

立法會 *Legislative Council*

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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.

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

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