

Legislative Council Panel on Constitutional Affairs

Issues Pertaining to Prorogation

Introduction

This paper aims at setting out the Administration's position on the following issues pertaining to prorogation, as referred by the House Committee to the Panel on Constitutional Affairs for consideration (LC Paper No. CROP 30/03-04):

- (a) whether the power to prorogue the Council should be transferred from the Chief Executive (CE) to the President of the Council;
- (b) whether the power to determine the commencement and end dates of a Legislative Council (LegCo) session should be transferred from the CE to the President of LegCo; and
- (c) whether the Council and its committees can resume operation during prorogation in circumstances other than at the request of the CE for convening emergency Council meetings.

Legal Provisions for Prorogation

2. Section 6 of the Legislative Council Ordinance (LCO) (Cap.542) provides that the CE has the power to specify dates for holding general elections of the LegCo. Section 6(3) of the LCO provides that "to enable [such] a general election to be held, the Chief Executive may, before the end of a term of office of the Legislative Council, prorogue that Council to terminate its operation". Section 6(4) further provides that if LegCo is to be prorogued under section 6(3), the CE must specify the date from which LegCo stand prorogued and give notice of that date in the Gazette.

Powers and Functions of the Chief Executive and the Legislature

3. According to paragraphs 9 and 10 of LC Paper No. CROP 30/03-04, some members of the Committee on Rules of Procedure (CRoP) considered that "the Basic Law now empowers LegCo to make laws and transact business on its own". They also considered that "to tie

in with the Basic Law, LCO should be amended to transfer to the President the power to prorogue the Council”.

4. The powers and functions of LegCo, including its legislative powers, must be seen in the overall context of the political structure as provided for in the Basic Law. Insofar as the legislative process is concerned, Article 74 of the Basic Law provides that LegCo Members may not introduce bills relating to public expenditure or political structure or the operation of the government. The written consent of the CE shall be required before bills relating to government policies are introduced by members. Further, it should be noted that a bill passed by LegCo may take effect only after it is signed and promulgated by the CE (Articles 48(3) and 76 of the Basic Law are relevant).

Policy Rationale of Prorogation

5. Under the electoral system before reunification, it was an established practice to dissolve LegCo before nominations started for a general election¹. The rationale was that incumbent LegCo Members seeking re-election should not be perceived to be enjoying undue advantage over non-incumbent rivals by conducting their campaigns in the capacity of serving members. Following reunification, to maintain the “level playing field” philosophy, a prorogation arrangement is put in place under the LCO whereby LegCo will, in effect, cease to transact any formal business in the period immediate before an upcoming general election even though it will continue to exist and its Members will continue to have such status. In practice, prorogation normally begins around the commencement of the nomination period of the election². The arrangement is conducive to achieving open and fair elections.

¹ Royal Instructions XXVIII(1) specifies that the Governor may dissolve LegCo in the fourth year after the latest election for all the elected Members of LegCo. LegCo was dissolved on 22 August 1991 before the elections were held on 12 September 1991 (for functional constituencies) and on 15 September 1991 (for geographical constituencies). In 1995, it was dissolved on 31 July 1995 before the elections were held on 17 September 1995.

² In 2004, LegCo was prorogued on 22 July 2004. Nomination period commenced on 22 July 2004 and the general election was held on 12 September 2004. In 2000, prorogation of LegCo was not necessary as there was already a gap of three months between the end of the first term (30 June 2000) and the start of the second term (1 October 2000).

Power of Prorogation

6. Under Section 6(1) of the LCO, the CE must specify a date for holding a general election to elect the Members for each term of office of LegCo. Since it is the CE who specifies the date for election, it follows logically that he should also specify the period for which LegCo stands prorogued, given in particular that the latter is “to enable such a general election to be held” (Section 6(3) of the LCO).

7. As mentioned in paragraph 5 above, the rationale for prorogation is that incumbent LegCo Members should not be perceived to be enjoying undue advantage over non-incumbent rivals. The LegCo President himself or herself is a LegCo Member. In any given elections, it is possible that the incumbent LegCo President may, as a serving Member, seek re-election to a LegCo seat. To retain the power of prorogation in the CE will, therefore, help to maintain the impartiality of the office of the LegCo President.

Commencement and End Dates of Legislative Session

8. According to paragraph 9 of LC Paper No. CROP 30/03-04, some members of CROP considered that “there are no valid grounds for requiring that the commencement and ending dates of a LegCo session be specified by CE. Since Article 72(3) of the Basic Law provides that one of the powers and functions of the President of LegCo is to decide on the time of meetings, the commencement and ending dates of a LegCo session can likewise be determined by the President”.

9. Before reunification, Order 5(3) of the Standing Orders of the LegCo of Hong Kong provides that “[a] session shall begin on such date as the Governor may appoint by notice published in the Gazette...”. Order 5(2) provides that “[a] session shall end on such date as the Governor may appoint by notice published in the Gazette...”.³ Order 7(1) provides that “[s]ittings of the Council during each session shall be held on such days and shall begin at such hour as the President shall determine...”. While the LegCo President had the power to determine the date and time of meetings, the authority to appoint the

³ Article XXIA(1) of the Royal Instructions provides that “The sessions of the Legislative Council shall commence on such date and end on such date as the Governor shall from time to time appoint by notice published in the Hong Kong Government Gazette...” Article XXIII provides that “the Legislative Council may from time to time to make standing rules and orders for the regulation of their own proceedings, provided such rules and orders be not repugnant to Our said recited Letters Patent, or to these Our Instructions, or to any other Instructions from Us under Our Sign Manual and Signet.”

commencement and end dates of a LegCo session was vested in the Governor.

10. After reunification, the arrangements basically mirror those adopted prior to reunification: the CE determines the commencement and end dates of a LegCo session, whilst the LegCo President decides on the time of meetings. The arrangement has been operating smoothly and we do not see any reason for change.

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. These two aspects are dealt with by vesting in CE the authority to determine the relevant dates.

Resumption of Operation

12. According to paragraph 10 of LC Paper CROP 30/03-04, some members of the CRoP suggested that “consideration should also be given to whether the operation of the Council and its committees, which has been terminated during prorogation, can resume only when emergency Council meetings are called at CE’s request”.

13. Section 6(3) of the LCO stipulates that to enable a general election to be held, the CE may prorogue that Council to terminate its operation. As provided for under the Article 72(5) of the Basic Law, the President shall, at the request of the CE, call emergency meetings of the LegCo. As previously advised by the Director of Administration, the Council may, at an emergency meeting held during the prorogation, refer a specific issue for consideration of a relevant committee, but the issue should be of a nature as to warrant the holding of such an emergency Council meeting in the first place. If LegCo (or its committees) can decide on its own to resume operation during the period of prorogation, the purpose of prorogation i.e. to provide a level playing field among incumbent members seeking re-election and non-incumbent rivals, will be undermined. Thus, it is appropriate that emergency meetings can be held during prorogation only at the request of the CE.

Conclusion

14. To sum up, the Administration's position on the issues relating to prorogation of LegCo is that:

- (a) the existing legal provisions and arrangements with regard to the prorogation of the LegCo are appropriate and should remain unchanged;
- (b) the existing legal provisions and arrangements with regard to the determination of the commencement and end dates of a LegCo session are appropriate and should remain unchanged; and
- (c) the Council and its committees can resume operating during prorogation only at the request of the CE for convening emergency Council meetings.

Constitutional Affairs Bureau
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