

立法會

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Information Paper for the House Committee

Committee on Rules of Procedure

Voting Procedures

Purpose

This paper outlines the deliberations of the Committee on Rules of Procedure on the Department of Justice's interpretation of Annex II of the Basic Law with regard to the voting procedures of the Legislative Council and its views on the position of the President during the voting process.

Background

2. The voting procedures of the Legislative Council of the Hong Kong Special Administrative Region are set out in Annex II of the Basic Law (reproduced in **Appendix I**). In the course of drafting the Rules of Procedure of the Council in June 1998, Members (then Members-elect) noticed the discrepancy between the Chinese and English texts of the wordings used in the Basic Law on the requirements for the passage of bills, etc. Members took note of the decision of the Standing Committee of the National People's Congress on 28 June 1990 that "In case of discrepancy between the two texts in the implication of any words used, the Chinese text shall prevail", and decided to draft the voting procedures in accordance with the wording in the Chinese text.

3. In compliance with the requirements stipulated in Annex II of the Basic Law and having regard to the voting practices in previous legislatures in Hong Kong, Members drew up a set of voting procedures, including the voting arrangements by the raising of hands and by divisions, in Rules 46 to 49 of the Rules of Procedure (reproduced in **Appendix II**). The procedures are summarized as follows:

- (a) The passage of Government bills shall require a majority vote of the Members present;
- (b) The passage of Members' bills, motions and amendments introduced by Members to any motions or bills shall require a majority vote of each of the two groups of Members present: Members returned by functional constituencies, and those returned by geographical constituencies through direct elections and by the Election Committee.
- (c) A majority vote of Members present means that of the Members present, the total number of those voting in favour has a majority over the aggregate of the remainder, including those voting against, those abstaining from voting and those present but not voting.

4. Regarding the vote of the President, Members reached consensus at the discussions in June 1998 that although the President, like any other Member, should have the right to vote in accordance with the Basic Law, he/she should not vote so as to maintain his/her neutrality in the Council. Furthermore, no provision for a casting vote by the President was included in the Rules of Procedure as it was not provided for in the Basic Law and as no motion shall be passed without a majority vote.

5. On 30 June 1998, prior to the first meeting of the Council at which the Rules of Procedure were to be considered, the Solicitor-General of the Department of Justice wrote to the Legal Adviser of the Legislative Council Secretariat providing a different interpretation of the provisions in Annex II of the Basic Law. The letter is attached in **Appendix III**. In response to the Department of Justice's opinion, the Legal Adviser of the Legislative Council Secretariat gave his advice on the subject in LC Paper No. LS4/98-99 (**Appendix IV**). The letter from the Solicitor-General and the Legal Adviser's advice were circulated to all Members on 30 June 1998.

6. At the first Legislative Council meeting on 2 July 1998 when the Council considered the Rules of Procedure, Members noted that the opinion of the Department of Justice would be further studied by the Committee on Rules of Procedure. In view of the urgent need to deal with the matter, the Solicitor-General was invited to brief Members on 9 July 1998 on his letter of 30 June 1998. The briefing continued on 15 July at the first meeting of the Committee on Rules of Procedure (the Committee).

7. In the meantime, the Legal Adviser issued two documents to respond to the points raised by the Solicitor-General: a letter to the Solicitor-General on 2 July 1998 (**Appendix V**) and LC Paper No. LS 6/98-99 (**Appendix VI**).

Views of the Department of Justice

8. In relation to voting procedures, the Solicitor-General has raised the following points:

- (a) In respect of Government bills, abstentions should not be counted in determining the voting outcome. This is based on the use of the word “票” (votes) in referring to the passage of Government bills as opposed to the absence of the word “票” in respective of voting on Members’ bills, motions and amendments in Annex II of the Basic Law.
- (b) The President, by abstaining from voting, would be counted as one of those present who is not in favour of the proposal. Such a result would render nugatory the neutrality of the President. The President should therefore not to be regarded as present for the purposes of deciding whether a majority of those present support the proposal.

9. According to the Solicitor-General, the word “票” does not appear in the voting procedure in Annex II for approving Members’ proposals. The sentence, which reads “均須分別經功能團體選舉產生的議員和分區直接選舉、選舉委員會選舉產生的議員兩部分出席會議議員各過半數通過” means that the passage of such proposals shall require the support of a majority (or more than half) of each of the two groups of Members present. However, in the case of Government bills, the word “票” (votes) has been used. “過半數票” in this context would effectively mean “having more than half of the votes casting in favour of the question”. Since an abstention is not a vote, “過半數票” for approving Government bills refers to the actual votes cast either in favour of or against the question, but not abstentions.

10. To substantiate his arguments, the Solicitor-General quoted examples in the Basic Law to point out the conscious efforts of the drafters of the Basic Law in maintaining consistency in the use of language and choice of words. An extract of a document considered by the Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region in 1989 was tabled at the briefing session on 9 July 1998 (copy at **Appendix VII**) to illustrate that the word

“票” did carry a specific meaning at drafting. Although the word “票” did not appear in the draft in 1989, the word was subsequently added in the final text in respect of voting on Government proposals. According to the Solicitor-General, this reflected the conscious decision of the drafters for using different methods to count the votes for Government proposals, and for Members’ proposals.

11. As regards the position of the President, the Department of Justice has proposed that the Rules of Procedure should provide that, if the President does not vote, he/she is not to be regarded as being present for the purposes of deciding whether a majority of those present support the proposal.

The Legal Adviser’s opinion

12. The Legal Adviser of the Legislative Council Secretariat has advised that the provisions on voting procedures in Annex II of the Basic Law have to be read as a whole. The only difference between the requirements for Government bills and Members’ motions, etc., is in the requirement for the majority support of two separate groups of Members. The other differences in expression, including the word “票” highlighted by the Solicitor-General, cannot possibly cause any substantive difference in meaning simply because of textual or syntactic variations.

13. In the Legal Adviser’s view, the wording of the provision in Annex II of the Basic Law is so clear that it would not be necessary to resort to other aids to interpretation. Nevertheless, reference could be made to the part of the speech on voting procedures given by Mr Ji Peng-fei at the National People’s Congress meeting held on 28 March 1990 when moving the adoption of the draft Basic Law. It says:

.....政府提出的法案獲出席會議的議員過半數票即為通過；議員個人提出的法案、議案和對政府法案的修正案須分別獲功能團體選舉的議員和分區直接選舉、選舉委員會選舉議員兩部分出席會議的議員的各過半數票，方為通過。

14. As for the position of the President, the Legal Adviser has pointed out that the need for counting the presence of the President under the voting procedure is dictated by the Basic Law. The Solicitor-General’s suggestion to disregard the presence of the President for the purpose of vote-counting would also give rise to quorum problems.

The Committee's Views

15. As the Solicitor-General's interpretation of the voting procedures contained in Annex II is different from that of Members when the Rules of Procedure were drawn up, the Committee has re-examined provisions in the Basic Law with a view to finding out:

- (a) whether there is any ambiguity in the Basic Law about the voting requirements for the passage of Government bills and for the passage of bills, motions and amendment to Government bills introduced by Members, in particular the effect of the word “票” on the meaning of the requirements;
- (b) whether there is sufficient evidence to indicate that there was intention to provide two methods of vote-counting, i.e. the discounting of abstentions as votes for the passage of bills introduced by the Government, and the counting of abstentions as votes for the passage of bills, motions, etc. introduced by Members; and
- (c) whether the abstention of the President from voting gives rise to any unfairness to any parties, and if the President could be regarded as “not present” for the purpose of vote-counting.

16. The Committee finds the description of the voting procedures in Annex II of the Basic Law reasonably clear. It is evident that decisions of the Council are governed by the principle of “the majority rules”. This principle has applied consistently throughout the Basic Law notwithstanding the different requirements for different circumstances. The stipulation of the requirements for the passage of such motions is also very specific. For example, under Article 49, the Chief Executive may return a bill to the Council for reconsideration but must sign and promulgate the bill within one month if the original bill is passed again by not less than a two-thirds majority of all the Members; under Article 79, a Council Member may be declared no longer qualified for the office when he/she is censured for misbehaviour or breach of oath by a vote of two-thirds of the Members present; and under Article 159, bills for amending the Basic Law may be submitted after obtaining the consent of two-thirds of the deputies of the delegation of the Region to the National People's Congress, two-thirds of all the Members of the Council, and the Chief Executive.

17. In Annex II of the Basic Law, the stipulation of the requirements is equally specific. Government bills 如獲得出席會議的全體議員的過半數票，即為通過 (shall be passed if given the votes of the majority of the Members present). Bills, motions and amendments to Government bills introduced by

Members 均須分別經兩部分出席會議議員各過半數通過 (shall be passed by a majority of each of the two groups of Members present). The “votes” refer to “affirmative votes”. It means that the decision shall be made with the support of more than half of the Members referred to. Under the circumstances, only “affirmative votes” are taken into account when deciding on a question. The Committee also affirms that “Members present” refers to those who are physically present at the meeting when a vote is taken.

18. The Solicitor-General, in substantiating his point that the basis for calculating the majority vote for the passage of the two types of proposals ought to be different, has emphasized the effect of the character “票” for the passage of Government bills and the absence of it for Members’ bills, motions, etc. He argues that with the existence of the character “票” in the former, all Members who have abstained from voting or are present but have not cast any vote ought to be ignored for deciding whether there is a majority vote of the Members present. In other words, the counting should only be based on those who have voted for or against the question.

19. The Committee cannot concur with the Solicitor-General’s viewpoint. Members consider that the use of different wordings to describe the requirement for Government bills and that for bills, etc, introduced by Members is only a matter of style in writing (行文). The character “票” is needed when it is used jointly with the character “獲”, hence “政府提出的法案，如獲得出席會議的全體議員的過半數票，即為通過。”。 There is no need for the character “票” for the sentence on Members’ bills, etc. as the sentence reads “立法會議員個人提出的議案、法案和對政府法案的修正案均須分別經功能團體選舉產生的議員和分區直接選舉、選舉委員會選舉產生的議員兩部分出席會議議員各過半數通過。”。 Both descriptions are clear in setting out the requirements. The use of different styles in writing for describing similar contents is not uncommon in the Basic Law, which was produced after years of drafting with the involvement of hundreds of advisers, many of whom were not trained in law-drafting. Even though the Consultative Committee on Basic Law, which was quoted by the Solicitor-General, might have selected different styles in describing the two voting arrangements, there is no evidence to suggest that the intention was to provide two different vote-counting modes for the two categories of proposals. The fact that the descriptions of the voting requirements for the two categories of proposals in the English text are entirely consistent proves that there was no intention, apart from the bicameral voting procedure, to provide different voting-counting arrangements for the passage of these proposals. Besides, the part of the speech of Mr Ji Peng-fei quoted in paragraph 14 above should remove any possible doubt in this respect. In Mr Ji’s speech, the style of writing chosen in describing both situations was exactly the same and the word “票” was used in both cases. It should also be mentioned that Mr Ji’s speech

was given at the time he moved for the passage of the Basic Law at the Standing Committee of the National People's Congress. This speech therefore serves as an important piece of reference document for the purpose of understanding the Basic Law.

20. As regards the position of the President, the Committee considers that since the Basic Law requires all Members present to be counted, it would be a breach of the Basic Law if the President who does not cast his/her vote on a question is regarded as "not present" for the purpose of vote counting during a Council meeting when the President, who presides over meetings, is actually physically present at a meeting. His/her presence should be counted towards the quorum laid down in Article 75. The Rules of Procedure of the Legislative Council do not deprive the President of the right to vote. The President therefore can vote on a question, although by convention the President abstains from voting in order to preserve his/her neutrality. The Committee considers it important for the President to remain neutral at all times. The Solicitor-General's suggestion of disregarding the President's presence if he/she does not vote is a legal fiction which will deviate seriously from all parliamentary conventions and will create a bad precedent for disregarding arbitrarily the presence of Members at a meeting. The Committee is firmly of the view that the spirit of the Basic Law is on how many Members are in support of a question, and not on how many object or abstain.

Conclusion

21. On the basis of the above and in pursuance of Article 75 of the Basic Law which gives the power to the Legislative Council to make its own rules of procedure, the Committee has concluded that the voting procedures provided in the Rules of Procedure do not contravene Annex II of the Basic Law and do not require amendments. The Committee does not accept the arguments put forth by the Solicitor-General in this respect. Nevertheless, the Committee has come to the view that further elaboration on the procedural steps required to ascertain "a majority vote" in the Rules of Procedure is required. The Committee will follow-up this particular issue in its current review of the Rules of Procedure.

Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures

I. Method for the formation of the Legislative Council

1. The Legislative Council of the Hong Kong Special Administrative Region shall be composed of 60 members in each term. In the first term, the Legislative Council shall be formed in accordance with the "Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region". The composition of the Legislative Council in the second and third terms shall be as follows:

Second term

Members returned by functional constituencies	30
Members returned by the Election Committee	6
Members returned by geographical constituencies through direct elections	24

Third term

Members returned by functional constituencies	30
Members returned by geographical constituencies through direct elections	30

2. Except in the case of the first Legislative Council, the above-mentioned Election Committee refers to the one provided for in Annex I of this Law. The division of geographical constituencies and the voting method for direct elections therein; the delimitation of functional sectors and corporate bodies, their seat allocation and election methods; and the method for electing members of the Legislative Council by the Election Committee shall be specified by an electoral law introduced by the Government of the Hong Kong Special Administrative Region and passed by the Legislative Council.

II. Procedures for voting on bills and motions in the Legislative Council

Unless otherwise provided for in this Law, the Legislative Council shall adopt the following procedures for voting on bills and motions:

The passage of bills introduced by the government shall require at least a simple majority vote of the members of the Legislative Council present.

The passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee.

III. Method for the formation of the Legislative Council and its voting procedures subsequent to the year 2007

With regard to the method for forming the Legislative Council of the Hong Kong Special Administrative Region and its procedures for voting on bills and motions after 2007, if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for the record.

46. Decision on Motions

(1) Except as otherwise provided in Articles 49, 52(2), 73(9), 79(6) and (7) and 159 of the Basic Law, the passage of all motions before the Council or a committee of the whole Council shall, subject to subrule (2), require a majority vote of the Members present.

(2) The passage of a motion (other than the motion "That the Bill returned by the Chief Executive in accordance with Article 49 of the Basic Law do pass after reconsideration" referred to in Rule 66 (Bills Returned for Reconsideration)) or bill introduced by a Member, or an amendment introduced by a Member to any motion or bill, shall require a majority vote of each of the following two groups of Members present -

- (a) Members returned by functional constituencies (Group I); and
- (b) Members returned by geographical constituencies through direct elections and by the Election Committee (Group II).

47. Decision of Council and Committee of the Whole Council

(1) Except where subrule (2) applies, when the President or Chairman puts a question to the Council or to the committee of the whole Council for its decision -

- (a) the President or Chairman shall first call upon those Members who are in favour of the question to raise their hands, and shall then call upon those who are against the question to raise their hands;
- (b) the President or Chairman shall then, according to his judgment, state whether or not he thinks the majority of the Members present are in favour of the question and, subject to any challenges to his statement being dealt with under paragraph (c) below, he shall declare the question to have been so decided;
- (c) if a Member challenges the statement of the President or Chairman by claiming a division, then the President or Chairman shall order the Council or the committee, as the case may be, to proceed to a division; and, subject to Rule 49(4) to (7) (Divisions), the division shall be held forthwith immediately after a division bell has been rung for three minutes.

(2) When the President or Chairman puts a question to the Council or to a committee of the whole Council for its decision in relation to a motion or bill introduced by a Member, or an amendment introduced by a Member to any motion or bill -

- (a) the President or Chairman shall first call upon Members who are in favour of the question to raise their hands, and shall then call upon those who are against the question to raise their hands;
- (b) the President or Chairman shall then, according to his judgment, state whether or not he thinks that each of the two groups of Members present, referred to in Rule 46(2) (Decision on Motions), are in favour of the question; subject to any challenge to his statement being dealt with under paragraph (c), he shall declare the question to have been so decided;
- (c) if a Member challenges the statement of the President or Chairman by claiming a division, then the President or Chairman shall order Members to proceed to a division; and, subject to Rule 49(4) to (7) (Divisions), the division shall be held forthwith immediately after a division bell has been rung for three minutes.

48. Use of Electronic Voting System

Unless the President or Chairman otherwise directs, where an electronic system of voting is provided in the Council or a committee of the whole Council for the purposes of a division, the Members present and voting shall cast their votes in the division by using such electronic system in accordance with the operating requirements of the system, and the President or Chairman shall then declare the result of the division.

49. Divisions

(1) Subject to Rule 48 (Use of Electronic Voting System), when a division has been ordered, the votes shall be recorded by the Clerk. The President or Chairman shall first call upon those Members who are in favour of the question to raise their hands. After the Clerk has recorded the votes in a seating plan, the President or Chairman shall read out the names and the number of the Members in favour of the question. The President or Chairman shall then call upon those Members who are against the question to raise their hands. After the Clerk has recorded the votes in a seating plan, the President or Chairman shall read out the

names and the number of Members against the question. The President or Chairman shall then call upon those Members who abstain from voting to raise their hands. After the Clerk has recorded the votes in a seating plan, the President or Chairman shall read out the names and the number of Members abstaining from voting on the question. If no Member raises any queries, the President or Chairman shall declare the result of the division.

(2) Subject to Rule 48 (Use of Electronic Voting System), where a division has been ordered in relation to a question on a motion or bill introduced by a Member, or on an amendment introduced by a Member to any motion or bill, the procedure in subrule (1) shall be followed except that the President or Chairman shall read out the names and the number of Members in each of the two groups referred to in Rule 46(2) (Decision on Motions) who are in favour of the question, who are against the question, and who abstain from voting.

(3) If a Member states that he voted in error or that his vote has been counted wrongly, he may claim to have his vote altered, if his statement is made before the President or Chairman has declared the result of the division.

(4) Immediately after the President has declared the result of a division on an amendment to a motion, or the Chairman has declared the result of a division on an amendment to a bill, a Member may move without notice that in the event of further divisions being claimed in respect of the motion or any amendments thereto, or in respect of any amendments to the bill, the Council or the committee of the whole Council do proceed to each of such divisions immediately after the division bell has been rung for one minute. Thereupon the President or the Chairman shall propose the question on that motion.

(5) When a motion under subrule (4) has been agreed to the President or the Chairman shall order accordingly in respect of each of such further divisions, if any.

(6) Where there is more than one motion in respect of subsidiary legislation on the Agenda of the Council (excluding motions referred to in Rule 29(3) (Notice of Motions and Amendments)) then, immediately after the President has declared the result of the first division on any such motion or any amendment thereto, a Member may move without notice that in the event of further divisions being claimed at that meeting in respect of motions on subsidiary legislation, or amendments thereto, the Council do proceed to each of such divisions immediately after the division bell has been rung for one minute. Thereupon the President shall propose the question on that motion.

(7) When a motion under subrule (6) has been agreed to the President shall order accordingly in respect of each of such further divisions, if any.

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30 June, 1998

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Dear Jimmy,

Draft Rules of Procedure

This Department has considered very carefully the draft Rules of Procedure of the Legislative Council (LegCo). It is our opinion that certain draft rules contravene the Basic Law. We are therefore drawing those parts of the draft to your attention so that you may take appropriate remedial action.

Article 74

Article 74 of the Basic Law prohibits certain bills from being introduced by members of the Council (viz. those relating to public expenditure or political structure or the operation of the government) and requires the written consent of the Chief Executive before other bills (viz. those relating to government policies) are introduced. You will appreciate from the authorities that, since the Basic Law is a constitutional instrument, it must be given a generous and purposive interpretation as opposed to a narrow and literal one which generates anomalies: per Lord Wilberforce in Minister of Home Affairs v. Fisher [1980] AC 319, at 328; per Chan CJHC in HKSAR v. David Ma [1997] HKLRD 761, at 772.

The clear intent underlying Article 74 is to prevent members from introducing certain types of legislative proposals and to require the written consent of the Chief Executive before legislative amendments relating to government policies are introduced. Giving the article a generous and

purposive interpretation, it must cover not only bills but also committee stage amendments (CSAs). Any other interpretation would create the anomaly that members might achieve by way of a CSA that which they could not attain by way of a bill.

We note that draft Rules 57(6) and 69 do not reflect the correct interpretation of Article 74 of the Basic Law, but refer instead to the charging effect test (elaborated below), an irrelevant consideration for present purposes. These rules are inconsistent with the Basic Law and should be amended accordingly.

Application of Articles 48(10) and 74

Articles 48(10) and 74 of the Basic Law contemplate decisions being taken as to whether certain proposals are subject to those articles. Whilst neither article expressly identifies the decision-maker, it is clear by necessary implication that such decisions must be made by the Chief Executive. We understand the purpose of the articles is to restrict the powers of LegCo members in certain specified areas falling within the purview of the Executive. It would defeat this very purpose were the LegCo President given the power to decide whether the Articles applied, particularly where, in doing so, he or she might differ from the Chief Executive.

It is clear that the Chief Executive is best placed to decide these questions. For example, the final sentence of Article 74 provides that the written consent of the Chief Executive shall be required before bills relating to government policies are introduced. The question whether a bill relates to government policies can only be decided by the very government which formulates those policies. This being so, it follows that it must be the Chief Executive who decides the question.

As we shall indicate below, draft Rule 31 does not reflect Article 48(10) of the Basic Law. When it is amended to do so, it must avoid providing for the President or Chairman to decide whether a motion falls within the rule. Similarly, when draft Rules 51(3) and 57(6) are amended to reflect Article 74 of the Basic Law, they should likewise avoid providing for the President to decide whether proposals fall within that article.

Article 48(10)

Article 48(10) of the Basic Law stipulates that the Chief Executive shall "approve the introduction of motions regarding revenues or expenditure

to the Legislative Council". Thus, members may only introduce such motions with the Chief Executive's consent.

We notice that a requirement of the Chief Executive's consent appears in Rule 31 of the draft Rules of Procedures. However, that rule is confined to motions or amendments "the object or effect of which may, in the opinion of the President or the Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong" (emphasis supplied). This formulation, which is generally referred to as the "charging effect" test, is identical to that adopted by the Provisional Legislative Council and in LegCo prior to 1 July 1997. Its genesis lie in Clause XXIV of the Royal Instructions which stipulates that "every ordinance, vote, resolution, or question, the object or effect of which may be to dispose of or charge any part of Our revenue arising shall be proposed by the Governor, unless the proposal of the same shall have been expressly allowed or directed by him.". Such a formulation is clearly much narrower and more specific than "regarding revenues or expenditure" specified in Article 48(10) of the Basic Law.

"Charging effect" covers only those motions or amendments which would have the effect of reducing revenue or increasing expenditure. In other words, motions which have the effect of increasing revenue or reducing expenditure will not be subject to it. However, "regarding revenues or expenditure" clearly has a wider ambit. It covers motions which have any effect on revenue or expenditure (that is, increases or decreases in revenue as well as increases or decreases in (expenditure) as well as motions which are related to any other aspects of revenue or expenditure. Rule 31, as currently drafted, is accordingly inconsistent with the Basic Law.

Voting procedures

We note that draft Rule 47 provides for decisions to be made according to whether or not the majority of members present are in favour of the question. We agree that the passage of private members' bills and members' CSAs require the support of a majority of members present in the council. However, we are of the considered opinion that the passage of government bills requires the majority vote of members present, and that abstentions cannot be counted in determining the voting outcome. The reason for the difference arises from Annex II of the Basic Law which stipulates that:-

"The passage of bills introduced by the government shall require at least a simple majority vote of the members of the Legislative Council

present.

The passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of members present : members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee."

"政府提出的法案，如獲得出席會議的全體議員的過半數票，即為通過。

立法會議員個人提出的議案、法案和對政府法案的修正案均須分別經功能團體選舉產生的議員和分區直接選舉、選舉委員會選舉產生的議員兩部分出席會議議員各過半數通過。"

For members' proposals, although the English text of the voting arrangement refers to a simple majority vote of each of the two groups of members present, the crucial word "票" (votes) does not appear in the Chinese text. The Chinese words "過半數" (more than half or majority) therefore qualify "出席會議議員" (members present at a meeting). This does not refer to the majority vote but rather the majority of those present. According to established authorities, "those present" include those who are present but who abstain. Given the discrepancy between the English and Chinese texts, the Chinese original, being the language of authorship, must prevail.

For government proposals, the Chinese words "過半數" (more than half or majority) appear immediately before the word "票" (votes). They therefore qualify "票", effectively making "過半數" (majority votes) a technical expression standing by itself. The "majority vote" referred to in the provision is to be given its normal meaning of the greater number of votes. An abstention is not a vote. The fact that the provision refers to "members present" does not displace that normal meaning. It merely indicates that one does not count the votes (e.g. proxy votes) of those who are not present.

Position of the President

We understand that you consider that the President of LegCo should be politically neutral and should therefore abstain from voting. As the draft rules stand, however, the President will presumably be regarded as 'present'

for the purpose of deciding whether a majority of those present are in favour of a proposal. If so, this would mean that, by not voting, the President would be counted as one of those present who is not in favour of the proposal. Such a result would render nugatory the proposed neutrality of the President.

One way to avoid such an anomalous outcome would be for the Rules of Procedure to provide that, if the President does not vote, he or she is not to be regarded as present for the purposes of deciding whether a majority of those present support the proposal. Such a provision would be consistent with the Basic Law. The President would not be denied the right to vote, and the provision would reflect the special position occupied by the President under Article 72 of the Basic Law. Since the President is required to 'preside over meetings', he or she does not have the option of being absent during the voting process. It would clearly be absurd to regard his or her presence as tantamount to a permanent, immutable, in-built opposition to every single proposal requiring the support of the majority of members present.

We request, therefore, that consideration be given to the inclusion of such a provision in the rules. The relevant provisions of the draft Rules of Procedure should be amended to reflect this Basic Law requirement.

The way forward

We feel sure that LegCo members will wish to ensure that their Rules of Procedure are consistent with the Basic Law. You will no doubt agree that seeking a broad constitutional consensus as between the Executive and the Legislature is the best way forward. Before you give further advice to members, therefore, we trust you will give careful consideration to the points made above. We hope also that you will revert to us on the outcome. We shall be glad to discuss these issues further if necessary.

Yours sincerely,



(Daniel R. Fung, QC, SC, JP)
Solicitor-General



To enable Members-elect to consider the provisions on voting procedures in the Rules of Procedure of the Legislative Council as proposed by the working group under the convenorship of Member-elect Dr LEONG Che-hung, Legal Adviser presents his analysis and views on the provisions pertaining to voting procedures in Annex II of the Basic Law for Members-elect's reference.

Legal Basis

Article 75 of the Basic Law

2. Article 75 of the Basic Law provides:

"Article 75 The quorum for the meeting of the Legislative Council of the Hong Kong Special Administrative Region shall be not less than one half of all its members.

The rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene this Law."

3. The words ".....do not contravene this Law" should be construed as not conflicting with or violating the Basic Law. On the one hand, the rules of procedure must not be contradictory to the contents of the specific provisions of the Basic Law, and on the other hand, they must not conflict with or violate the spirit and basic principles of the Basic Law. This restriction has a positive effect in that it provides a clear legal basis for the Legislative Council to make the rules of procedure and necessary provisions in respect of business on which no stipulation or only those concerning matters of principle are made in the Basic Law.

4. Regarding the spirit of Article 75 of the Basic Law, the following two points merit the attention of Members-elect:

- (a) Notwithstanding that the provisions in the Basic Law are mostly "constitutional", Article 75 stipulates the quorum for meetings of the Legislative Council and empowers the Legislative Council to make the rules of procedure on its own. In other words, it is not a constitutional provision. It is not intended to provide for the relationship among the principal organs of authorities of the Hong Kong Special Administrative Region (HKSAR) and their respective powers and obligations.

- (b) The rules of procedure made by the Legislative Council on its own under Article 75 of the Basic Law have a legal status. The making of the rules serves to give full effect to Article 66 of the Basic Law, and affirm the position of the HKSAR Legislative Council as the only legislature of the HKSAR. Subject to other provisions in the Basic Law, the legislature has absolute autonomy to decide what are to be included in the rules of procedure.

Annex II of the Basic Law

Legal status

5. According to the Decision of the National People's Congress on the Basic Law of the HKSAR of the People's Republic of China made on 4 April 1990 when the Basic Law was adopted, Annexes I, II and III form part of the Basic Law. According to Part III of Annex II, if there is a need to amend the provisions of Annex II, including those on voting procedures, such amendments could be made with the endorsement of a two-thirds majority of all the Members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for the record. The procedure for amending the Basic Law as set out in Article 159 is not applicable in this regard. By implication, it is expected that the need to amend the provisions of the Basic Law on voting procedures for bills and motions is more likely to arise than the need to amend the main body of the Basic Law. Annex II further stipulates in clear terms that matters relating to the amendment of such provisions subsequent to the year 2007 shall be dealt with by the HKSAR on its own.

The relevant provisions of Annex II

6. Part II of Annex II of the Basic Law provides:

"II. Procedures for voting on bills and motions in the Legislative Council

Unless otherwise provided for in this Law, the Legislative Council shall adopt the following procedures for voting on bills and motions:

The passage of bills introduced by the government shall require at least a simple majority vote of the members of the Legislative Council present.

The passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee."

7. The words "unless otherwise provided for in this Law" in the first paragraph refer to the provisions of Articles 49, 52(2), 73(9), 79(6) and (7), and Part III of Annex II. Under these provisions, the passage of matters in question requires the endorsement either of a two-thirds majority of all the Members (see Articles 49, 52(2), 73(9) and Part III of Annex II) or a two-thirds majority of the Members of the Legislative Council present (see Article 79(6) and (7)). The second clause of this paragraph is a general provision, stipulating that under all other circumstances not provided for otherwise, the voting procedures set out in this Part shall be adopted for voting on bills and motions. Strictly speaking, the procedures set out therein spell out the extent of support required for the passage of bills or motions. They are neither meant to lay down rules on how Members should indicate their preferences nor provide for how such preferences should be counted.

8. Incidentally, Members-elect may wish to note that the categories of matters as referred to in this Part are not exhaustive. For example, motions introduced by the government and amendments introduced by Members to bills moved by Members are not included. While the latter may come under the category of motions introduced by Members, the former can by no means be included in the category of government bills. As a matter of fact, it has been the practice for the legislature in Hong Kong to transact its business through the primary procedure of motions. For the passage of a bill or amendment of a bill, motions are moved, followed by debate and vote on the motion. Or put it another way, any matter for the decision of the legislature is put in the form of a motion. The Council will then proceed to a debate, after which the motion will be put to vote.

9. The procedures set out in Part II of Annex II are divided into two categories: one for bills introduced by the government and the other for motions, bills or amendments to government bills introduced by Members. With regard to the requirement for the passage of bills introduced by the government, it is explicitly stipulated that “如獲得出席會議的全體議員的過半數票，即為通過” (the passage of bills introduced by the government shall require at least a simple majority vote of the Members of the Legislative Council present). Expressions with binding effect such as “必須獲得過半數票” are not used here, nor is there any clear indication as to what the word “票” (votes) in the Chinese text refers to. Does it refer to "affirmative votes", "negative votes", "affirmative and negative votes" or "affirmative or negative votes"? Are "abstentions" and "non-votes" counted as well?

10. On the issue of binding effect, as this part seeks to set out the voting procedures (requirements), its binding effect lies in the first sentence. Thus, the provision thereof is binding to the effect that the passage of a bill shall require the endorsement by a specified number of Members - that is the majority of all Members present.

11. As for the meaning of the word “票”, Legal Adviser's opinion is that from the linguistic point of view, as the term “獲得” is used in the front part of the sentence in the Chinese text, there must be a corresponding object at the end (i.e. “獲得 XX”) in order to form a complete sentence. The meaning of the word “票” in this context has to be interpreted together with the phrase “即為通過” that follows. In other words, since this sentence aims to lay down the requirement for the passage of bills, the word “票” in question is certainly used as a general term denoting endorsement of the passage of bills (usually referred to as "affirmative votes").

12. The second type of business transacted by the Legislative Council as set out in Part II includes motions, bills or amendments to government bills introduced by individual Members of the Legislative Council. The passage of these matters "shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee." (“均須分別經功能團體選舉產生的議員和分區直接選舉、選舉委員會選舉產生的議員兩部分出席會議議員各過半數通過。”) This sentence is drafted differently from the previous one which provides for the passage of government bills in that:

- (a) it is drafted in a binding manner, i.e. the word “須” (shall) is used in the Chinese text;
- (b) the term “全體” is not put between “出席會議” and “議員” in the Chinese text;
- (c) the word “票” is not put after the term “過半數” in the Chinese text;
- (d) the structure of the two sentences is different: while the previous sentence points out the extent of support required for the passage of government bills, the sentence in question stipulates with the word “須” that the passage of Member's motions, etc. shall require a simple majority vote of each of the two groups of Members present. However, the Chinese text of this provision does not expressly stipulate the consequence of “通過”. However, with reference to the meaning of the previous sentence and by interpreting this Part of Annex II as a whole, the logical conclusion is that when Members' motions, etc. are put for passage by this Council, if there is a simple majority vote of each of the two groups of Members present, such motions, etc. will be passed.

In the four points of difference listed above, with the exception of paragraph 12(d) relating to the requirement of dividing Members into two groups for the purpose of voting, the others could not possibly cause the two sentences to have substantive difference in their meaning because of textual or syntactic variations. The reasons are as follows:

- (i) Although the third sentence carries wording with binding effect while the second does not, the binding effect of the first sentence of Part II applies to the whole part. Given that, it is out of the question to consider that the requirement for the passage of government bills is not binding.
- (ii) Whether certain Members are present is an objective fact. By simply looking at the term “全體” in the second sentence of the Chinese text, we can possibly see that this term is intended by the drafter to emphasize the point that all Members present are taken as the base for the purpose of determining a simple majority. Even if there are Members who cast no vote or abstain from voting, these Members will also be counted in as part of the base. As for the third sentence, why is the term “全體” not used here? In Legal Adviser's view, there is no substantive difference between this sentence and the previous one. The phrase "a simple majority vote of each of the two groups of members present" has already made it clear that the number of each of the two groups of Members present has to be taken as the base. Is it that the presence and absence of the word “票” reflect the different requirements laid down by Annex II for decisions to be made on the two types of business dealt with by the legislature? The analysis made in paragraph 11 above reveals that the use of the word “票” is mainly a matter of grammatical requirement. Semantically, this word also clearly indicates endorsement of the passage of bills. According to the analysis made in paragraph 12(d) above, while the word “票” cannot be put in the third sentence, the meaning of this sentence is obviously the same as that of the previous one which provides for the passage of government bills. That is to say, the number of Members present in each group of Members is to be taken as the base, and the motions, etc. will only be passed if more than half of the Members of each group are in favour of the motions, etc. in question.

Conclusion

13. Concluding from the analysis above, Legal Adviser considers that the extent of support required for the passage of government bills as provided in Part II of Annex II in the Basic Law is a majority vote of the Members present. For example, if 40 Members (including the President) are present, the support of 21 Members is required for a bill to be passed. Only this can fulfil the requirement that the passage of bills shall require the endorsement of more than half of all Members present. As for the extent of support required for the passage of motions and bills, etc. introduced by Members, it can be considered the same as that for the passage of government bills. The only difference lies in the need for Members to vote in groups, and for any motions or bills to be passed, there must be a majority vote of each of the two groups of Members present who are in favour of the motions or bills in question.

Prepared by

MA Yiu-tim, Jimmy
Legal Adviser
Legislative Council Secretariat
30 June 1998

Letterhead of Legislative Council Secretariat Legal Service Division

Appendix V

Your Ref: SJO 5012/3C III
Our Ref: LS/S/2
Tel: 2869 9419
Fax: 2868 2813

Mr Daniel R FUNG, QC, SC, JP 2 July 1998
Solicitor-General
Department of Justice
4/F, High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Daniel,

Draft Rules of Procedure

I refer to your letter of 30 June 1998, which I received in the afternoon of the 30th, and our telephone conversation on that day.

I would like to thank you for the valuable opinion of the Department of Justice on some of the provisions of the draft Rules of Procedure which are due to be adopted in the afternoon of 2 July 1998. In view of the short time available, it would not be possible to invite Members to a meeting to discuss the issues raised. However, our Secretariat has sent to all Members a copy of your letter on 30 June 1998 for their consideration. I am sure the opinions set out in your letter will be taken in account when Members consider the motion to adopt the draft Rules of Procedure.

Although it has not been possible for Members to meet before today to discuss the issues, you may be pleased to note that Members have decided that a Legislative Council committee be formed as soon as the draft Rules of Procedure have been adopted to review the Rules and to discuss issues which they did not have time to deal with during their discussion of the draft Rules of Procedure.

I have asked you over the phone for clarification as to whether in your Department's view Article 48(10) of the Basic Law should cover motions which are not intended to have legislative effect. This may assist the President when deciding whether some of the motions intended for introduction for debate by Members at the meetings to be held in July could be put on the Agenda of the Legislative Council.

I have also asked you whether you have considered implications on quorum requirement provided in Article 75 of the Basic Law when you proposed that the presence of the President could be discounted for the purpose of vote counting in respect of bills or motions introduced by Members if he or she decided not to vote.

I was not able to attend a meeting with you as proposed because, as you will understand, Hon. Margaret Ng, Deputy Chairman of the Working Group on the draft Rules of Procedure, did not think it would be appropriate under the present circumstances.

Yours

(Jimmy MA)
Legal Adviser

bcc SG
DSG
ASG1) f.i.
ASG2)
ASG3
SALA
ALA5

立法會
Legislative Council

LC Paper No. LS 6/98-99

**Rules of Procedure
Legal Adviser's comments on
the Solicitor General's letter of 30 June 1998**

At the House Committee meeting held on 6 July 1998, Members agreed to invite the Solicitor General to a meeting to be held on 9 July 1998 to brief them on the opinion of the Department of Justice on the Rules of Procedure of the Legislative Council. The opinion is contained in the Solicitor General's letter of 30 June 1998 addressed to Legal Adviser. In order to assist Members in preparation for the meeting Legal Adviser has been requested to comment on the opinion of the Department of Justice.

2. Legal Adviser would like to point out that the issues involved are by no means simple and Members have agreed that the Committee on Rules of Procedure should start its review on the Rules of Procedure as soon as its members are appointed by the President.

Article 74

3. The Solicitor General is seeking to argue that by giving the article a generous and purposive interpretation the meaning of the word "bill" in Article 74 should include Committee Stage amendments (CSAs) to a bill. He suggests that "any other interpretation would create the anomaly that Members might achieve by way of a CSA that which they could not attain by way of a bill."

4. In Legal Adviser's view, the principle of interpretation referred to by the Solicitor General may be understood more easily by following the approach adopted by Mortimer VP in the case of Director of Immigration v Chan Kam Nga (an infant) [1998]2 HKC 405 at 422 to 423: "The first task is to decide whether the words of the article bear a clear and plain meaning which involves neither anomaly nor absurdity. If so, that meaning must prevail and it is unnecessary to fall back upon other aids to construction."

5. The plain reading of Article 74 does not give rise to any anomaly or absurdity. Article 74 authorizes Members to introduce bills in accordance with the provisions of the Basic Law and legal procedures. Exceptions under this authorization are bills relating to public expenditure or political structure or the operation of the government which Members are not allowed to introduce. The other exception is in

respect of bills relating to government policies for which the written consent of the Chief Executive is required for introduction. It is clear that Article 74 is directed at the procedure of introduction of a bill as opposed to other possible procedures in the legislative process. The Basic Law contemplated that there would be amendments by Members to government bills, as evidenced by such reference in Annex II to the Basic Law. However, the details of procedures on amendment of bills are left to the Legislative Council to determine by way of rules of procedure.

6. On the suggested anomaly raised by the Solicitor General, it could be argued that it would be equally, if not more, anomalous if the same exceptions applied to CSAs because (given that most of the bills introduced by government would fall within one or more of the exceptions) it would deprive the Council of the opportunity to discuss and agree to proposals alternative to those proposed by government in a bill. This would raise serious doubt as to whether the Legislative Council was properly performing its constitutional function of enacting, amending or repealing laws under Article 73 of the Basic Law. The anomaly perceived by the Solicitor General may be seen as reflecting the intention of the Basic Law to leave open the question on proposed amendments to bills so that the Legislature may determine the proper checks and balances between the Executive and the Legislature through its rules of procedure.

Rules 57(6) and 69

7. In the first paragraph on page 2 of the Solicitor General's letter, it is said that Rules 57(6) and 69 do not reflect the correct interpretation of Article 74 of the Basic Law and are inconsistent with the Basic Law.

8. Rule 57(6) provides for the "charging effect" restriction on CSAs. Under that restriction any CSA which may have the object or effect of disposing of or charging any part of the revenue of Hong Kong can only be proposed by the Chief Executive (the CE), a designated public officer or a Member who has obtained the CE's consent in writing to the proposed CSA. Rule 69(3) provides for a procedure under which a Member may move an amendment to an appropriation bill by taking the form of reducing the amount allotted to a head of expenditure.

9. Rule 57(6) was not made to apply Article 74. In the Standing Orders of the previous Legislative Council, a standing order of substantially the same wording was made to implement the restriction imposed by the Royal Instructions. In the Rules of Procedure of the Provisional Legislative Council, the same provision was adopted as a 'self-imposed' restriction which Members found necessary because, in their view, which was never challenged by the Government, Article 74 did not apply to CSAs and no restriction on the moving of CSAs was found in the Basic Law.

10. As regards Rule 69, it is not clear in the Solicitor General's letter in what way it should be amended. If the suggested amendment would result in removing the procedure under which Members may amend an appropriation bill by way of reducing a proposed amount, it would mean the Legislative Council could only pass or not pass an appropriation bill (with or without amendments proposed by the Government only) when performing its function to examine and approve budgets and to approve taxation and public expenditure. This way of defining the role of the Legislative Council would be very different from that for the previous legislatures including the Provisional Legislative Council which had the same task as the current Legislative Council of examining and approving budgets, and approving taxation and public expenditure as provided in section 5(2) and (3) of the Preparatory Committee's decision to establish the Provisional Legislative Council. It may raise doubt as to whether it would upset the checks and balances between the Executive and the Legislature in the area of public financial control which have been in place for many years, both before and after the Reunification.

Application of Articles 48(10) and 74

11. The Solicitor General is suggesting that decisions as to whether a motion falls within the ambit of "regarding revenues or expenditure" as provided in Article 48(10) of the Basic Law and whether a bill falls within the areas relating to public expenditure, political structure or the operation of the government or government policies should be for the Chief Executive.

12. Under Rules 31 (relating to 'charging effect' restrictions on motion), 51(3) (relating to Article 74 restrictions) and 57(6) (relating to 'charging effect' restrictions on CSAs) of the Rules of Procedure, it is for the President to form an opinion as to whether a proposed motion, bill or CSA falls within the relevant restriction.

13. In Legal Adviser's view, even assuming that the Solicitor General's opinion as to the effect of Articles 48(10) and 74 is accepted by Members, a procedural rule which requires the President to form an opinion on the question is quite in order and would not contravene the Basic Law. The President is empowered by Article 72(2) of the Basic Law to decide on the Agenda of the Legislative Council. The power is subject only to the condition that government bills are to be given priority on the Agenda. It would, therefore, be the President's duty to determine whether a proposed motion, bill or CSA falls within the Basic Law restrictions in order to decide whether it could be printed on the Agenda.

14. While acknowledging that neither Article 48(10) nor Article 74 expressly identifies the decision-maker, the Solicitor General argues that it is by necessary implication that such decisions must be made by the CE.

15. The same argument of necessary implication could be applied in support of the requirement in the Rules of Procedure that it is for the President to form the relevant opinions. These Basic Law restrictions are imposed as part of the scheme of checks and balances between the Executive and the Legislature. Bearing in mind that the Legislative Council is specifically authorized to make its own rules of procedure, the requirement that the President form the relevant opinions could not reasonably be seen as contravening the Basic Law.

16. In terms of checks and balances, public officers may make representations to the President when there is a need for her to make a ruling and they may raise a point of order at a meeting of the Council.

17. Although not directly relevant, it should be noted that under Standing Order No. 23 of the Standing Orders of the previous Legislative Council, the President was given the authority to form an opinion as to whether a motion would have charging effect. That Standing Order was for the purpose of implementing Clause XXIV of the Royal Instructions which also did not specify the identity of the “decision-maker”.

Article 48(10)

18. The Solicitor General is of the opinion that Article 48(10) of the Basic Law applies to all kinds of motions which have any effect on revenues or expenditure as well as motions which are related to other aspects of revenue or expenditure.

19. Although the Solicitor General has suggested that the formulation in Rule 31 (the ‘charging effect’ restriction) is much narrower and more specific than “regarding revenues or expenditure” specified in Article 48(10), Legal Adviser would like to point out that despite the textual difference it does not necessarily follow that Rule 31 contravenes Article 48 (10). The issue for consideration is whether the rule accurately implements the rather vague expression of “regarding revenues or expenditure”.

20. Since all businesses of the Council are conducted by way of motion and because of the Council’s functions under the Basic Law many of the motions moved by Members might fall within the ambit of “regarding revenues or expenditure”. For example, a motion urging the Government to reduce tax or a motion to amend a piece of subsidiary legislation on increase of government fees. Members may wish to seek clarification from the Solicitor General as to how his opinion referred to in paragraph 19 above (see second paragraph on page 3 of the Solicitor General’s letter) would reflect the proper checks and balances between the Executive and the Legislature as intended by the Basic Law.

Voting Procedure

21. Legal Adviser has provided Members with his advice on the issue. In Legal Adviser's view, the voting procedure provision in Annex II of the Basic Law has to be read as a whole. Simply singling out a certain phrase in the provision and ignoring its interaction with others could easily produce a distorted meaning.

22. In Legal Adviser's view, the wording of the provision in Annex II of the Basic Law is so clear that it would not be necessary to resort to other aids to interpretation. Nevertheless, it would be useful for Members to take note of the attached part of the speech on voting procedure given by the Mr Ji Peng-fei at the National Peoples's Congress meeting held on 28 March 1990 when moving for the adoption of the draft Basic Law. Mr Ji's explanation of the rationale and operation of the relevant provision in Annex II of the Basic Law confirms that the Rules of Procedure are not in contravention with it.

Position of the President

23. Members are aware of the so-called "anomalous outcome" described by the Solicitor General and have decided that the neutrality or impartiality of the President could only be judged by the President's own conduct. The need for counting the presence of the President under the voting procedure is dictated by the Basic Law.

24. The Solicitor General's proposal is to provide in the Rules of Procedure that the presence of the President could be discounted for the purpose of vote counting in respect of bills or motions introduced by Members if the President decided not to vote. In Legal Adviser's view, the Solicitor General's proposal should be given more thought by Members. However, there may be problems concerning the quorum requirement under Article 75 of the Basic Law if a meeting is marginally quorate with 29 Members and the President when a vote is being taken.

Encl.

Prepared by

MA Yiu-tim, Jimmy
Legal Adviser
Legislative Council Secretariat
8 July 1998