presiding at the meeting. Provision should be made in the investigation committee's own procedure to enable the chairman to adjourn a meeting whenever there is no quorum.

Investigation process

2.59 The functions of an investigation committee are to establish the facts of the case and to give its views on whether or not the facts established constitute grounds for censure. In the absence of definitions for "misbehaviour" and "breach of oath" within the context of Article 79(7), it may also be necessary for the investigation committee to also give its view in this respect having regard to, among other things, the circumstances of individual cases and the standard of behaviour expected of a Member by the community. However, the decision on whether or not the Member should be censured, hence disqualified from office, should rest with the Council, by a two-third majority vote of the Members of the Council present.

2.60 The Committee is aware that in other jurisdictions as well as local professional bodies, preliminary investigation is usually conducted to establish whether there is a prima facie case before undertaking a full investigation. As the process of and the publicity attracted by preliminary investigations are no different from that of a full investigation, the Committee considers that once the motion is referred to an investigation committee, full investigation should be undertaken immediately.

2.61 The Committee considers that the investigation committee should, by resolution of the Council, have the power to summon persons to testify or give evidence and to call for papers and documents. Having regard to the need to maintain fairness in the investigation process, the

Committee considers it appropriate for the hearing of witnesses to be conducted in camera. Upon an election made by the Member being accused at the beginning of the investigation that hearings should be open to the public, the hearings shall be conducted in public throughout the entire investigation. However, the investigation committee may decide on sufficient reason, upon a request made by a member of the committee or an application made by a witness, to conduct any part thereof in camera. Internal deliberations shall always be held in camera. Irrespective of whether hearings are conducted in public or in camera, the transcript of evidence should be published in full as far as possible and form part of the report of the investigation committee.

Proceedings following completion of investigation

2.62 Upon completion of the investigation process, the investigation committee should table its report in the Council. As the report contains the investigation committee's views on which of the facts in the motion are established and whether the facts established constitute grounds for censure, there is no need for a separate motion to endorse the report. The report only serves as a reference for Members to decide whether the Member concerned should be disqualified from office under Article 79(7). The investigation committee will be dissolved upon the tabling of its report in the Council. However, if further matters arising from the motion have to be considered, the investigation committee could be revived.

2.63 To ensure that the debate on the motion will be resumed without delay, the Committee considers that it should be written into the Rules of Procedure that debate on the motion will be resumed automatically upon the tabling of the committee's report in the Council,

irrespective of the findings of the Committee. The debate should take place at the earliest meeting of the Council at which normal business is transacted next following the tabling of the investigation committee's report.

2.64 During the resumed debate, all Members including the Member alleged may speak on the motion. The Member alleged should be allowed to speak more than once, if the Member so requests, as in the case of a motion moved under Article 79(6). As to whether the Member alleged has the right to vote, present rules already provide that any Member with a direct pecuniary interest should not vote; but if he does vote, there is a mechanism to disallow his vote. The Committee is of the view that the Member alleged has a direct pecuniary interest, but there is no need to make any special provision in this respect.

2.65 After Members have voted on the motion and if the motion is passed by two-thirds of the Members present, the President shall immediately declare the Member disqualified from office.

Rules

2.66 The Committee has prepared amendments to the Rules of Procedure to put in place certain specific rules to deal with a motion moved under Article 79(7). Other related procedures, for example, those provided in Rules 80 (Attendance of Witness) and 81 (Premature Publication of Evidence), should continue to apply. As for voting, the Committee considers that, with the exception of the motion moved under Article 79(7), all other motions moved in relation to the motion should be decided in accordance with the Rules in Part J (Voting) of the Rules of Procedure.

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