

Issues relating to Prorogation of the Legislative Council

Views of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“the Bar”) has been invited by the Panel on Constitutional Affairs of the Legislative Council to express its views on constitutional issues relating to prorogation of the Legislative Council (“LegCo”).
2. The Bar wishes to address the following issues:-
 - (a) In whom the power to prorogue LegCo is vested, the Chief Executive (“CE”) or the President of LegCo;
 - (b) In whom the power to determine the commencement and end dates of a LegCo session is vested, the CE to the President of LegCo; and
 - (c) Whether LegCo and its committee can resume operation during prorogation in circumstances other than at the request of the CE for convening emergency meetings.

The Legal Framework

The Powers of the Chief Executive in relation to LegCo

Basic Law

3. Article 43 of the Basic Law of the HKSAR (“the Basic Law”) provides that the CE shall be the head of the HKSAR and shall represent the Region.
4. Article 48 of the Basic Law provides, *inter alia*, that the CE shall exercise the following powers and functions:-

- (1) To lead the government of the Region;
- (2) ...
- (3) To sign bills passed by LegCo and to promulgate laws;
- (4) To sign budgets passed by LegCo and report the budgets and final accounts to the Central People's Government for the record;
- (5) ...
- (6) ...
- (7) ...
- (8) ...
- (9) ...
- (10) To approve the introduction of motions regarding revenues or expenditure to LegCo;
- (11) ...
- (12) ...
- (13) ...

5. Article 49 of the Basic Law provides that the CE may return a bill to LegCo within three months for reconsideration if s/he considers that it is not compatible with the overall interests of the Region. If the LegCo passes the bill again by not less than two-thirds majority of all the members, the CE must sign and promulgate it within one month, or act in accordance with the provision of Article 50 of the Basic Law, which empowers the CE to dissolve LegCo once in each term of his or her office after consulting the Executive Council in critical cases of deadlock between the CE and LegCo.

6. Article 51 provides that if LegCo refuses to pass the budget introduced by the government, the CE may apply to LegCo for provisional appropriations. If appropriation of public funds cannot be approved because LegCo has already been dissolved, the Chief Executive may, prior to the election of the new LegCo, approve provisional short-term appropriations according to the level of expenditure of the previous fiscal year.

Legislative Council Ordinance (Cap 542)

7. Section 4 of the Legislative Council Ordinance (Cap 542) (“the Ordinance”) provides that each term of office of LegCo is to begin on a date to be specified by the CE-in-Council by giving notice of that date in the Gazette. But if LegCo is dissolved by CE in accordance with the Basic Law, the new term of LegCo is to begin on a date to be specified by CE-in-Council by notice published in the Gazette and each subsequent term of office of that Council is to begin on a date to be so specified.

8. Section 6 of the Ordinance provides that :-

- (1) The CE must specify a date for holding a general election to elect the members of LegCo for each term of office of LegCo. The CE must give notice of that date in the Gazette.
- (2) The date specified in the notice must be not earlier than 60 days and not later than 15 days before the new term of office of LegCo is to begin.
- (3) To enable such a general election to be held, the CE may, before the end of a term of office of the LegCo, prorogue that LegCo to terminate its operation.
- (4) If LegCo is to be prorogued under (3), the CE must specify the date from which that LegCo stands prorogued. The CE must give notice of that date in the Gazette.

11. Section 7 of the Ordinance provides that:-

- (1) Within 30 days after LegCo is dissolved in accordance with the Basic Law, the CE must specify a date for holding a general election. The CE must give notice of that date in the Gazette.
- (2) The date specified for the purposes of (1) must be within 3 months after the date on which LegCo was dissolved.

9. Section 9 of the Ordinance provides that:-

- (1) The CE must convene at least one ordinary session of LegCo in each calendar year.
- (2) The CE must publish in the Gazette the dates on which an ordinary session of the LegCo is to begin and end.
- (3) ...
- (4) ...

10. Section 10(1) of the Ordinance provides that the CE must specify a date and time for holding the first meeting of each term of office of LegCo and give notice of that date and time in the Gazette.

The Powers of the President of LegCo

Basic Law

11. Article 72 of the Basic Law provides that the President of LegCo shall exercise the following the powers and functions:-

- (1) To preside over meetings;
- (2) To decide on the agenda, giving priority to government bills for inclusion in the agenda;
- (3) To decide on the time of meeting;
- (4) To call special sessions during the recess;
- (5) To call emergency sessions on the request of the Chief Executive;
- (6) To exercise other powers and functions as prescribed in the rules of procedure of the Legislative Council.

12. Article 79 of the Basic Law provides that the President has power to declare a member of LegCo is no longer qualified for the office under any of the circumstances prescribed thereunder.

Legislative Council Ordinance

13. Section 11 of the Ordinance provides that the President of LegCo shall, at the request of the CE, convene an emergency session of the LegCo during the period after the end of the term of the office or the dissolution of LegCo.

Rules of Procedure of the Legislative Council of the HKSAR ("ROP")

14. Rule 4 of the ROP provides that:-

- (1) ...
- (2) ...
- (3) The President of LegCo shall hold office until the dissolution of LegCo.
- (4) The person holding the office of President of LegCo immediately before a dissolution of LegCo, ... shall be deemed to be President and shall call and preside at a meeting of LegCo held for the consideration of urgent business during that dissolution and shall be Chairman at a meeting of a committee of the whole LegCo held in consequence of such a meeting of LegCo. ...

15. Rule 11 provides that at least one session of LegCo shall be convened in every calendar year, and a session shall begin on such date as the CE may appoint by notice published in the Gazette and shall end on such date as the CE may appoint by notice published in the Gazette or on a dissolution of LegCo, whichever is the earlier.

16. Rule 14 provides that:-

- (1) Meeting of LegCo during each session shall be held on such days and shall begin at such hour as the President of LegCo shall determine but a period of 6 weeks shall not elapse between the date of one meeting and the date appointed for the next meeting in the same session.
- (2) ...
- (3) The President of LegCo may, at any time after he has determined the day and hour upon which a meeting is to begin, change the day or hour so determined to a later day or hour, or to an earlier day or hour.

- (4) When in the opinion of the President of LegCo it is necessary for the proper completion of the business on the Agenda of LegCo Council at a meeting of LegCo to continue an unfinished business on another day, the President of LegCo may order that the meeting shall continue on such other day for that purpose. Where the President so orders at a meeting of LegCo, the meeting shall stand suspended and shall resume for the continuation of business on such other day.
- (5) The President of LegCo may at any time suspend a meeting or adjourn LegCo.

17. Rule 15 provides that:

- (1) The President of LegCo, shall, at the request of the CE, call emergency meetings of LegCo. Where such a meeting is to be held during the period after the end of a term of office or the dissolution of LegCo, it shall be convened before the date (if more than one, the first date) specified for the holding of a general election for all the Members of LegCo.
- (2) During any period when LegCo is in recess between the end of one session and the beginning of the next session, the President of LegCo may call a special meeting of LegCo on such day and at such hour as he may specify.
- (3) ...

Relationship between the CE and LegCo

18. Professor Yash Ghai describes the design of the political and administrative institutions and the relationship among them is based on the principle of the separation of powers. He says that there is a clear and sharp separation between the executive and the legislative in Hong Kong under the Basic Law and that the incorporation of the principle represented an important change of political landscape. For example, the CE, as distinguished from the British colonial

Governor, is *no longer* the head of the legislature. See Ghai, Yash, *Hong Kong's New Constitutional Order* (2nd Ed, 1998), pp.262-264.

19. On the other hand, while the legislature is vested with the function of supervising the executive, the CE has power to dissolve the legislature. Yash Ghai also considers that the political structure was designed to achieve the result of a check and balance. See also, Ji Pengfei, *Explanations on "The Basic Law of the HKSAR of the People's Republic of China (Draft)" and Its Related Documents (Address to the National People's Congress on 28th March 1990)*, para 4.1.

20. Professor Xiao Weiyun, a former member of the Basic Law Drafting Committee, considered that Articles 49, 50 and 52 of the Basic Law established a check and balance mechanism between the CE and LegCo, while Articles 54, 55 & 56 encouraged co-operation between the CE and LegCo. See Xiao Weiyun, *One Country Two Systems and Hong Kong's Basic Legal System*, (1990) pp 229-230.

「從以上所引的第 49、50、52 等條文看，行政長官有解散權，立法會有要求辭職權，都是為了使二者能正確地行使自己的職權，合理地進行分工，各得其所，以達到互相制衡的目的。而行政長官要行使解散權，立法會要迫使行政長官辭職。都是很不容易、受到法律嚴格限制的。行政長官在行使解散權的時候，還要考慮到可能帶來被要求辭職的後果，立法會再次通過行政長官發回重議的法案或拒絕通過政府提出的財政預算法案或其他重要法案的時候，還要考慮到可能帶來被解散的後果。所以這種互相制衡又是希望行政長官不要輕易地行使解散權，立法會不要輕易地通過發回重議的法案或拒絕通過財政預算法案或其他重要法案，而是二者既要互相制衡，又要互相配合。」

「行政長官、行政機關和立法機關的相互配合主要體現在“基本法”的第 54、55、56 條。第 54 條是說在香港特別行政區建立一個名為“行政會議”的結構，這是一個協助行政長官進行決策的機構。第 55 條規定：“行政會議的成員由行政長官從行政機關的主要成員、立法會議員和社會人士中委任，其任免由行政長官決定。”第 56 條規定，除人事任免、紀律制裁和緊急情

況外，行政長官在作出重要決策、向立法會提交法案、制訂附屬法規和解散立法會前，須徵詢行政會議的意見。這就是要用行政會議對行政長官、行政機關與立法機關起着互相配合的重要作用。」

21. Professor Xiao argued that, unlike the previous colonial LegCo (which was the consultation body to the Governor), the legislature of the HKSAR would be a true ‘legislature’ (Xiao, p 270).

「1997 年後，香港特別行政區立法會已不同於現在香港的立法局，它是名副其實的立法機關，...」

22. Professor Xiao also briefly explained the difference in the constitutional roles of the Governor and the CE at p 288:-

“During the drafting of the Basic Law, there were two proposals for the establishment of the President of LegCo: either elected by and from among LegCo members or acted by the CE.

After discussion and consultation, the Political Affairs Sub-Committee preferred the former proposal. If the CE also act as the President of LegCo, that would render the power of the CE to be too wide, and that it would blur the distinction between executive and legislative powers. Although the colonial legislature used to be presided by the Governor, it does not follow that the legislature of the HKSAR should be accordingly presided by the Chief Executive. The constitutional role of the Governor is different from that of the Chief Executive. The Governor is the representative of the Queen (the Sovereign), and the colonial legislature is the consultation body of the Governor. The role of the Chief Executive is different. It is not necessary for him to act as the President of LegCo so that he will possess of both executive and legislative power.”

「在“基本法”的起草過程中，對立法會主席的產生曾經提出兩個方案，一是主張立法會主席由立法會成員互選產生，另一個方案主張立法會主席由行政長官兼任。」

經過討論和諮詢，政治體制專題小組多數委員認為由立法會成員互選產生比較適當，如果由行政長官兼任，則行政長官權力過大，而且易造成行政權與立法權的混淆不分。雖然現在香港由總督兼任立法局主席，但1997年香港特別行政區立法會不一定要沿用此制，港督的地位與1997年行政長官的地位也不同，港督是英女王的代表，立法局是港督的立法諮詢機構，行政長官的地位則與此不一樣，不必兼任立法會主席，集行政、立法權於一人。」

23. Although Professor Xiao's main contention was that the CE could not have the full powers of the Governor in the light of his constitutional role, he concluded at p 253 that some powers, which closely resembled those exercised by the Governor, should remain, namely (i) the power of signing bills passed by the Legco and of promulgating laws; (ii) the power of appointing and removing judges and holders of public office; and (iii) the power of pardoning persons convicted of criminal offences or commuting their penalties.
24. It is clear that the powers vested under the Basic Law in the CE in relation to the legislature are very limited. The CE's powers and duties vested under the Basic Law in relation to the legislative process are those exercisable under Article 48(3), 48(4), 48(10), 49, 50, 51, 56(2), 72(5) and 74 of the Basic Law.

Whether CE has Power to Convene or Prorogue a LegCo Session

25. The CE is a creature of the Basic Law. The CE would be regarded as acting *ultra vires* and therefore unlawfully if he purports to do any act that is without or beyond the constitutional authority of the provisions of the Basic Law.
26. No provision of the Basic Law expresses the vesting upon the CE the power to convene or call any meetings, sessions or terms of LegCo. The CE was also not vested under the Basic Law with the express power to determine the relevant dates of a session of LegCo or to prorogue LegCo.

27. If the CE has no power to convene a LegCo session, he also has no power to prorogue LegCo.
28. Article 72(5) of the Basic at best allows the CE to *request* an emergency session through the President of LegCo. It is the President who will call the session, *not* the CE.
29. The stipulation under Article 43(1) of the Basic Law that the CE is “the head of the HKSAR and represents the Region” does not imply that the CE has, by virtue of that provision, power under the Basic Law other than those enumerated in other provisions of the Basic Law. Rather, Article 48, as well as the other provisions of the Basic Law which confers expressed powers upon the CE, are provisions reflecting the general proposition of Article 43. This view is not inconsistent with Professor Xiao’s approach:-

“The Chief Executive will be the head of both the HKSAR as well as its government. The dual capacity brought him the important political and administrative responsibilities. He should be accordingly conferred with certain powers as an assurance to the exercising of these duties. By enjoying the powers of administration and decision, the Chief Executive can ensure the necessary efficiency and the smooth co-operations among different parties. He will be subject to legal sanction if he does not work in accordance with the stipulated powers or even works beyond them.” (p 252).

「...行政長官既是特別行政區的首長，又是特別行政區政府的首長，他的這兩重身份決定他負有重大的政治和行政責任，應當相應地賦予他一定的職權，作為履行其職責的法律保證。行政長官享有這些行政權和決策權，也可以保證行政工作應有的效率和協調各方面的關係。當然，如果行政長官不按照這些法定的職權辦事，甚至違法瀆職，也將依法對其追究責任。」

30. The position in relation to the Basic Law, however, does not mean that the CE cannot be conferred with other powers by HKSAR legislation enacted in accordance with the Basic Law. The CE may have such powers in so far as there

is no inconsistency with the provisions of the Basic Law. The question therefore is whether sections 6, 9(1) and (2) of the Ordinance are inconsistent with any of the articles of the Basic Law.

31. The discussion above of the legal framework indicates that the Basic Law makes no provision for the vesting of the power to convene or prorogue a session of LegCo upon a designated person. The Bar therefore is driven to the conclusion that this question is not one that can be answered by reference singly to legality under the Basic Law but one that has to be answered through the making of appropriate choice(s) as between legal and legitimate options, including the current arrangement under sections 6, 9(1) and (2) of the Ordinance.

Who should have the Power to Convene or Prorogue

32. The colonial Governor had the power of prorogation because he was the constitutional representative of the Queen as well as the law-maker. See Letters Patent 1917-1991, Article VII.

33. The British Queen's power to prorogue a session of Parliament was explained by Professor Jackson in the following terms:-

“Prorogation terminates a session of Parliament. It is effected by command of the Queen – acting by convention on the advice, formerly, of the Cabinet but, it seems, in practice in modern times on the advice of the Prime Minister – such command being signified to both Houses either by the Lord Chancellor (in the Queen's presence or by commission) or by proclamation.” (O Hood Philips and P Jackson, *Constitutional & Administrative Law* (18th Ed, 2001), para 8-012).

34. Erskine May summarizes the effect of prorogation in the following terms:-

“The effect of prorogation is at once to terminate all the current business of Parliament. Not only are the sittings of Parliament at an end, but all

proceedings pending at the time are quashed, except impeachments by the Commons, and appeals before the House of Lords. Thus, subject to what is said elsewhere about hybrid bills and private bills, every bill must be renewed after a prorogation, as if it had never been introduced. As it is a rule that a bill of the same substance cannot be introduced in either House twice in the same session, a prorogation has been resorted to on three occasions to enable another bill to be brought in” (Limon & McKay (Eds), Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament (22nd Ed, 1997), pp 56-57).

35. Turning to the United States, the Constitution of the United States, Section 4, Article 1 empowers Congress to make regulations for fixing the times, places and manner of holding Elections. Clause 2 of Section 4 further states that the Congress shall assemble at least once a year, and such meeting shall take place on the first Monday in December, unless they shall by law appoint a different day.

36. Rule I of the *Rules of the 109th Congress* provides, *inter alia*, the powers and duties of the Speaker of the House of Representatives as:-

“Recess and convening authorities

12. (a) To suspend the business of the House for a short time when no question is pending before the House, the Speaker may declare a recess subject to the call of the Chair.

(b) To suspend the business of the House when notified of an imminent threat to its safety, the Speaker may declare an emergency recess subject to the call of the chair.

(c) During any recess or adjournment of not more than three days, if the Speaker is notified by the Sergeant-at-Arms of an imminent impairment of the place of reconvening at the time previously appointed, then he may, in consultation with the Minority Leader --

(1) postpone the time for reconvening within the limits of clause 4, section 5, article I of the Constitution and notify Members accordingly; or

(2) reconvene the House before the time previously appointed solely to declare the House in recess within the limits of clause 4, section 5, article I of the Constitution and notify Members accordingly.

(d) The Speaker may convene the House in a place at the seat of government other than the Hall of the House whenever, in his opinion, the public interest shall warrant it.”

37. Article 66 of the Basic Law stipulates that LegCo is the legislative body of the HKSAR whilst Article 73(1) forms the legal basis for LegCo to regulate itself over the law-making process. The Bar considers that the powers to commence and prorogue a session of LegCo can be within the scope of such self-regulation.

38. Giving the President of LegCo the power to set the dates of commencement and prorogation of a LegCo session does not offend Article 72(3) of the Basic Law.

39. The Constitutional Affairs Bureau expressed the following difficulties in para 11 of its paper:-

“11. From a practical angle, the Legco President for a new term will not be elected until the first Council meeting is held. There will be no Legco President as such to fix a commencement date for the first legislative session of a Legco term. With regard to fixing an end date of the last legislative session in a term, the end date needs to be fixed in coordination with the date of prorogation. ...”

40. Rule 4 of the ROP provides that the President of LegCo shall hold office until the dissolution of LegCo.

41. Section 4(6) of the Ordinance provides that LegCo is dissolved immediately after its term of office ends, if not earlier by the CE in accordance with the Basic Law.

42. It follows a President of LegCo will hold office during the period of prorogation and vacate his/her office only immediately after the end of the previous term, i.e., at the expiration of the full four years' term.
43. The Hong Kong legislation is similar to that of the United Kingdom which provides that the then Speaker shall be deemed to be the Speaker until a Speaker shall be chosen by the new Parliament. See Ministerial and other Salaries Act 1972, s 3(2); House of Commons (Administration) Act 1978, Sch 1 & 2.
44. As prorogation is distinct from dissolution, there is no reason why the President of LegCo, cannot, while still holding office, fix in advance the commencement date of the next term. In the light of the Constitutional Affairs Bureau's observation above, the Bar considers that if the President of LegCo is to be granted the power to fix in advance the commencement date of the next term, such power should be provided in the Legislative Council Ordinance as opposed to the ROP.

Power to Resume Operation during Prorogation

45. The function of prorogation is to terminate all business with the exception of convening an emergency session as requested by the CE under Article 79(5) of the Basic Law and Rule 15(1) of the ROP.
46. The Bar agrees that the objective of prorogation will be frustrated if LegCo is allowed to resume its business in a circumstances other than the one prescribed by law.

Concluding Observations

47. The Bar expresses in summary the following views:-

- (a) The Basic Law does not in its provisions either expressly or impliedly make provision for the vesting of the power to order the commencement or prorogation of a session of LegCo upon a designated person.
- (b) The powers conferred upon the CE under the Ordinance and the ROP for fixing the relevant dates of a LegCo session or for the prorogation of LegCo do not appear to offend any provisions of the Basic Law. On the other hand, it can be within the scope of the self-regulation of LegCo of the law-making process for its President to have such powers, though such powers should preferably be provided by way of primary legislation.
- (c) LegCo cannot resume operation during prorogation in circumstances other than at the request of the CE for convening an emergency session in the light of the constraints imposed by the provisions of the Basic Law.

Dated 29th April 2005.

Hong Kong Bar Association