

12 March 1999

To: the Legislative Panel on Constitutional Affairs

My submission will address the following three issues:

1. The parties within the HKSAR who/which may initiate the amendment process;

Basic Law does not address this issue directly though it mentions that an amendment to the Basic Law from the HKSAR requires the endorsement of the Chief Executive, two-thirds majority of the Legco members and local deputies to the NPC respectively. Bearing in mind that both the executive branch and Legco members can propose bills (though the latter's capacity is quite limited), I am of the view that both the executive branch and Legco members should have the authority to propose amendment to the Basic Law. The issue of whether the same restriction should be maintained for the proposals made by Legco members will be addressed later. Another issue should also be considered, i.e., whether an individual member or only a group of members will be allowed to submit a bill to amend the Basic Law. Since there is a requirement under the Basic Law that such a bill has to get the support of two-thirds majority of Legco members before it can be submitted to the NPC, an individual member should be allowed to initiate the amendment process. That is consistent with our practice of proposing a private member bill.

Whether or not local deputies to the NPC should have the authority to initiate the amendment process is arguable. On the one hand, local deputies are not expected to get directly involved with affairs of the HKSAR. They are not part of the HKSAR government. Following this line and also for the sake of the image of high degree of autonomy, it is better to restrict its capacity. On the other hand, Basic Law does not have such restriction. Moreover, Article 10 of the Organic Law of the National People's Congress of the PRC provides:

A delegation or a group of thirty or more deputies may submit to the NPC bills or proposals that fall within the scope of its functions and powers. The Presidium may decide whether or not to put the bills or proposals on the agenda of the Congress, ...

That means under Chinese constitutional structure, local deputies to the NPC enjoy the right to propose a bill to amend the Basic Law. Any restriction on their exercise of such a right may be argued as a violation of their constitutional right.

Because Article 159 provides that a bill to amend the Basic Law has to be submitted by the delegation of the Region to the NPC, any proposals from either the executive branch of the government or Legco members will go through the delegation of local deputies to the NPC anyhow. I am, therefore, in favor of not granting the authority to local deputies to initiate the amendment process.

2. The need and appropriateness to underpin the process by local legislation and to regulate by local legislation the manner in which Legco members and local deputies to the NPC discharge their constitutional duties and responsibilities.

It is absolutely necessary to have such legislation. There exist both local and mainland Chinese examples where lack of procedure legislation or rules has led to improper

protection of individuals' rights (in the HKSAR) or no exercise of the authority (in mainland China). Here I only point out the well-known problem with the Standing Committee of the NPC itself. It has the authority to interpret all the laws enacted by either the NPC or its Standing Committee. Due to the lack of institutional arrangement and procedural rules, it has hardly exercised its authority in this aspect, apart from the interpretation made relating to the HKSAR.

I am also of the opinion that it is quite appropriate to have such local legislation to regulate the process. It is because the Basic Law does not have any provisions concerning the process itself. It is therefore entirely appropriate for the HKSAR to have local legislation to supplement or complement the Basic Law and make it possible for both Legco members and local deputies to exercise their constitutional duties and responsibilities.

3. The need to consult the people of the HKSAR on an amendment to the Basic Law proposed by the Standing Committee of the NPC and the State Council.

This may become a very controversial issue. At the very beginning it is necessary to define the exact kind of consultation the HKSAR wants to have and who can represent the people of the HKSAR. If what is wanted is informal consultation, which I doubt, then it will not be a problem. If what is expected is a formal legal consultation such as referendum, I am not sure that the Central Government is willing to go that far since that may be regarded as a restriction of the sovereign power of the NPC. From purely legalistic analysis, the requirement of referendum is a restriction upon the sovereign right of a state to legislate through its legislature. As Legco members are elected, though not all by universal suffrage, it may be feasible to demand consultation with the Legco on an amendment to the Basic Law proposed by the Standing Committee of the NPC or the State Council.

The only consultation as provided under the Basic Law is the consultation with the Basic Law committee. Whether consultation with that Committee can be regarded as consultation with the people of the HKSAR is arguable. Only half of the Committee members are from the HKSAR. Whether they can represent the people of the HKSAR is also arguable.

At the end of the day, apart from the legal aspect of the issue, mutual understanding and trust are essential to the establishment and the operation of any mechanism for the amendment of the Basic Law. The controversy over the CFA judgment on right of abode has shown that there is a lack of understanding and trust between the HKSAR and mainland China. I have argued at another forum that if both sides try to understand each other and trust each other and also do things according to the rule of law principle, then all disputes can be resolved satisfactorily.

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