

(Summary translation prepared by the
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for Members' reference only)

**Participating in the amendment of the Basic Law to
display the spirit of autonomy**

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1. The Basic Law is a constitutional law which is also the fundamental law of the Hong Kong Special Administrative Region (HKSAR). The major difference between constitutional laws and general laws is that the former govern the fundamental constitutional structure and the principles of basic rights. When compared with general laws, constitutional laws are more authoritative and solemn, carrying a stronger legal effect. Meanwhile, they command more respect from the people and have greater acceptability. Therefore, constitutional laws should not be amended lightly. Generally speaking, the procedure for constitutional amendment differs from that for amending general laws. This is to ensure that any constitutional amendment is discreetly proceeded with, that there is full participation from the public in the amendment process, that a reasonable balance among various constitutional powers can be maintained and that the necessary safeguards for basic human rights will not be undermined.

2. While the Basic Law is not a constitution, it is a constitutional law of supremacy designed to give effect to the Sino-British Joint Declaration and Mr DENG Xiao-ping's great notion of "one country two systems". Therefore, the Basic Law has specifically provided for its amendment. Under Article 159 of the Basic Law, the power of amendment shall be vested in the National People's Congress (NPC). The power to propose amendments can be exercised by each of the following three parties: (1) the Standing Committee of NPC; (2) the State Council; (3) HKSAR. Before a bill for amendment to the Basic Law is put on the agenda of the NPC, the Committee for the Basic Law of HKSAR shall study it and submit its views. Finally, Article 159 stipulates that no amendment to the Basic Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.

3. As such, either the Central People's Government (CPG) or HKSAR can take the initiative to propose amendments to the Basic Law. Considering the principle of "Hong Kong people ruling Hong Kong", it is more desirable for Hong Kong to take the initiative and exercise the power conferred by Article 159 to propose amendments where amendments to the Basic Law are deemed necessary. Article 159 has rather detailed provisions on amendment bills proposed by Hong Kong:

“Amendment bills from the HKSAR shall be submitted to the NPC by the delegation of the Region to the NPC after obtaining the consent of two-thirds of the deputies of the Region to the NPC, two-thirds of all the members of the Legislative Council (Legco) of the Region, and the Chief Executive (CE) of the Region.”

4. In understanding this Article, the key question is how to trigger the process through which Hong Kong can propose amendments to the Basic Law? In other words, which party in Hong Kong can formally introduce amendment proposals to the Basic Law first? For example, can individual Members of the Legco exercise the power to introduce amendment proposals in Legco? Can individual local deputies to NPC exercise this power at meetings of the local deputies? Or whether it is the case that only the HKSAR Government can exercise this power?

5. On this question, my opinion is that any of the three parties (namely local deputies to NPC, Members of the Legco and the CE) mentioned in Article 159 with regard to amendment bills proposed by Hong Kong may exercise this power and trigger the mechanism to amend the Basic Law. It is because Article 159 and other provisions in the Basic Law do not deny or restrict the power of any of the three parties to propose amendments to the Basic Law. Besides, when reference is made to the three parties in Article 159, it seems that the three parties are given equal status in their participation in the amendment process (except that local deputies to NPC are further made responsible for submitting amendment bills to the NPC after consent is obtained from the three parties).

6. Regarding the power to introduce bills which may become the law of the HKSAR, the Basic Law (mainly in Article 74) does provide for certain restrictions. Yet, these restrictions are not applicable to the power to propose amendments to the Basic Law. Article 48 (10) of the Basic Law empowers the CE “to approve the introduction of motions regarding revenues or expenditure to the Legco”. The word “motions” here should refer to those which are directly related to a specific item of revenue or expenditure, and amendment proposals on the Basic Law are unlikely to be included. (It should be noted that if an amendment proposal on the Basic Law is first proposed by local deputies to NPC, the Legco has the duty to respond under Article 159 and this corroborates the above argument that Article 48(10) is not applicable to amendment proposals on the Basic Law.) Furthermore, while Article 62(5) empowers the HKSAR Government “to draft and introduce bills and motions”, it does not mean that this power is exclusively conferred on the HKSAR Government. For example, where motions are concerned, Annex II of the Basic Law, which stipulates the voting procedures, has expressly made provisions on “motions introduced by individual Members of the Legco”.

7. Therefore, I am of the opinion that any Legco Member has the power to move “motions” to propose amendments to the Basic Law. The amendment proposals should then be debated and put to a vote in Legco and be passed in the form of a “motion” or “resolution”. (In this regard, it is useful to refer to the procedure for constitutional amendment in Canada. For example, reference can be made to Section 38 of the Canadian Constitution which stipulates the methods of constitutional amendment. To amend the Constitution, the Senate and the House of Commons shall each determine whether the Constitution should be amended and also the specific amendment proposals in the form of “resolutions”. The decisions should be supported by two-thirds of the provincial legislatures which represent more than half of the total population in Canada. The Governor General of Canada will then publish a public notice and the procedure for constitutional amendment will be completed.) These motions are not subject to the restrictions in Article 74 or 48(10).

8. Under Article 75 of the Basic Law, the rules of procedure of the Legco shall be made by the Council on its own. A very comprehensive set of Rules of Procedure has been made for the first term of Legco but it does not contain express provisions on how motions or proposals to amend the Basic Law should be dealt with. Therefore, I propose that the Legco should consider amending its Rules of Procedure to incorporate provisions on the introduction and handling of amendment proposals on the Basic Law. Such provisions may be drafted along the lines of the existing provisions on motions.

9. Apart from making provisions on amendment proposals from Members, the Rules of Procedure should also include provisions on how amendment proposals from the CE or local deputies to the NPC should be handled. Under the current system, bills introduced by the Government should be sent to the Clerk to the Legco for subsequent arrangements to be made for the first, second and third readings of the bill. Similarly, amendment proposals from the CE or local deputies to the NPC may be forwarded to the Clerk to the Legco first. Arrangements can then be made for the proposals to be debated and put to a vote (in the form of a “motion” instead of a “bill”). Similar to the procedure on bills, Basic Law amendment proposals introduced by any of the three parties should first be published in the Gazette before they are scrutinized by the Legco in order to facilitate public discussion. The Legco should also consider setting up committees to study the amendment proposals and hold public hearings to receive views from all sectors of the community, thereby fostering the spirit of democratic participation and drawing on collective wisdom.

10. Given that amendment proposals introduced by Hong Kong to the NPC involve interaction among the three parties concerned (the Legco, local deputies to NPC and the HKSAR Government), local deputies to NPC also have the duty to work out procedural rules on how they should handle, scrutinize, discuss and vote on the amendment proposals. These rules should be made in a manner as scientific, stringent and democratic as that of Legco in making corresponding stipulations on the matter. As Article 159 of the Basic Law has clearly provided for the role of local deputies to NPC in amending the Basic Law, stating in express terms that the consent of two-thirds of the deputies is required, I believe that the deputies have been impliedly authorized by the Basic Law to devise procedural rules on how they should give their consent. The draft rules may be submitted to the Standing Committee of NPC for confirmation where necessary. In the event of future disputes in the implementation of the rules, the cases may have to be handled by the Standing Committee of NPC, given that courts in Hong Kong may not be able to exercise full jurisdiction in this regard.

11. Apart from the formal procedural rules, informal contact and communication are also essential. The success of any amendment proposal from Hong Kong hinges on whether a consensus can be reached in the community of Hong Kong. The greatest difference in substance between amendments to constitutional laws and those to general laws is that the former require a broader and a more consolidated mandate from the people. Insofar as the amendment of the Basic Law is concerned, Members of the Legco and local deputies to NPC must respect people's opinions, reflect people's opinions and conform to the will of the people. In a nutshell, everything must ultimately be premised on people's opinions.

12. There are ways to collect and collate people's opinions. For instance, public opinion polls, the media, referendum, etc. Irrespective of the ways through which people's opinions are conveyed, one should never overlook the influence of community leaders in stimulating people's thinking. Community leaders can identify the major areas that require discussion and present different arguments, thereby leading the general public to conduct discussions. In this regard, Members of the Legco and local deputies to NPC also have a part to play as community leaders and their views on the amendment of the Basic Law carry weight.

13. In this connection, any amendment proposal from Hong Kong involves at least three types of interaction. First, interaction among community leaders. This includes the exchange of views and the formation of a consensus among Members of Legco, among local deputies to NPC, and also between the two. Secondly, interaction between community leaders and the general public. Thirdly, interaction between community leaders and the Government.

14. To facilitate the development of the various types of interaction and enable a consensus to be reached in the community of Hong Kong about amendments to the Basic Law, Members of the Legco may consider convening a joint meeting with local deputies to NPC to discuss the amendment proposals. While the joint meeting provides the opportunity for more communication between the participants, it can also enhance liaison with various social organizations. Hearings may also be held to collect public views on the issue. It is considered a more plausible approach for the joint meeting to come up with amendment proposals in the first place. Then, the proposals can go through the various stages of the amendment mechanism which are subject to formal procedural rules.

15. While any constitutional document is inherently solemn and authoritative and should not be amended arbitrarily, amendments ought to be made where and as necessary from time to time in order to ensure that the constitutional document synchronizes with the development of society, that it meets the evolving needs of society and that it addresses new problems which were unforeseen at all when the document was being drafted. Overseas experience in the development of constitutions provides strong justifications for this point of view. K. C. WHEARE, a famous British jurist in constitutionalism, pointed out that:

“.....for the most part, countries which have taken their Constitutions seriously have been able to make sufficient use of their process of formal amendment to justify us in saying that the process is not unduly rigid or cumbersome.where communities have lived under constitutional government, where, that is to say, the Constitution has been in effective operation and where it has been regarded with respect, the process of formal amendment has seldom proved too difficult for the necessary adaptation of the Constitution to any strongly felt needs in the community.” (Modern Constitutions, 1966, pp.97,99)

Besides, in countries where constitutionalism is upheld, it is rather common that constitutional amendments are used as a means to override the interpretation by the highest court in the country of a particular provision in the constitution. In his book titled “American Constitutional Law”, Laurence H. TRIBE, a famous American academic in constitutionalism, cited four such cases in American constitutional history as examples (the first case took place in 1795 and the last in 1971).

16. The Basic Law was formulated in 1990 and most of the provisions therein (including Articles 22 and 24 which have aroused most concern) are based on the Sino-British Joint Declaration signed in 1984, which was 15 years ago. It is believed that the drafters of the Joint Declaration 15 years ago could not possibly have anticipated the social problems that the Court of Final Appeal’s

recent judgement entails. For these reasons, I hold the view that the social problems caused by the judgement should be resolved by amending the Basic Law. In order to facilitate the orderly arrival of children born in the Mainland to Hong Kong people and address the need for Mainland talents in view of the economic development in Hong Kong, we must properly formulate a sound policy for people from the Mainland to settle in Hong Kong and establish such a policy by making the necessary amendments to the Basic Law.

17. As illustrated above, there is a wider scope for Members of the Legco to take a more proactive approach in respect of the amendment of the Basic law compared to their position in proposing a Member's bill. Local deputies to NPC can also play a positive and important role in this regard. In fact, when compared to the extent that the people of Hong Kong could participate in the drafting process of the Basic Law, the right of Hong Kong people to participate in the amendment of the Basic Law under Article 159 can be considered an improvement. Participation in the amendment process under Article 159 will be a valuable experience to the people of Hong Kong in democracy and autonomy. It is hoped that this profoundly meaningful right of ours will be cherished and put to good use.

Annex

Proposed amendments to the Basic Law to resolve certain problems caused by the judgement of the Court of Final Appeal:

Proposal 1

Article 24(3) be amended as follows:

“Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2) after they have become permanent residents.”

Explanation

This amendment incorporates a corresponding provision in Macau’s Basic Law, reaffirming the relevant proposals made by the Sino-British Joint Liaison Group and the Preparatory Committee of the HKSAR on the issue. The Preparatory Committee’s report on its work was endorsed by the NPC in March 1997. Besides, the substance in the proposed amendment has already become the law of HKSAR, and was confirmed to be consistent with the Basic Law by the Court of Appeal before the Court of Final Appeal gave its recent judgement.

Proposal 2

Paragraph 4 of Article 22 be amended as follows:

“For entry into the Hong Kong Special Administrative Region, people from other parts of China, including those mainland residents originally residing in China who have become Hong Kong permanent residents by virtue of Article 24(3) of this Law upon the commencement of the Basic Law on 1 July 1997 and who intend to enter the Region for the purpose of settlement, must apply for approval. Among them,

Explanation

The proposed amendment reaffirms the previous system under which the “Certificate for Entitlement” was linked with the “One-way Exit Permit”. This system had been confirmed to be consistent with the Basic Law by the Court of Appeal and the Court of First Instance. Under this system, persons who are originally residents in the Mainland and who, by virtue of the Basic Law coming into effect, have become permanent residents of Hong Kong since 1 July 1997 under Article 24(3) can come to Hong Kong for settlement in batches and in an orderly manner, which is in the interest of the community of Hong Kong. This Article involves the relationship between the CPG and HKSAR, as well as

matters under the jurisdiction of CPG. Before making its recent judgement, the Court of Final Appeal should have asked the Standing Committee of NPC to interpret paragraph 4 of Article 22. The proposed amendment can reflect more clearly the original intention of the Article.