

**Letterhead of HONG KONG HUMAN RIGHTS MONITOR**

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**Submission of the Hong Kong Human Rights Monitor to the Legislative Council Panel  
on Constitutional Affairs on the Procedure for the Amendment of the Basic Law**

1. The invitation from the Legislative Council Panel on Constitutional Affairs seeks our views on various aspects of article 159 of the Basic Law which provides for the amendment of the Basic Law. These aspects are listed in the Annex to the invitation. But we are also invited to express our views on other issues which we consider relevant to the subject matter of the mechanism for amending the Basic Law.

2. This memorandum begins with some general considerations regarding the amendment of constitutions, particularly constitutional instruments which establish autonomy for one part of a state. It then provides an account of the methods for amending the Basic Law. We confine ourselves largely to matters of principles as we consider that it is necessary to establish agreement on them before we can proceed to detailed question of procedure.

3. A constitution aims to provide stable frameworks for the governance of a state. It is intended to endure for a substantial period of time. It is not to be lightly amended. Generally a constitution will contain rules for its amendment, stipulating a more complex process of change than for ordinary legislation. It is not uncommon for different provisions of a constitution to enjoy different degrees of entrenchment. Certain constitutional principles or provisions may be regarded so basic that they cannot be amended at all. On the other hand, some provisions are transitional or of temporary duration, so that they either expire automatically after a specified time or may be changed more easily than other provisions.

4. In general the rules for the change of a constitution will provide sufficient time for public debate and consultation. It may also involve institutions other than the legislature in the process of amendment. Ratification by the people, in the form of a referendum, may be necessary. Constitutions vary in the complexity of the process for change. Most try to balance policy objectives of avoiding rigid and difficult process that makes change hard and making change too easy. Even when the voting requirements are designed to facilitate change, rules seek to avoid hasty amendments, by stipulating minimum periods of time

between the introduction of the bill for amendment and the final vote on it.

5. In practice understandings of rules of the constitution can change without formal amendment. Changes of understanding, without formal amendment, are reflected most clearly in judgments of courts, especially of the highest appellate court. Courts tend these days to regard constitutions as dynamic and living documents which have to respond to changing social and political circumstances; and they see their role as facilitating the response. Contemporary rules of interpretation emphasize this judicial approach.

6. Special rules for amendment often apply in constitutional systems which have provisions for federal or autonomous regions. Changes to the national constitution may require the consent of all or a specified proportion of the regions. All or certain amendments to the regional constitution may be made by the regional legislature and/or people by themselves without intervention by the national authorities. Even if the regional constitution can be amended by the national legislature, the consent of the region may be necessary. Rules for the change of a regional constitution, particularly the role therein of the national institutions, frequently reflect the nature and degree of autonomy. Since formal constitutional change in federal or autonomous systems is usually complex, the role of courts in bringing about change can be crucial.

7. The Basic Law is a regional constitution. It derives its authority from article 31 of the PRC Constitution. Although the relationship of the Basic Law to the national constitution is nowhere clearly specified, it is probable that changes to the national constitution may have effect on the Basic Law. However, the HKSAR, as a region, plays no role in the amendment of the national constitution. It would seem that there is nothing in the national constitution which prevents the NPC from making "unilateral" changes in the constitutional position or rules relating to Hong Kong. Article 31 authorises the NPC to establish a special administrative region, but says nothing about altering or disestablishing it. It is a separate matter whether the PRC is prevented from making certain kinds of change due to its obligations under the Sino-British Joint Declaration.

8. The general features relating to constitutional amendment outlined above are reflected in the rules for the amendment of the Basic Law. Various provisions of the Basic Law cannot be amended at all; these are the provisions which implement the "basic policies of the PRC regarding Hong Kong", as stated in the Joint Declaration. Of the provisions which may be amended, some may be more easily amended than others. There is no rule guaranteeing that the Basic Law may not be changed adversely to the autonomy of the HKSAR without reference to the region, much less without its consent. In this respect, the HKSAR has much

less protection of its autonomy than many autonomous areas in other states.

9. The Basic Law can also be "changed" through interpretation. It is often assumed that the Standing Committee of the NPC can amend the Basic Law through interpretation (art. 158). The role of the Hong Kong judiciary in changing the understanding of the Basic Law is less clear, although the approach it has taken to interpretation is consistent with an active role. However, given the likely controversy about its "constitutional jurisdiction", it may be that courts would be reluctant now to engage in "creative interpretation". The absence here, as in federal or autonomous systems in other states, of a supreme and independent court or tribunal, means that change by either the NPCSC or the CFA is likely to be controversial.

10. The question of constitutional amendment of the Basic Law is seen by most groups as an extremely sensitive matter, given the differences in the political and legal systems of Hong Kong and the Mainland. There is also considerable international interest in any amendment, which may act to inhibit change. However, we believe that amendments should be made if there is a good justification for change and provided that the basic policies of the PRC regarding Hong Kong are not infringed. The Basic Law incorporates a unique system of autonomy for which there were few precedents to draw upon. It would not be surprising if some difficulties in its operation have arisen. Moreover, the Basic Law envisages certain developments which require amendments, particularly towards the greater democratisation of political institutions. A further case for amendment arises from the "codification" of previous systems of politics, economy, civil service, and welfare, which are proving a serious obstacle to reform of policies or institutions.

#### *Provisions for the amendment of the Basic Law*

11. There are three (or possibly four) provisions for the amendment of the Basic Law. The main provision is article 159. The second provision is Annex I, para 7, for the specific purpose of amending the method for the selection of the Chief Executive ("CE"). The third is Annex II, section III, for the composition of and elections to the Legislative Council and its procedure for voting on bills and motions. It may be argued that there is a fourth method as well, that of an interpretation by the NPCSC under article 158. Different procedures apply in different cases.

#### *The First Method--Article 159*

12. The principal provision for amendment is article 159. However, the scope of amendments

is severely restrictive. The fourth paragraph of the article says, "No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong". As mentioned previously, basic policies are stated in the Joint Declaration, including Annex I. In practice most important articles of the Basic Law are covered by this exemption. The essential principles are stated in Chapter I of the Basic Law ("General Principles"), but they do not exhaust the range of basic policies. The Basic Law does not list basic policies so protected (it was suggested in the Basic Law Drafting Committee that they should be so listed). However, the task of identifying basic policies, and therefore the articles that cannot be amended or amended in a particular way, is not difficult, once it is recognised that the Joint Declaration, including Annex 1, contains an authoritative statement of the basic policies. The scope for the amendment of the Basic Law is therefore quite limited.

13. The exemption of basic policies from amendment was clearly provided as protection for HKSAR's autonomy. It is necessary so that the PRC could honour its commitment under the Joint Declaration to the UK (and indirectly to the people of Hong Kong) to preserve the autonomy for 50 years.

*Another method?--Article 158*

14. It is appropriate here to discuss the whether an amendment may be made by an interpretation of the NPCSC. Under article 158 the NPCSC can interpret the Basic Law in two situations. The first is a general, "free standing" power under the first paragraph. It would seem that the NPCSC can interpret any provision of the Basic Law under this paragraph outside the context of litigation. The second situation, under paragraph three, is on reference from the highest court in Hong Kong from which no further appeal is possible (in most cases this will be the CFA) on an article which concerns the responsibility of the Central Authorities or the relationship between them and the HKSAR, which the Court of Final Appeal has called an "excluded provision". This reference arises out of litigation commenced in the SAR courts and is confined to such provisions. The CFA has in its recent decision on the right of abode clarified the circumstances in which it is required to make a reference. It says that a reference is necessary only when an exclusion article is the "predominant" article in the case (it should be noted that there has been some criticism of the CFA for qualifying the need for reference in this way). After receiving the interpretation from the NPCSC, the SAR court applies it to the facts of the case in concluding its adjudication.

15. It is not clear whether an NPCSC interpretation can be used to amend the Basic Law. On one reading of a Resolution of the NPCSC on interpretation adopted in 1981, it can be argued that it can make "additional stipulations" where necessary. There have been suggestions in

recent weeks that the NPCSC interpret the Basic Law so as to overrule the CFA regarding entitlement to the right of abode as an alternative to formal amendment. In our view, even if the NPCSC can exercise the power of amendment in this way under the normal rules of Chinese law, it cannot do so in relation to the Basic Law. The Basic Law provides a specific method for its own amendment (principally in article 159). As we understand it, the Basic Law is the only Mainland law (apart from the PRC Constitution), for which a method of amendment is stipulated. It is also provided that basic policies regarding Hong Kong cannot be altered even through a formal amendment process.

*The Second Method--Annex I, para 7*

16. This method is confined to the amendment of the method for selecting the Chief Executive, for terms of office starting subsequent to the year 2007. The current method for the selection of the Chief Executive is specified in Annex I. An election committee of 800 members elects and nominates a candidate for appointment by the Central People's Government (art. 45). The only amendment permitted under para 7 relates to the method of selection of the candidate for nomination to the CPG and cannot be used to abolish the power of the CPG to appoint the Chief Executive. If it was intended to remove the power of appointment, it would be necessary to amend art. 45.

17. We argue that the only type of amendment possible under para 7 is for the democratisation of the selection process. Article 45 incorporates the principle of "gradual and orderly progress" and states as the ultimate aim "the selection of the Chief Executive by universal franchise...".

18. It would therefore be possible under para to change the composition of the Election Committee, or even to abolish it. However, it would be necessary to establish "a broadly representative" body ("nominating committee") to nominate candidates for election by universal franchise (art. 45).

*Third method--Annex II, part III*

19. The third method is confined to amendments, after the year 2007, on the method of forming the Legislative Council and the procedures for voting on motions and bills. Under Part III, it would be possible to abolish, or reduce the number of, functional constituencies. As art. 68, dealing with the constitution of the LegCo, also incorporates the principle of

"gradual and orderly progress" and the ultimate aim of universal franchise, we argue that only amendments which provide for greater democratisation are possible.

20. It would also be possible after 2007 to amend or abolish current rules on voting in the LegCo which are established by Part II of Annex II (and include "bicameral" type of voting on members' bills, amendments or motions).

#### *Procedures for Amendments*

21. Amendments under art. 159 are made by the NPC. The voting requirement to pass an amendment is not specified. Presumably the amendment would require the votes necessary under the PRC Constitution for passing legislation, i.e., "majority votes of more than two-thirds of all deputies to the National People's Congress" (art. 64 of the PRC Constitution).

22. The power to propose amendments is granted to the NPCSC, the State Council and the HKSAR. Proposals from Hong Kong require the approval of 2/3rds of the members of the LegCo, 2/3rds of Hong Kong deputies to the NPC and the Chief Executive, and would be submitted to the NPC by Hong Kong deputies.

23. Under Chinese law, a proposal for legislation which is submitted to the NPC is not automatically presented to the Congress for debate or voting. Whether it is placed on the agenda depends on its Presidium. Presumably in this case, all proposals would be put to the vote, but the point may need to be clarified.

24. However, a proposal cannot be placed on the agenda until the views of the Committee for the Basic Law on the proposal have been submitted to the NPC.

25. It is possible for the NPC to make an amendment without any reference to the HKSAR authorities or residents. It seems wrong that the HKSAR should have not been consulted on proposed amendments or its approval not sought. Since the NPC can amend any provision of the Basic Law, the result could be that a provision within the autonomy of the HKSAR is amended without any reference to its legislature or residents. We would therefore urge that a convention should be agreed upon that amendments to a provision within the autonomy of Hong Kong should be initiated only by the HKSAR.

26. The other two methods of amendments require the approval of 2/3rds of members of the LegCo, 2/3rds of the HKSAR deputies to the NPC and the Chief Executive. So far as an

amendment to the composition of the LegCo or its voting procedures is concerned, these approvals are sufficient to bring the amendment into effect. The amendment has to be reported to the NPCSC for "the record". But an amendment to the method for the selection of the Chief Executive has to be reported to the NPCSC for "approval". The NPCSC may thus veto a proposal which has a very wide degree of support in Hong Kong.

27. These two types of amendments cannot be initiated using the procedures in the Annexes before 2007. They can be amended using art. 159. It is therefore possible to speed up the pace of democratisation without waiting until 2007.

28. We recommend that after 2007, these types of amendments should be made only by using the procedure established in the Annexes and not by using art. 159. In this way the amendment of these provisions which are within the autonomy of the HKSAR will be the primary responsibility of the people of the region.

28. We now turn to the issues in Appendix II of the letter from the Panel on Constitutional Affairs.

*The parties within the HKSAR who/which may initiate the amendment process*

29. The proposal can come from the members of the LegCo, HKSAR deputies to the NPC or the Chief Executive.

*The procedure for obtaining consent of the three concerned parties in the HKSAR*

30. No procedure is prescribed in the Basic Law. The consent of each of the parties is required. This consent could be manifested in accordance with the normal procedures of each party. Thus, as far as the LegCo is concerned, any member can propose an amendment for consideration by the LegCo. It would then be debated and voted upon in accordance with the Standing Orders. A proposal would not be governed by article 74 of the Basic Law, so that a member is free to propose any amendment so long as it is not inconsistent with the basic policies of the PRC regarding Hong Kong. All members would vote together. If successful, it would be passed to the HKSAR deputies who would vote on it in accordance with its own rules. If successful, it would be sent to the Chief Executive. The Chief Executive would have to consult with the Executive Council before deciding on whether to approve or not, but would not be bound by its advice. (art. 56). This process could also be initiated by a deputy or the Chief Executive.

*The form of the amendment proposal*

31. No form is prescribed in the Basic Law, but article 159 assumes that the proposal would be in the form of a bill.

*The need to consult the public on the amendment proposal.*

32. There is no legal requirement to consult the public. Indeed it could be argued that such consultation, if adopted as a formal condition, is impermissible. However, we consider that it is essential to have a mechanism for consultation with the public. None of the Hong Kong bodies involved in the formal process, particularly the Chief Executive and the deputies, are fully elected through universal franchise and cannot claim to speak on behalf of Hong Kong people.

33. We recommend, first of all, acceptance of the principle that no matter how the proposal for amendment is initiated, it should not be submitted to the NPC without prior consultation with the people of Hong Kong.

34. Secondly, we strongly recommend that there should be maximum transparency throughout the process. There should be mechanisms to ensure that the proposals are disseminated to the public in a readily comprehensible form. Enough time should be provided for public debate on the proposals.

35. Thirdly, public hearings should be held by the LegCo and the deputies. Presumably the LegCo Panel on Constitutional Affairs will provide a platform for the public to express its views.

36. Finally, provision should be made for an "advisory" referendum by the permanent residents of the HKSAR before the proposal for any amendment is submitted to the NPC. Because the referendum would be advisory, it would not infringe any of the procedures for the amendment of the Basic Law. At the same time it would register public opinion in a most reliable form (instead of the administration doing its "surveys" of public opinion, which have historically been biased).

*The means to ensure that the amendment proposal does not contravene the established basic policies of the People's Republic of China regarding Hong Kong*

37. It is the responsibility of all institutions involved in the amendment process to ensure that the basic policies are not contravened.

38. More specifically the NPC will look to the Committee for the Basic Law (CBL) for advice on this question. A proposal for an amendment under article 159 has to be referred to the CBL for its opinion before it is considered by the NPC. One of the purposes of the CBL is to advise on questions of law. The CBL must establish procedures for examining proposals from the legal point of view, including allowing for the submission of opinions by individuals and groups. In its submission to the NPC it must state with detailed analysis its view on legality.

39 While every effort must be made before the NPC enacts an amendment to ensure its compatibility with basic policies, the HKSAR courts should be able to review the validity of the amendment. Under the principles enunciated by the CFA in its recent decision in *Ng Ka ling*, the courts do have the jurisdiction to do so.

*The mechanism for amending an amendment proposal*

40. We presume that this issue deals with the power of one of the three Hong Kong parties to amend a proposal made by another party and the procedures for it. The procedures in all three instances of amendment require the consent of all three parties. Presumably they deliberate and vote on the proposal separately. It will be necessary to have some procedure for resolving differences among them. Guidance may be obtained from constitutional systems which are bicameral as to their procedures for resolving differences between the lower and upper houses, such as informal conferences or some "go between" mechanisms.

*The need and appropriateness to underpin 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*

41. As far as the members of the LegCo are concerned, the necessary rules can be provided in the Standing Orders. Standing Orders could also provide for consultations with deputies and the Chief Executive on amendments to proposals for amendments.

42. Legislation would be necessary for the process when it involves deputies. Since the conduct of deputies might be regarded as within the "powers" of the NPC, it may be that the initiative has to come from the NPC itself and then given effect to in an ordinance. There is nothing which prevents the Panels making suggestions as to what the procedure should be.

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

43. We have already stated our recommendation that no proposal for amendment to the Basic Law, no matter how it is initiated, should be submitted to the NPC without prior consultation with the people of Hong Kong. The views of the people should be secured through an advisory referendum.

*Concluding Remarks*

44. We reiterate our view that amendments to the Basic Law is a serious matter, not to be undertaken lightly. Equally, we consider that it is necessary to review the Basic Law as the necessity to democratise our political institutions is expressly recognised in arts. 45 and 68. Other defects have been noted by commentators and have begun to surface in the implementation of the Basic Law (such as the restrictions on the rights of members under art. 74 and the system of voting in the LegCo). We have made no attempt in this memorandum to identify provisions which need to be reviewed. We shall be happy to assist the Panel when it begins the review of the Basic Law.

45. In any review and subsequent amendment, the principle of the participation by Hong Kong people should be paramount. No amendment to the Basic Law should be made without the consent of the people manifested in an advisory referendum.

11 March 1999