

**Re: Election of Chairman of the House Committee**

**Joint Opinion**

**A. Overview**

1. Instructing solicitors act for the President of the Legislative Council (respectively “**President**” and “**LegCo**”).
2. The extraordinary events leading to the President taking legal advice are well-known. LegCo’s 2019-2020 session commenced on 16 October 2019. The first business of the session for LegCo’s House Committee (“**HC**”) is to elect its Chairman. Despite having convened over a dozen meetings over the past 7 months, the HC has so far failed to elect its Chairman. This is due to the filibustering tactics adopted by some LegCo members including the member presiding over the election.
3. This stalemate in the HC has seriously impeded LegCo’s business. As of 31 March 2020, the legislative process of 13 Government Bills, 1 Member’s Bill and some 95 items of subsidiary legislation has been held up. LegCo’s process to endorse the appointment of the next Chief Justice of the Court of Final Appeal also remains pending. The election of LegCo members to fill important statutory bodies such as the Legislative Council Commission and governing bodies of universities is also unable to take place.
4. We are instructed to advise on the following 3 specific questions, with reference to the experience of the United Kingdom Parliament and other Westminster-model Parliaments where appropriate:
  - 4.1 Given that delay in the election of the HC Chairman for the 2019-2020 session has brought the legislative process to a standstill, thereby affecting the performance of LegCo’s law-making function under article 73(1) of the Basic Law (“**BL**”) since bills which cannot be dealt with by LegCo within this session (being

the final session of the four-year LegCo term) are to lapse at the end of the current LegCo term<sup>1</sup> and must be introduced again in the next LegCo term, whether the President, in his capacity as such, has the duty or function to ensure that LegCo can exercise or perform its law-making function under BL 73(1); if so, what immediate action can the President take to deal with the situation where the HC is not performing its functions in relation to legislative proposals?

- 4.2 In view of the possible dire consequences on the operation of LegCo if there is no President's deputy in the event that the President is absent or unable to act, whether and what action may be taken by the President and/or the Council to deal with the difficulties and problems caused by the delay in the election of the HC Chairman for a new session?
- 4.3 Since the HC is supposed to be assisting LegCo in performing the functions of LegCo, whether LegCo can take any immediate action when the HC is not functioning properly without the need to amend the Rules of Procedure ("RoP") or suspend the relevant rules in the RoP.
5. The core of the advice which we are asked to give, as identified in the first and third questions (which are connected), is whether, and if so what, immediate action may be taken swiftly by the President and/or LegCo to resolve the present impasse to enable the HC to proceed with its work for the remainder of this session.
6. For the reasons set out below, our opinion is that the President has a duty, as a matter of constitutional obligation under BL 72, to act to ensure that LegCo can perform its constitutional functions under the BL which are currently being frustrated by filibustering (which LegCo members have no constitutional right to carry out). It is the

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<sup>1</sup> Section 9(4) of the Legislative Council Ordinance (Cap. 542).

constitutional responsibility of the President under BL 72 to ensure that the orderly conduct of LegCo's business is not frustrated, including by one or more of its own members.

7. The most effective solutions would be for the President to invoke RoP 92, or for LegCo to pass a resolution (on a motion moved by a LegCo member), to introduce a new procedure to provide for either (a) the election of the HC Chairman at a Council meeting presided over by the President or (b) the election of the HC Chairman at a HC meeting presided over by another specified member of LegCo. A further option (c) would be a variation of (a): a LegCo member would move a motion that an identified LegCo member be appointed as the HC Chairman.
8. Each of these measures would be lawful, since they would have, as their purpose and effect, the remedying of the frustration of the business of LegCo, and the frustration of its constitutional function. The Courts would recognise that it is a matter for the President or for LegCo to take such actions, if they consider one of them necessary to enable LegCo to return to the orderly performance of its constitutional functions, none of the options being contrary to the BL or to any other law. As to which measure is likely to be more effective, or whether the President or any LegCo member should take the initiative, these are political (and not legal) questions, on which we do not advise.
9. In respect of the second question, which is a question put to us on the basis of the President's reading of RoP 5(1)-(2) that there is no President's deputy pending the election of the HC Chairman and Deputy Chairman for the 2019-2020 session, if the President is temporarily absent from or unable to preside over a Council meeting or part thereof, the situation envisaged in RoP 3(2)(b) would arise, and the procedure therein may be invoked to elect a LegCo member to preside in the President's place. On that basis, Council meetings should not be affected by the present failure to elect the HC Chairman.

10. We are aware that the President has obtained the Joint Advice of Benjamin Yu SC and Jenkin Suen SC. The advice addresses distinct questions to those put to us. In particular, the advice deals with the powers of the incumbent HC Chairman pending the election of the HC Chairman for the 2019-2020 session, which is not an issue we have been asked to address. Mr Yu and Mr Suen advised that *“the incumbent HC chairman (being the HC chairman in office) should have all the usual powers which may be exercised by an HC chairman to conduct the usual business of HC until a new chairman is elected for the 2019-2020 session or until the end of the current term, whichever is earlier, but the exercise of powers is subject to...caveats”*.<sup>2</sup> The President will, no doubt, wish to consider whether that solution is more practical and effective in all the circumstances than the solutions we suggest.
  
11. The structure of this opinion is as follows:
  - 11.1 In Section B, we begin with a discussion of the interrelationship of LegCo, the President and the HC to highlight in particular HC’s supporting and subordinate role to LegCo in the discharge of the latter’s constitutional powers and functions.
  
  - 11.2 In Section C, we outline the HC’s procedure for electing its Chairman and turn to examine overseas legislatures to offer a sketch of the relevant procedures used by their committees to choose office bearers and resolve any deadlock in the process.
  
  - 11.3 In Section D, we identify the propositions of law that are relevant to answering the 3 specific questions and the various issues arising from such questions.
  
  - 11.4 In Section E, we answer the 3 specific questions. As the first and third questions are connected, we will deal with them first before addressing the second question.

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<sup>2</sup> §4 of Annex II to LegCo’s paper dated 27 April 2020 (LC Paper No. LS 67/19-20).

**B. LegCo, President and HC**

12. LegCo is a body created under section 3 of Chapter IV (“Political Structure”) of the BL. BL 66 provides that LegCo shall be the legislature of Hong Kong.

13. BL 73 provides that:

*“The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:*

- (1) To enact, amend or repeal laws in accordance with the provisions of the Basic Law and legal procedures;*
- (2) To examine and approve budgets introduced by the government;*
- (3) To approve taxation and public expenditure;*
- (4) To receive and debate the policy address of the Chief Executive;*
- (5) To raise questions on the work of the government;*
- (6) To debate any issue concerning public interests;*
- (7) To endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court;*
- (8) To receive and handle complaints from Hong Kong residents;*
- (9) If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its finding to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all*

*its members and report it to the Central People's Government for decision; and*

*(10) To summon, as required when exercising the above-mentioned powers and functions, persons concerned to testify or given evidence."*

14. BL 71(1) provides that the President shall be elected by and from among LegCo members. BL 72 provides that:

*"The President of the Legislative Council of the Hong Kong Special Administrative Region shall exercise the following 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 meetings;*
- (4) To call special sessions during the recess;*
- (5) To call emergency sessions on the request of the Chief Executive; and*
- (6) To exercise other powers and functions as prescribed in the rules of procedure of the Legislative Council."*

15. The *"rules of procedure"* and *"legal procedures"* mentioned in BL 72(6) and BL 73(1) respectively are references to the rules of procedure that LegCo set for itself including the RoP, which was made by the First LegCo on 2 July 1998, based on the Standing Orders of Hong Kong's colonial legislature, and amended from time to time by LegCo.<sup>3</sup>

16. BL 75(2) stipulates that:

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<sup>3</sup> *Leung Kwok Hung v President* [2007] 1 HKLRD 387 at §§7-8 (Hartmann J, as he then was); *Kwok Cheuk Kin v President* [2019] HKCFI 1482 at §8 (Chow J).

*“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.”*

17. It has been said of BL 75(2) that it *“enables the Council to set up various committees of the Council and prescribe their procedures including the quorum requirements for such committees.”*<sup>4</sup>
18. Central to the present discussion, RoP 75 establishes the HC, which comprises all LegCo members other than the President, and outlines its considerable powers and functions as well as some of its procedure.

*“75. House Committee*

*(1) There shall be a committee, to be called the House Committee, the members of which shall be all the Members other than the President.*

*(2) The chairman and deputy chairman of the committee shall be elected by the committee from among its members and shall hold office until the chairman and deputy chairman of the committee for the next session are respectively elected in that next session or, in case that election is held before that next session commences, until that commencement. In the event of the temporary absence of the chairman and deputy chairman, the committee may elect a chairman to act during such absence.*

*(2A) The election of the chairman and deputy chairman of the committee for the first session of a term shall take place at the first meeting of the committee in the session. For the second or each subsequent session of the term, the election may take place at a meeting held before that session commences.*

*(3) (Repealed)*

*(4) At any time after a bill has been referred to the committee under Rule 54(4) (Second Reading), the committee may allocate it to a Bills Committee for consideration, or may cause it to be considered in such other manner as the committee thinks fit.*

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*Kwok Cheuk Kin at §52.*

*(5) In deciding upon the timing and order of allocation of bills to a Bills Committee, the committee may take into account the number and relative priority of other bills currently referred to the committee under Rule 54(4) (Second Reading), and may at any time vary any decision as to the timing and order of allocation of any bill.*

*(6) Following allocation of a bill to a Bills Committee, the committee, after consultation with that Bills Committee, may decide the date for completion of consideration of the bill by the Bills Committee. Any such decision may be varied at any time, after consultation with the Bills Committee.*

*(7) Upon the allocation of a bill to a Bills Committee, the members of that Bills Committee shall be those Members (other than the President) who signify membership in accordance with procedural rules (which shall provide only for the manner and timing of such signification) decided by the committee.*

*(8) The committee may provide guidelines relating to the procedure of the Bills Committees, subcommittees constituted under subrule (12) and Panels constituted under Rule 77 (Panels).*

*(9) The committee may discuss any deliberations of a Bills Committee for the purpose of assisting members in preparation for resumption of second reading debate in the Council.*

*(10) The committee shall decide the manner of consideration of the following matters –*

*(a) any subsidiary legislation, whether or not such subsidiary legislation is subject to the provisions of sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap. 1);*

*(b) any other instrument made under any Ordinance;*

*(c) any draft of subsidiary legislation or instrument referred to in paragraph (a) or (b); or*

*(d) a petition referred to it under Rule 20(6) (Presentation of Petitions).*



*(10A) After the consideration of the subsidiary legislation, other instruments and petitions referred to in subrule (10), the committee may present a report to the Council.*

*(11) The committee may consider, in such manner as it thinks fit, any other item relating to the business of the Council.*

*(12) The committee may appoint subcommittees for the purpose of assisting the committee in the performance of its functions under subrules (10) and (11).*

*(12A) 20 members, including the chairman, shall form a quorum of the committee.*

*(12AA) All matters for the decision of the committee or its subcommittees shall be decided by a majority of the members voting.*

*(12B) The chairman of, or any other member presiding at, the committee or its subcommittees (other than those appointed under subrule (12) for the purpose of assisting the committee in the consideration of a matter referred to in subrule (10)) shall not vote, unless the votes of the other members are equally divided, in which case he shall give a casting vote.*

*(12C) The chairman of, or any other member presiding at, a subcommittee appointed under subrule (12) for the purpose of assisting the committee in the consideration of a matter referred to in subrule (10) shall have an original vote but not a casting vote.*

*(12D) (Repealed)*

*(12E) Notwithstanding the provisions in subrules (12B) and (12C), the chairman or the member presiding, as the case may be, shall have both an original vote and a casting vote in the election of the chairman or deputy chairman of the committee or its subcommittees. In the event that two or more nominees receive the same highest number of valid votes in such election, the chairman or the member presiding, as the case may be, shall give his casting vote.*

*(13) The committee may refer any policy matter relating to the business of the Council to a Panel constituted under Rule 77 (Panels), may make recommendation on the terms of reference for the consideration of such matter after consultation with the Panel and may request and receive*

*report on the policy matter from the Panel and then report further to the Council as appropriate.*

*(14) The committee shall meet at the time and the place determined by the chairman. Written notice of the place, day and time of every meeting shall be given to the members at least 3 days before the day of the meeting but shorter notice may be given in any case where the chairman so directs.*

*(15) Meetings of the committee shall be held in public unless the chairman otherwise orders in accordance with any decision of the committee.*

*(16) (Repealed)*

*(17) Where the chairman so orders, any matter for the decision of the committee may be considered by circulation of papers to the members of the committee and each member may signify his approval in writing submitted to the chairman. If a majority of the members so signify before the expiry of the period specified by the chairman for the purpose, and if upon expiry of that period no member has (in writing submitted to the chairman) signified disapproval of the matter or requested that the matter be referred for decision at a meeting of the committee, it shall be deemed to be approved by the committee.*

*(18) Subject to these Rules of Procedure, the practice and procedure of the committee and its subcommittees shall be determined by the committee."*

19. It is clear from RoP 75 that the HC's role is to assist and support LegCo in the discharge of its constitutional powers and functions. Additionally, the HC also assists and supports the President's work, as is evident by:

19.1 The HC's Chairman is the President's deputy and, when the President is absent or is unable to act, presides over meetings of the Council or a committee of the whole Council: RoP 3 and 5.

19.2 The HC is responsible for making recommendations to the President on a wide range of matters (eg RoP 23(4), 37(2), 37(3) and 78(2)). The rationale is that although it is for the President to

make the final decision, the HC's recommendation represents the majority view of LegCo members and accordingly, should have a bearing on the President's decision-making process.<sup>5</sup>

19.3 Where a motion to introduce a new procedure or suspend an existing rule in the RoP is proposed, the practice is that the President will take into account whether the HC supports the proposal before deciding to give or withhold consent to move the motion.<sup>6</sup>

20. The HC's practice and procedure further highlights its supporting and subordinate role to LegCo. RoP 75, which is made by LegCo, sets out the crucial procedural matters. RoP 75(18) expressly provides that the HC may determine its own practice and procedure but subject to the RoP. The House Rules ("HR"), adopted by the HC, gives more specific guidance, particularly on the finer operational aspects.

21. The relationship between LegCo and the HC on the one hand and between the RoP and the HR on the other hand is further illuminated by the provenance and subsequent development of the HC and its practice and procedure.

21.1 The origins of the HC may be traced back to the early 1970s. It was known as LegCo In-house meetings and acted under the UMELCO<sup>7</sup> structure of informal committees that operated outside of LegCo's formal committee structure, which only comprised 2 and later 3 standing committees and the occasional select committees.<sup>8</sup>

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<sup>5</sup> *A Companion to the history, rules and practices of the Legislative Council of the Hong Kong Special Administrative Region*, §13.162 ("Companion")

<sup>6</sup> *Companion*, §1.45; Instructions, §§10-11.

<sup>7</sup> UMELCO stands for Office of the Unofficial Members of the Executive and Legislative Council. Prior to 1985 Hong Kong LegCo election, which was the first ever election of LegCo, LegCo members were either official members (i.e. Government officials) or unofficial members appointed by the Governor. Following the 1985 election, UMELCO was renamed OMELCO, which stands for Office of Members of the Executive and Legislative Council.

<sup>8</sup> *Companion*, §6.8.

- 21.2 Like the HC, LegCo In-house meetings were held weekly when LegCo was in session to discuss matters relating to forthcoming Council sittings. Under it were various Ad Hoc Groups (the predecessors of the Bills Committee) formed to examine individual items of legislation and discuss issues of topical interest. They reported back to LegCo In-house meetings after completing their work.<sup>9</sup>
- 21.3 Being informal committees, they fell outside of, and were not subject to, the Standing Orders. Practices and guidelines developed and were agreed over time, which subsequently became the HR in 1988.<sup>10</sup>
- 21.4 Between 1992 and 1993, these informal committees were formally incorporated into the LegCo committee system and the Standing Orders were amended accordingly. On 8 July 1992, the Standing Orders were amended to provide for the HC to replace LegCo In-house meetings.<sup>11</sup>
- 21.5 In order to minimize disruption to the work of these committees, only those practices which were essential to their functioning such as membership, chairmanship and quorum etc were included in the Standing Orders while other operational details were supplemented by the HR or other work manuals.<sup>12</sup>
- 21.6 When the First LegCo considered the draft RoP in June 1998, they made a conscious decision to retain in the RoP the historical Westminster type of committees (i.e. the standing committees

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<sup>9</sup> *Companion*, §6.8.

<sup>10</sup> *Companion*, §§1.48, 6.9.

<sup>11</sup> *Companion*, §13.25.

<sup>12</sup> *Companion*, §§1.48, 6.16, 13.26 and 13.27

and select committees) as well as the committees drawn from the UMELCO (and later OMELCO<sup>13</sup>) structure.<sup>14</sup>

**C. Election of HC's Chairman and relevant overseas experience**

**C1. Hong Kong**

22. As mentioned at §18 above, RoP 75(2) and (2A) provide for the election of the HC's Chairman and Deputy Chairman.

23. HR 20(a) to (d) provide more details on the election procedure:

*“(a) The chairman and the deputy chairman of the House Committee shall be elected from among its members at an open meeting and shall hold office until the chairman and deputy chairman of the committee for the next session are respectively elected in that next session or, in case that election is held before that next session commences, until that commencement.*

*(b) The election of the chairman and deputy chairman of the House Committee for the first session of a term shall take place at the first meeting of the committee in the session. The Member who has the highest precedence in the Council is responsible for calling the first meeting of a term of the House Committee.*

*(c) For the second or each subsequent session of a term, the election of the chairman and deputy chairman of the House Committee may take place at a meeting held before that session commences. The meeting shall be called by the chairman in office. If both the chairman and deputy chairman in office before the election are being nominated for the office of the chairman, the member present who has the highest precedence shall preside at the election.*

*(d) The procedure for the election of the chairman and deputy chairman of the house committee is in Appendix IV. a member*

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<sup>13</sup> See footnote 7 above.

<sup>14</sup> Companion, §13.1.

*who nominates and absent member for the office is required to state that the absent member's acceptance of the nomination for office has been secured."*

24. We are told that LegCo's practice, in line with the practice in overseas legislatures to which we shall turn later, is that the Chairman and Deputy Chairman of the HC for a new session have to be elected before the HC proceeds to deal with its substantive businesses in the new session.<sup>15</sup>
25. In the present case, the HC Chairman for the 2018-2019 session has accepted nomination for that office for the 2019-2020 session. Therefore, her deputy for the last session presides over the election but he and others have filibustered all the meetings called by her to hold the election. As a result, the HC has failed to transact any substantive business 7 months into the present session. We are told this is unprecedented as past elections were completed within half an hour.<sup>16</sup>

## **C2. Relevant overseas experience**

26. Turning to the subject of the practice adopted by overseas legislatures in the election of the chairmen of committees, it would appear that, generally speaking, the chairmen are either (a) elected or appointed by the legislature or (b) elected by members of the committee.
27. There appears to be a notable trend (particularly in European Parliaments and also in the United Kingdom, Scotland, Northern Ireland) where chairmanships in committees are allocated (instead of elected) to different parties, usually through negotiations and consensus, to reflect the composition of the legislature as much as possible.<sup>17</sup> Another example is India where the chairmanships are appointed either by the

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<sup>15</sup> Instructions, §§23-25.

<sup>16</sup> Instructions, §28.

<sup>17</sup> *Catherine Lynch, The effect of parliamentary reforms (2011-16) on the Oireachtas committee system*, p. 74 (accessible at <https://www.researchgate.net/publication/317831136> The effect of parliamentary reforms 2011-16 on the Oireachtas committee system).

Chairman of the upper house or the Speaker of the lower house (as the case may be). We will not explore these examples in detail but will confine our discussion to instances relevant to resolving LegCo's present difficulties.

28. In the paragraphs below, we summarise how committees of overseas legislatures elect their chairmen and, where necessary, resolve any impasse in the election. The overseas experience shows that where deadlocks in elections at committee level did occur and could not be resolved through political discussions and negotiations, the dispute is often settled by a vote at the legislature level on a resolution to either (a) conduct the committees' election at the legislature level or (b) appoint a specific individual as chairman of the committee.
29. An important caveat to bear in mind when considering the overseas experience is that the respective constitutional settlement and established practices of Hong Kong and other jurisdictions are distinct, and in some cases vastly different. For instance, the BL is supreme whereas Queen-in-Parliament is supreme in the United Kingdom. Another example is that LegCo is unicameral whereas the legislatures of the United Kingdom, Canada and Australia are bicameral. A third example is that Hong Kong does not have government and (official) opposition parties as understood in other commonwealth jurisdictions.

**C2a. United Kingdom<sup>18</sup>**

30. In the House of Commons, the Chairs of committees listed in Standing Order No. 122B (currently the departmental committees together with the Environmental Audit Committee, the Petitions Committee, the Public Administration and Constitutional Affairs Committee, the Committee of Public Accounts, the Procedure Committee, and the Committee on Standards) are elected by the House by secret ballot following the

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<sup>18</sup> *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament (25<sup>th</sup> Ed., 2019)*, §§38.4, 38.17, 39.6, 40.12 & 41.7.

procedure set out in that Standing Order. Each party is allocated a proportion of the Chairs, which reflects the composition of the House.

31. For the handful of select committees not covered by Standing Order No. 122B, the committees elect their Chairs except in rare cases where the House orders that the Chair should be chosen in some other way (for example, typically, by specifying the Chair within the order appointing the committee).<sup>19</sup>

32. In the past where an election of the Chair resulted in deadlock, the methods adopted to resolve the situation include:

32.1 A member was called to the Chair for a single sitting only and a decision was taken on a permanent Chair at a subsequent meeting. Notably, where a committee has had a serious disagreement over the election of a Chair, it reported its formal minutes earlier than it would otherwise have done in order to allow a public debate of that disagreement.<sup>20</sup>

32.2 Another committee with power to appoint 2 sub-committees elected the 2 Chairs of the sub-committees to act as joint Chairs (or alternate as Chairs) of the main committee.<sup>21</sup>

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<sup>19</sup> *Erskine May* cites the example on 10 September 2014 where, upon the retirement of the Clerk of the House, the House agreed to a motion to appoint (a) a committee to “consider the governance of the House of Commons, including the future allocation of the responsibilities currently exercised by the Clerk of the House and Chief Executive” and (b) a member as the Chair. See also HC Deb (10 September 2014) col. 1014 to 1048, accessible at <https://publications.parliament.uk/pa/cm201415/cmhansrd/cm140910/debtext/140910-0004.htm#14091048000002>.

<sup>20</sup> *Erskine May* refers to the example of the Select Committee on International Development 2001-2002. The minutes of proceedings for 18 and 19 July 2001 are accessible at <https://publications.parliament.uk/pa/cm200102/cmselect/cmintdev/1326/132602.htm>.

<sup>21</sup> *Erskine May* quotes the example of the Environment, Transport and Regional Affairs Committee 1997-1998 where the committee resolved that 2 members would be called to the Chair as it saw fit, see the Terms of Reference accessible at (<https://publications.parliament.uk/pa/cm200001/cmselect/cmenvtra/485/48502.htm>). It would appear that the arrangement was carried over to the 2000-2001 session, by which time the function of the committee was taken over by the newly established Transport, Local Government and the Regions Committee, see: Minutes of Proceedings (<https://publications.parliament.uk/pa/cm200102/cmselect/cmtlgr/1346/134603.htm#2>).



33. The Chair or Chairs of each general committee (such as public bills committees, European Committees, Scottish, Welsh and Northern Ireland Grand Committees) are appointed by the Speaker from the Panel of Chairs.
34. In the House of Lords, the Chairman of a select committee may be appointed by the House on the proposal of the Committee of Selection: Standing Order No. 63(3). Alternatively, a committee may be given power to appoint its own Chairman as part of the order appointing the members of the committee. In the absence of a duly appointed Chairman, a committee may appoint its own substitute Chairman: Standing Order No. 63(4).
35. The Chair of a Joint Committee of the Lords and Commons is elected although in practice, the Lords include in their order of reference a specific power to agree with the Commons committee on the appointment of a Chair.

**C2b. Canada<sup>22</sup>**

36. In the House of Commons, the method of designating Chairs and Vice-Chairs vary depending on the type of committee. In most cases, they are elected by members of the committee, but others are, or may be, chosen by third parties (the House, the Speaker or the main committee in case of a subcommittee).
37. Standing Order No. 106(2) requires that each standing or special committee and standing joint committee shall elect a Chair and two Vice-Chairs from its membership at the beginning of each session. The

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<sup>22</sup> *Bosc and Gagnon, House of Commons Procedure and Practice (3<sup>rd</sup>, 2017), Chapter 20* (accessible at [https://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/ch\\_20\\_6-e.html#20-6-2-2](https://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/ch_20_6-e.html#20-6-2-2)), which is the current version of the book referred to in Instructions, §25; *Companion to the Rules of the Senate of Canada (2<sup>nd</sup> Ed., 2013), pp.301-303.*

standing order allocates the Chair and Vice Chairs amongst the government party, the official opposition and other opposition parties.

38. The first meeting is convened by the Clerk of the House: Standing Order No. 106(1). The only agenda item for the meeting is the election of the Chair. The committee clerk presides over the election but may not take part in the debate, hear points of order or questions of privilege, or entertain any motions except those concerning the election. The election is by secret ballot pursuant to the procedures in Standing Order No. 106(3).
39. The second edition of *House of Commons Procedure and Practice* (known as *Marleau & Montpetit*) at p.830 puts the point thus:<sup>23</sup>

*“As the meeting is called pursuant to Standing Order for the sole purpose of electing a Chair, and since the committee is not properly constituted until the Chair has been selected, the clerk who presides over the election has no authority to hear points of order or to entertain any motion except for the election of a Chair not even a motion to establish the manner in which the committee wishes to proceed with that election.”*

40. The committee clerk invites members to make motions proposing the election of a member as Chair. If no motion is adopted, the committee cannot proceed with other business. When stalemate is evident, the members disperse (i.e. the meeting is not adjourned)<sup>24</sup> and the Clerk of the House must convene another meeting at a later time, when the election of a Chair will be the first order of business.

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<sup>23</sup> Enclosure 6 of the Instructions.

<sup>24</sup> *Bosc and Gagnon* invokes the example of the Standing Committee on Official Languages, Evidence, May 15, 2007, Meeting No.54 at p.12 (accessible at <https://www.ourcommons.ca/DocumentViewer/en/39-1/LANG/meeting-54/evidence#page=14>) where after the committee voted to relieve the Chair of his duties, the clerk proceeded in the same meeting to receive motions for the election of a new Chair during which he was recorded to have said *“As clerk, all I can do is receive motions for the election of the chair. I cannot receive any other motion, I cannot hear any points of order and I cannot take part in your debates. I need motions for the election of the chair.”* and that *“I have no power to adjourn the meeting.”*

41. Following the election of the Chair, the committee under the direction of the Chair may agree, as is the usual practice, to proceed to the election of the Vice Chairs. The election may also be postponed to a later meeting.
42. Similarly, in the Senate, Rule 12-13 provides that once a Senate has agreed on membership of a committee, the Clerk of the Senate shall, as soon as practicable, call an organization meeting of the committee at which it shall elect a Chair. The clerk of the committee presides over the election of the Chair and no other business. Nominations are made by motion, but are not debatable. Once elected, the Chair presides over the remainder of the meeting. If no Chair is elected, the members disperse as the clerk cannot entertain motions to adjourn.
43. For joint committees of both Houses, the clerk of the committee conducts the election of first, a Joint Chairman from the Senate and then a Joint Chairman from the House of Commons. All members, regardless of their House, may vote on each motion.

**C2c. Australia<sup>25</sup>**

44. In the House of Representatives, the Chair and deputy Chair of a committee of the House (in contradistinction to unofficial committees of Members and Senators) are appointed: Standing Order No. 232. The Prime Minister appoints the Chair whereas the Leader of the Opposition appoints the deputy Chair.
45. It would appear from the old editions of *House of Representatives Practice* that the old Standing Orders, which required committees to elect their Chairs before starting business, were, in practice, overlooked in favour of either appointing, or only permitting the election of, (usually)

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<sup>25</sup> Elder & Fowler, *House of Representatives Practice* (7<sup>th</sup> Ed., 2018), pp. 643, 660-661, 669-671; Odger's *Australian Senate Practice* (14<sup>th</sup> Ed., 2016), pp. 489, 493, 523-524.

government nominees as Chairs.<sup>26</sup> This history suggests that the present Standing Order No. 232 codified the House's past practice.

46. Similarly, in the Senate, although the rules provide that the chair of a committee should be elected at the first meeting presided over by the secretary of the committee, it is customary that there will be one nomination for chair only. This, it seems, is due in large part to:
- 46.1 Standing Order 25(9), which provides that (a) for legislation standing committees, the chairs must be chosen from government senators and the deputy must be chosen from non-government or independent senators and (b) for references standing committees, the position is reversed.
- 46.2 The standard practice of following Standing Order 25(9) on the sharing of select committee chairs and deputy chairs.
47. For joint committees of the Senate and the House of Representatives, the resolutions of appointment generally provide for a Chair to be elected by each committee. In that case, the committee secretary calls the first meeting and presides over the election of the Chair. After the election, the Chair assumes control of the meeting and may announce the appointment, or conduct the election, of the deputy Chair if required. The remainder of the agenda is at the committee's discretion.

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<sup>26</sup> Page 566 of the first edition (published in 1981) explained that while the old Standing Order No. 331 provided that every committee, before the commencement of business, shall elect one of its Members to be chairman, in practice the resolutions of appointment provided that the committee shall elect as chairman one of the members nominated by the Prime Minister, the Leader of the House or the Government Whip whereas other resolutions provided that the Prime Minister shall nominate or appoint a government member of the committee as chairman. Page 593 of the third edition (published in 1997) explained that whereas Standing Order No. 331 remained, the practice was that the standing orders or resolutions of appointment normally provided that the committee shall elect as chair a government member while other resolutions provided that the Prime Minister shall nominate or appoint a government member of the committee as chairman. Page 660 of the sixth edition (published in 2012) explained that whereas Standing Order No. 232(a) provided that a committee shall elect its Chair before the start of business, it also provided that the Chair shall be a government member, except as otherwise provided. Accordingly, election was the exception as a committee secretary would normally receive only one nomination as chair.

**C2d. New Zealand<sup>27</sup>**

48. Select committees are established automatically by the Standing Orders or otherwise by the House on motion with notice: Standing Order Nos. 184 and 188.
49. At its first meeting, convened by the Speaker (Standing Order No. 190(1)), the committee's first duty is to elect a chairperson: Standing Order No. 201(1). Until the committee has done this, it is not in working mode. If it becomes clear during the first meeting that the committee is unable to elect a chairperson, the meeting is simply adjourned. The committee can transact no other business, nor can it decide when it will meet again. The Speaker convenes a further meeting of the committee.
50. Where a committee fails to elect a Chair due to deadlock, one viable solution is to move and pass a motion in the House to appoint a Chair.<sup>28</sup>
51. When the House establishes a committee, it may also designate a member as the chairperson, which it did on 4 April 2000 when it appointed the Speaker to chair the select committee to review the mixed-member proportional representation electoral system.

**D. Relevant propositions of law**

52. The following propositions of law are relevant to addressing the issues arising from the 3 specific questions posed to us:

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<sup>27</sup> *McGee, Parliamentary Practice in New Zealand (4<sup>th</sup> Ed., 2017)*, pp. 287, 294-295.

<sup>28</sup> *McGee* mentions the example on 17 February 2000 where the Government moved motions in the House, which were carried, to elect a named member as chair and another named member as deputy chair for each of 3 committees (i.e. Government Administration Committee, Education and Science Committee and Commerce Committee). What seems to have happened was that as a result of the gridlock between the Governing parties and the opposition parties, no nominee could obtain an absolute majority in the committee elections whereas the Government's motions in the House would be carried by simple majorities, which the Government and its allies had. See (2000) 581 NZPD (accessible at <https://drive.google.com/file/d/0B1lwfzv-Mt3CbVdYZk5xYkxOak0/view>), pp. 726-745, 745-769, 783-784 of the google document.

- 52.1 BL 73 confers various constitutional powers and functions, or responsibilities, on LegCo as a law-making institution and not on individual LegCo members.<sup>29</sup> In particular, LegCo members have no constitutional right to filibuster.<sup>30</sup>
- 52.2 BL 72 and BL 75(2) indicate that LegCo is to have exclusive authority to determine its procedure and that the President is to exercise the power to “preside over meetings” under BL 72 so as to ensure the orderly, efficient and fair disposition of LegCo’s business.<sup>31</sup>
- 52.3 In recognition of the separation of powers entrenched by the BL, and at common law, the Court observes the “non-intervention” principle, i.e. the Court recognises the exclusive authority of LegCo to manage its own internal process in the conduct of its business, in particular its legislative process, and will not intervene to rule on the regularity or irregularity of the internal process of LegCo but will leave it to determine exclusively for itself matters of this kind.<sup>32</sup>
- 52.4 The “non-intervention” principle is subject to, or limited by, the BL. This is because the BL is supreme and LegCo and the President must be subject to it. Any issue as to whether LegCo, or the President, has complied with the BL is a matter for the

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<sup>29</sup> *Leung Kwok Hung v President (No.1)* (2014) 17 HKCFAR 689 at §§21 & 29 (“**Filibuster CFA**”); *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555 at §§121-123, 200 (A Cheung J, as he then was); *Leung Kwok Hung v President* at §4 (Hartmann J).

<sup>30</sup> *Leung Kwok Hung v President (filibuster)* [2012] 3 HKLRD 470 at §§45, 47-48, 55, 57 (Lam J, as he then was); *Leung Kwok Hung v President* [2013] 2 HKC 580 at §44 (Cheung CJHC, as he then was) (“**Filibuster CA**”).

<sup>31</sup> *Filibuster CFA* at §22.

<sup>32</sup> *Filibuster CFA* at §§27-28.

Court given its constitutional obligation to enforce and interpret the BL.<sup>33</sup>

- 52.5 One instance where the Court will intervene is that it will determine whether LegCo and the President has a particular power, privilege or immunity – but not how or when they should be exercised – because any such power, privilege or immunity is conferred on them by the BL.<sup>34</sup>
- 52.6 Another instance is the Court will exercise jurisdiction to construe and enforce legislation if it prescribes “manner and form” procedures concerning LegCo.<sup>35</sup> The reason is obvious: LegCo and the President are not above the law, and the Court is under a constitutional obligation to construe and enforce the law, which LegCo has itself enacted.
- 52.7 The “non-intervention” principle, and the extent of the Court’s intervention as described above, is applicable to LegCo’s committees (and their chairmen) since they exercise and discharge the constitutional powers and functions, or responsibilities, conferred on LegCo by BL 73.<sup>36</sup>

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<sup>33</sup> *Filibuster CFA* at §§32, 34; *Chief Executive of HKSAR v President* [2017] 1 HKLRD 460 at §§24-25, 47 (Cheung CJHC) at §§62-66, 69 (Lam VP) at §§86-87 (Poon JA, as he then was), whose judgments were affirmed by the Appeal Committee; *Wong Yuk Man v Ng Leung Sing* [2015] 5 HKLRD 606 at §31 (Au J, as his Lordship then was, and whose judgment was affirmed on appeal).

<sup>34</sup> *Filibuster CFA* at §§39-43; *Yau Wai Ching v Chief Executive of HKSAR* (2017) 20 HKCFAR 390 at §§19-21 (Appeal Committee).

<sup>35</sup> *Yau Wai Ching* at §29 where the Appeal Committee approved the Court of Appeal’s judgment (see §§42-44) and the Court of First Instance’s judgment (see §§92-100) on the point. See also *R (Jackson) v Attorney General* [2006] 1 AC 262 at §§24 & 27 (Lord Bingham); §§49-51 (Lord Nicholls); *R v Chaytor* [2011] 1 AC 684 at §§63-78 (Lord Phillips PSC); *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 at §13.

<sup>36</sup> *Wong Yuk Man v Ng Leung Sing* (HCMP 3217/2015, 22.1.2016) at §§18-23 (Cheung CJHC and Lam VP) approving Au J’s judgment below (see §§35-56); *Cheng Kar Shun* at §§121-123, 143, 200, 209-212, 220, 231-232.

- 52.8 As the RoP is necessarily subject to BL 72 and BL 73, it cannot frustrate LegCo and the President in the discharge of their respective constitutional powers and functions.<sup>37</sup>
- 52.9 Unless a practice or procedure, whether in the RoP or not, is prescribed by the BL or in the law, it has no legal effect as the Court will not inquire whether there is a breach, impose any sanctions, or confer any remedy.<sup>38</sup>
53. From these propositions, we are able to distil these 2 core principles, which are fundamental to answering the 3 specific questions:
- 53.1 LegCo has exclusive authority to decide, devise, develop and depart from its own and its committees' procedure save that it cannot do anything contrary to the BL (particularly BL 73) and the law.
- 53.2 The President is obliged to interpret, apply and rule on the RoP, and other practices not covered by the RoP, in a manner which he considers, in his judgment, to be consistent with the BL (particularly BL 72) and the law.

**E. Answers to the Specific Questions**

**E1. First question (see §4.1 above)**

***E1a. Whether President has duty to act***

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<sup>37</sup> *Filibuster CFA* at §46; *Filibuster CA* at §§53-54.

<sup>38</sup> *Filibuster CFA* at §§33-38; *Erskine May*, §20.96, explaining the effect of orders, standing orders and resolutions of the United Kingdom House of Commons; *Elder & Fowler*, p.336, referring to the Speaker's Ruling in the Australian House of Representatives that motions to suspend standing orders that uphold constitutional requirements or principles are not acceptable.



54. In exercising his powers and functions under BL 72, the President has, in our opinion, a constitutional duty to ensure that LegCo can exercise or perform its law-making function under BL 73(1).
55. In particular, the Court of Final Appeal (see §52.2 above) has made it clear that the President's constitutional duty or function (conferred by BL 72) is not confined to presiding over meetings but includes ensuring the orderly, efficient and fair disposition of LegCo's business. Enacting, amending or repealing laws under BL 73(1) is arguably LegCo's *raison d'être*, or at least one of its core functions under the BL.
56. We also respectfully agree with the advice given by Sir Malcolm Jack (the former Clerk to the House of Commons of the United Kingdom) to the President's immediate predecessor that the President has the duty to protect LegCo as an institution.<sup>39</sup> In our view, the point is supported by a contextual and purposive construction of BL 72.<sup>40</sup> It is the constitutional responsibility of the President under that provision to ensure that LegCo works, and that its orderly conduct of its business is not frustrated by the conduct of anyone, including one or more of its members.
57. Presently, LegCo's business, in particular its legislative process, has been seriously disrupted by the filibusterers who have endlessly delayed the election of the HC Chairman. Although the filibusterers claim to be acting in accordance with the rules and procedures concerning the election of the HC Chairman,<sup>41</sup> BL 73 and BL 75(2) should be construed in a purposive manner.<sup>42</sup> The purpose of BL 75(2) in empowering LegCo to

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<sup>39</sup> President's Ruling on closing the joint debate at the Committee stage of the Legislative Council (Amendment) Bill 2012 (22 May 2012), §19.

<sup>40</sup> The approach to constitutional construction of the BL is well-established: *Kwok Cheuk Kin v Director of Lands* [2019] 2 HKC 538 at §§26-34 (Chow J).

<sup>41</sup> For example, we have been referred to the SCMP report of 13 April 2020 where the LegCo member presiding over the election is reported to have said "*I only follow the rules when presiding over the meetings, and I have no right to strip other members' right to speak.*". See also p.7 of Enclosure 7 of the Instructions: during the meeting on 15 November 2019, he is said to have invoked rule 22(p) of the HR to allow LegCo members to propose a motion he considered to be directly relevant to the election of the HC Chairman.

<sup>42</sup> *Kwok Cheuk Kin v Director of Lands* at §31; *Chief Executive of HKSAR v President* at §51; *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950 at §163 (Bokhary PJ).

make the RoP (and other rules and procedures of its committees including the HC) is to facilitate the orderly performance of its powers and functions under BL 73 and not to defeat the effective conduct of its business. Thus, those rules and procedures must not be used to frustrate LegCo from discharging its powers and functions.

58. In such circumstances, the President's duty described at §§55-56 above ("**President's Duty**") requires him to take steps to halt the disruption by misuse of the rules and procedures, particularly given the filibusterers have no constitutional right to filibuster: see §§52.1-52.2 above.
59. §41 of our Instructions raises a question whether some may criticize the President for acting in this case given the practice embodied in RoP 75(1)-(2A) that he is not a member, and does not participate in the internal work, of the HC including its elections.
60. We consider any such criticism to be misplaced. It overlooks the President's functions under BL 72 (including the President's Duty). RoP 75(1)-(2A) cannot be construed or applied to prevent the President discharging his constitutional duty or function to address the damaging effect the filibustering has caused to LegCo's work, in particular in the light of the propositions at §§52.2, 52.4-52.9 and 53.2 above. The President's constitutional duty under BL 72 cannot be removed by a rule of procedure.
61. The rationale behind the practice embodied in RoP 75(1)-(2A) is to ensure the President's impartiality, itself a feature of the President's constitutional duty or function under BL 72, as such impartiality is indispensable to the proper and smooth operation of LegCo's business.<sup>43</sup>
62. It is therefore our opinion that if the President considers it necessary to break the present gridlock so that LegCo can perform its constitutional functions, and he considers that he can do so without compromising his

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<sup>43</sup> *Companion*, §13.49.

impartiality, he is not acting in breach of the BL or the law: §§52.2, 52.4-54.9 and 53.2 above.

63. Overseas experience demonstrates that the Speaker participates, or is involved, in the business of committees including the election of office holders. It cannot be suggested that such involvement of itself has tainted the Speaker's impartiality.

63.1 In the United Kingdom, under Standing Order 122B(2)-(5), the Speaker facilitates the party leaders' discussion on the allocation of the chairs of select committees that require election and the tabling of motions concerning the allocation. Standing Order 122B(11)(b) provides that the ballot shall take place at a venue appointed by the Speaker and Standing Order 122B(12) empowers the Speaker to give directions on any matter of doubt arising from the conduct of the ballot and to vary the balloting timetable set out in Standing Order 122B(6)-(11).

63.2 In New Zealand, as mentioned at §51 above, the Speaker was appointed to chair a select committee on important issues concerning the electoral system. Further, it seems the Speaker may speak and vote in committee of the whole House so long as impartiality is not compromised.<sup>44</sup>

64. In any event, any suggestion that the President should have no say about the HC and its internal workings appears to us to be an overstatement.

64.1 In the first place, the proposition is plainly contrary to the President's Duty. The HC is part of LegCo and supports its work: section B above.

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<sup>44</sup> *McGee*, p.79.

- 64.2 Quite apart from the President's Duty, like the Speakers in other Westminster-model legislatures,<sup>45</sup> the President<sup>46</sup> is responsible for interpreting, applying and ruling on the RoP (including Part M of RoP, which deals with LegCo's committees, one of which is the HC) and other practices not covered by the RoP, which include matters concerning LegCo's committees including the HC.
- 64.3 Further, RoP 92 provides as follows: *"In any matter not provided for in these Rules of Procedure, the practice and procedure to be followed in the Council shall be such as may be decided by the President who may, if he thinks fit, be guided by the practice and procedure of other legislatures."*
- 64.4 Naturally, the President would take into account LegCo's views, if circumstances permit, since (a) BL 75(2) provides that LegCo shall make the RoP and (b) he should treat all LegCo members fairly and even-handedly.<sup>47</sup> But that does not mean that the President has no power, or duty, to take action, where necessary, in relation to the HC or its internal workings.
- 64.5 We are reinforced in our view by §3 of the Advisory Guidelines on Matters of Ethics (June 2009) issued by LegCo's Committee on Members' Interest, which states that a LegCo member *"should adhere to the spirit and the letter of any rules or regulations made by...the President for the regulation of the practice and procedure of the Council, its committees and subcommittees..."*.
65. The only legal constraints on the President are the BL and the law. The RoP, which must comply with the BL, cannot frustrate the President in his

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<sup>45</sup> *Erskine May*, §4.25; *Elder & Fowler*, pp.191-193 referring to Standing Order 3(e) of the Australian House of Representatives; *McGee*, p.17 referring to Standing Order 2 of the New Zealand House of Representatives.

<sup>46</sup> *Companion*, §§1.33 to 1.36.

<sup>47</sup> President's Ruling (22 May 2012), §§11-14, 23-24.

actions in discharging his constitutional duty or function: §§52.2, 52.4-54.9 and 53.2 above.

66. There is nothing in the BL or the law which prescribes how the HC Chairman is to be chosen or prevents the President from facilitating or expediting the process. In fact, as we have explained, the converse is true: the BL empowers the President to act if necessary. A paradigm example is where the President concludes that filibustering in the HC is preventing LegCo from performing its constitutional functions.
67. Further, RoP 75 was made by LegCo, pursuant to BL 75(2), to facilitate and not to hinder LegCo's business. Accordingly, it would be wrong in principle to construe or apply RoP 75 so as to permit the continuation of what the President concludes is action having the effect of preventing LegCo from carrying out its constitutional functions. Indeed, the President's constitutional duty or function under BL 72 requires him to construe and apply the RoP (including RoP 75) in a way that promotes the orderly, efficient and fair disposal of LegCo's business: §53.2 above.
68. Therefore, where the President construes and applies the RoP in a manner that facilitates and expedites the resolution of the present impasse, he cannot be said to be acting in breach of the BL or the law.

***E1b. What immediate action may be taken?***

69. For reasons discussed at section E1a, particularly as regards the President's Duty, we are of the view that the President has the power pursuant to BL 72 to direct the HC Deputy Chairman for the 2018-2019 session and/or the HC members to immediately proceed (at the next HC meeting) with the balloting for the HC Chairman for the 2019-2020 session in accordance with the procedures prescribed in §§7-12 of Appendix IV to the HR.
70. But we recognise that such action would be unlikely to resolve the gridlock as the filibusterers will probably ignore the President's direction.

The only available recourse for disregarding the direction is to commence disqualification procedure under BL 79(7) for misbehaviour, which in practice is, to say the least, an arduous and often arid exercise.<sup>48</sup>

71. Another option, which may be more effective, is for the President to invoke RoP 92.<sup>49</sup> As acknowledged at §41 of the Instructions, there is a clearly a matter that needs to be dealt with but which the RoP, particularly RoP 75(2)-(2A), does not provide for as is evident by the present impasse. As a result, LegCo finds itself in an unprecedented situation whereby voluminous work has been interrupted indeterminately. We have been asked whether it may be argued that the President cannot invoke RoP 92 as the election procedure of the HC Chairman is set out in HR 20 and Appendix IV to the HR. That the argument is untenable is evident by the facts of the case. It is one thing to say the procedure would have worked in normal circumstances. But the situation presently faced by LegCo is anything but normal. Its rules and procedures did not contemplate such circumstances and do not provide for them.
  
72. In the exceptional circumstances of this case, the President may consider introducing a procedure to provide, on this occasion and not generally, for the election of the HC Chairman by LegCo at a Council meeting presided over by the President. We should add that:
  - 72.1 In our view, there is no legal impediment precluding the President from deciding whether to proceed straight to balloting or to call for fresh nominations. It is a political decision, which we do not advise on.
  
  - 72.2 Given the practice that the President refrains from casting his or her original vote in Council meetings,<sup>50</sup> the election will, in substance, be no different from any election of the HC Chairman

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<sup>48</sup> *Companion*, §§3.91 to 3.93, 3.110 to 3.123.

<sup>49</sup> See §64.3 above.

<sup>50</sup> *Companion*, §2.77.

as only all LegCo members present (other than the President) will cast the vote.<sup>51</sup>

73. Alternatively, the President's power to decide "*the practice and procedure to be followed in the Council*" pursuant to RoP 92 is, in our opinion, sufficiently broad to enable the President to introduce a practice and procedure to be adopted at a HC meeting.<sup>52</sup> We therefore consider that it is open to the President, in the exceptional circumstances of this case to introduce a procedure to provide for a specified member of LegCo to preside, on this occasion, over the election of the HC Chairman at a HC meeting. More specifically:

73.1 We are asked whether the President must follow the procedure in §2 of Appendix IV to the HR in selecting the specified member. In our view, the answer must be "no" as otherwise it would lead to the result that only the HC Deputy Chairman of the 2018-2019 session may be chosen.

73.2 As mentioned at §72.1 above, there is no legal impediment precluding the President from deciding whether the presiding LegCo member should proceed straight to balloting or to call for fresh nominations.

73.3 Although there is Commonwealth precedent where a clerk of the committee presides over the election of the Chair of the committee, it would be inadvisable for the President to specify the Clerk to LegCo to preside as this may be vulnerable to legal challenge on the fundamental basis that it confuses the advisory role of the Clerk to LegCo with the role of someone with decision-taking responsibilities, with LegCo members having the latter function. In this regard, we should mention that RoP 75 was amended in 1999 by deleting the rule that the clerk to the

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<sup>51</sup> §§7-8 of Appendix IV to the HR.

<sup>52</sup> Our reading of RoP 92 is reinforced by the point (see §64 above) that the President may, if necessary, regulate the practice and procedure of LegCo's committees including the HC.

HC shall preside over the election of the HC Chairman so it would seem that LegCo's will, as expressed by that amendment, was that there should be a clear demarcation between the responsibilities of LegCo members and the clerk.

- 73.4 We have also been asked whether the President may (a) declare that the HC election for its Chairman for the 2019-2020 session is invalid on the grounds of material irregularity and (b) direct that the election procedure should be restarted. As we have said at §72.1 above, there is no legal impediment against the President deciding that the election procedure should be restarted, if the circumstances justify. That is on the basis that (whether or not there has been any "material irregularity"), the President considers that in all the exceptional circumstances it is appropriate to direct that the election procedure should be restarted in the interests of ensuring that LegCo can now conduct its business efficiently and without disruption.
74. In our opinion, all of these proposed procedures would be compatible with the BL and the law: §§52.2, 52.4-52.9 and 53.2 above. As we have said at §66 above, there is no constitutional or legal requirement governing how to choose or elect the HC Chairman. As only LegCo members present (other than the President) will be voting for the HC Chairman under any of these procedures, the deviation from the procedure under RoP 75(2)-(2A), which would have functioned properly but for the filibustering, will be kept to a minimal.
75. If the President invokes RoP 92, it is important that he should make clear that the procedure introduced is invoked only to address the exceptional difficulties which LegCo is now facing. He should emphasise that he is invoking RoP 92 not to circumvent the RoP but to deal with a problem which the RoP, and particularly RoP 75(2)-(2A), does not contemplate and for which it does not provide.



76. In a ruling made by the President's immediate predecessor to explain his reasons to invoke RoP 92, he intimated that he had thought it advisable to observe the principles of fairness, impartiality, even-handedness and to take into account the views of LegCo members before deciding whether to introduce the new arrangement.<sup>53</sup> We would respectfully advise that the President should, if circumstances permit, follow the same practice, which is eminently sensible, before deciding whether or not to invoke RoP 92.
77. Bearing in mind the scale and duration of the disruption and having regard to the President's powers and functions under BL 72, particularly the President's Duty, the President has every right to take a more active part in facilitating discussions amongst LegCo members to resolve the situation.
78. In this connection, the President may also advise LegCo members when consulted upon any action which they propose to take (for instance see section E2 below) or upon any question on points of order or requests for motions to be moved and, if necessary, give a ruling to facilitate or expedite LegCo's business.<sup>54</sup> The Speaker of the House of Commons in the United Kingdom has similar powers by usage.<sup>55</sup>

**E2. Third question (§4.3 above)**

79. The third question essentially asks whether LegCo (as opposed to the President) can take any immediate action to resolve the current impasse.
80. Since LegCo is the master of its own practice and procedure, it would be in breach of the BL if it were to fail or refuse to correct this continuous frustration of its business by some of its members persistently abusing its practice and procedure to block it from performing its functions under BL 73: §§52 and 53.1 above.

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<sup>53</sup> President's Ruling (22 May 2012).

<sup>54</sup> *Companion*, §1.34.

<sup>55</sup> *Erskine May*, §4.25.

81. In our view, the reasons justifying the President invoking RoP 92 to introduce a new procedure in the present case would apply *mutatis mutandis* to justify a LegCo member moving a motion that LegCo do pass a resolution to introduce a new procedure to provide for either (a) the election of the HC Chairman at a Council meeting or (b) the election, to be presided over by another specified LegCo member, at a HC meeting.
82. A variation of the first resolution is for the motion to identify the LegCo member who will be appointed as the HC Chairman (following the New Zealand example mentioned at §50 and footnote 32 above). The effect of the motion would be that LegCo members will be asked to vote for or against the LegCo member identified, in place of the election procedure prescribed in §§7-12 of Appendix IV to the HR being conducted at a Council meeting.
83. LegCo's power to pass one or more of the resolutions under discussion, if there is sufficient support,<sup>56</sup> is not in doubt. We repeat the point at §74 above. Further, the proposals are also consistent with overseas experience where the legislature may elect or designate a chair of one of its committees: §§30-31, 36, 50-51 above.
84. We do not believe the common practice for the HC to be consulted beforehand<sup>57</sup> is an insurmountable obstacle. This is not a requirement under the BL, the law or even the RoP (see the proposition at §§52-53 above). In any case, the reason for the practice is to gauge whether a proposed new procedure has the necessary support amongst LegCo members. That could be achieved via other avenues and, if necessary, the issues may be ventilated at a debate preceding the vote.

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<sup>56</sup> Section II of Annex II to the BL prescribes that the passage of a motion introduced by a LegCo member shall require a simple majority vote of each of the two groups of LegCo members (i.e. functional constituencies and geographical constituencies) present.

<sup>57</sup> *Companion*, §1.45; Instructions, §10.

85. As we have said at §71 above, LegCo is faced with a new situation not anticipated or provided for in the RoP, particularly RoP 75(2)-(2A). Accordingly, we do not think (a) it is necessary to suspend any of the RoP or (b) the resolutions under discussion have the object or effect of suspending any of the RoP. That being the case, RoP 91 is not engaged.
86. Even if RoP 91 were to be engaged,<sup>58</sup> the inability of the President to consult the HC to assess whether it supports the proposed suspension before deciding to give or withhold consent to the motion, as he would have done pursuant to practice<sup>59</sup> in normal circumstances, is not a stumbling block for the reasons we have given at §84 above. The HC is not the exclusive means by which the President may consult his colleagues. If, having taken appropriate soundings, the President finds there is sufficient support for a motion to introduce a new procedure, he may, given the extraordinary circumstances faced by LegCo, consider he should permit the motion to be debated and voted at a Council meeting.
87. Regarding other possible ways of handling the situation, as pointed out at §16 of our Instructions, RoP 54(4) provides that referral of a bill to the HC is not the only option in the second reading stage of the law-making process and in January 2020, a public officer, precisely because of the stagnation of the HC, moved a motion, and LegCo passed a resolution, to refer a Government bill to a LegCo panel instead. Whether this may be replicated for other bills will depend on the circumstances. But if the stalemate continues, LegCo collectively may have to consider whether a specific bill needs to be referred to the HC or may be referred to other panels or committees.
88. That said, any drastic and permanent change is likely to be controversial and is not the swift resolution needed to address LegCo's present predicament. We should add that we are not aware of any suggestion that LegCo should study whether there is any need to make any

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<sup>58</sup> *Companion*, §10.099 mentions that a motion under RoP 91 is subject to debate but not amendable.

<sup>59</sup> *Companion*, §1.45; Instructions §11.

permanent change to the procedure of electing (or selecting) the HC Chairman, or even more substantial changes regarding the HC's functions or the HC's place within LegCo's committee system. Any such changes may have far-reaching repercussions and thus, it would be prudent for LegCo members, particularly those on the Committee on Rules of Procedure, to take time to carefully examine all the issues, including any lessons that may be drawn from this unfortunate case, before arriving at a concluded view as to whether any changes should be made to the RoP.

**E3. Second question (§4.2 above)<sup>60</sup>**

89. We understand the second question to be directed at the problem identified at §38 of our Instructions, i.e. on the President's reading of RoP 5(1)-(2), if he is absent or unable to act, no Council meetings could be held as there is presently no President's deputy.

90. More specifically, we assume the President has in mind situations where he may be absent or unable to act temporarily instead of for any extended period of time, which may, depending on the facts, engage one or more of the events prescribed in BL 79(1) to (6).

91. The solution appears to lie in RoP 3(2)(b), which provides that:

*“(2) In the absence of the President from a meeting of the Council or a committee of the whole Council or when, in his opinion, he is unable to act, there shall preside at that meeting –*

*(a) the President's deputy; or*

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<sup>60</sup> Since the situation is covered by RoP 3(2)(b), we have not found it necessary to look to the experience in overseas legislatures. In any event, they have vastly different arrangements. For instance, in the House of Commons of the United Kingdom, the Deputy Speaker Act 1855 provides for the appointment of the Chairman, First Deputy Chairman and the Second Deputy Chairman of Ways and Means as Deputy Speakers. The positions are elected by the House pursuant to Standing Order 2A. On occasions when the Speaker and the Deputy Speakers are absent, the House has resolved another member should be entitled to exercise all the powers vested in the Deputy Speaker. The Speaker also appoints a Panel of Chairs, whose appointees may chair a committee of the whole House. See *Erskine May*, §§4.32, 4.37-4.38 and 8.30.

*(b) in the absence of the President's deputy from that meeting or when, in his opinion, he is unable to act, the Member who is elected by and from among the Members present in accordance with the procedure as determined by the House Committee."*

92. On the President's reading of RoP 5(1)-(2) that there is no President's deputy pursuant to those provisions because the HC Chairman and Deputy Chairman for the 2019-2020 session have yet to be elected as such under RoP75(2),<sup>61</sup> then if the President is absent from a meeting of the Council, or is unable to act, the situation envisaged under RoP 3(2)(b) would arise and a presiding member may be elected according to the procedure determined by the HC.

93. HR 1B provides that:

*"In the absence of the President and the President's Deputy from a Council meeting, or when in their opinion, they are unable to act, the Members present shall, in accordance with the procedure set out in Appendix 1A, elect among themselves a Member to preside at that meeting."*

94. §§2-9 of Appendix 1A set out the election procedure where the President knows in advance that he and his deputy will not be able to preside over a Council meeting or a part thereof: the nomination and election of a presiding member will be held at the meeting immediately preceding the relevant meeting.

95. §10 of Appendix 1A provides that where the President, his deputy and the presiding member (if one is elected), are absent from a Council meeting, the election of the presiding member shall be conducted at that meeting by the member present who has the longest continuous service in LegCo following the procedure identified at §§2-9 of Appendix 1A.

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<sup>61</sup> Instructions, §38.

96. In other words, Appendix 1A enables a presiding member to be elected to preside in place of the President whether or not the President knows in advance that he will be absent from or unable to preside over a meeting.
97. Further, RoP 3(3) provides that a presiding member shall enjoy all those powers conferred by the RoP on the President in respect of the Council meeting, or part of the meeting, at which the presiding member presides or in respect of which the President has requested the presiding member to preside. The President's immediate predecessor ruled in 2012 that such powers include not only those required for the conduct of a meeting, or part thereof, but also for dealing with matters which require the prior approval of the President in respect of such a meeting or part thereof.<sup>62</sup>
98. In the circumstances, if the President is temporarily absent or unable to preside over a Council meeting, the meeting may continue and should not be hindered by the fact that there is presently no President's deputy.

11 May 2020.



P.P.

Lord Pannick QC  
Blackstone Chambers



Anthony Chan  
Temple Chambers

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<sup>62</sup> *Companion*, §2.80.

**Re: Election of Chairman of the House Committee**



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**JOINT OPINION**

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11 May 2020

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