

**HONG KONG BAR ASSOCIATION
Amendment to the Basic Law**

1. Amendment to the Basic Law is provided for in Art 159:

“The power of amendment of this Law shall be vested in the National People’s Congress.

The power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People’s Congress, the State Council and the Hong Kong Special Administrative Region. Amendment bills from the Hong Kong Special Administrative Region shall be submitted to the National People’s Congress by the delegation of the Region to the National People’s Congress after obtaining the consent of two-thirds of the deputies of the Region to the National People’s Congress, two-thirds of all the members of the Legislative Council of the Region, and the Chief Executive of the Region.

Before a bill for amendment to this Law is put on the agenda of the National People’s Congress, the Committee for the Basic Law of the Hong Kong Special Administrative Region shall study it and submit its views.

No amendment to this Law shall contravene the established basic policies of the People’s Republic of China regarding Hong Kong.”

2. The procedure for proposing an amendment to the Basic Law by the NPCSC or the State Council is a matter of PRC law and is outside the jurisdiction of the HKSAR.

3. Insofar as proposals for amendments originating from the HKSAR are concerned, Art 159 tries to ensure that there are checks and balance among the 3 sources of power, namely, the Legislature, the Government, and the Deputies of the HKSAR to the NPC (“the Deputies”). Each of the three parties enjoys a veto power.

4. 3 procedural issues have to be addressed:

- (1) Who can initiate a bill for amendment?
- (2) What restriction, if any, are there in proposing an amendment?
- (3) What order should be followed in the passage of the amendment through different institutions?

5. **The Basic Law is silent on who can initiate an amendment bill in the HKSAR. Since the an amendment bill is to come from the HKSAR, it is logical that the HKSAR Government and the Legislative Council, being the law making body in the HKSAR, should be able to initiate the bill. While the consent of the Chief Executive is required, we believe that it is inappropriate for the Chief Executive to initiate an amendment bill if the HKSAR Government has already had a power to initiate a bill. Although the amendment bill also requires the consent of the Deputies of the HKSAR to the National People’s Congress (“the Deputies”), given their limited representativeness in Hong Kong, it seems appropriate that their role should be confined to a power of vetting and that they should not have the power to initiate the bill.**
6. **Under the existing legal framework, there are two ways that the Legislative Council can propose an amendment bill: first, by an ordinary bill; and second, by a motion.**
7. **The power of the Legislative Council is set out in Art 73 of the Basic Law. There is no express power on proposing an amendment to the Basic Law. Art 73(1) provides that the SAR Legislative Council shall exercise the power “to enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures.” This paragraph applies to amendment of legislation rather than amendment of the Basic Law. In this regard it should be noted that the Chinese word for “bill” in Art 159 (某杖) is different from that (豫杖) which appears in Arts 48, 49, 50, 52, 56, 62, 68, 74 and 76 dealing with enactment of legislation in the HKSAR (but the same character (某杖) is used in Art 72 and is also translated as “bill”). It follows that the provisions dealing with the enactment of local legislation do not apply to the amendment to the Basic Law. In such cases the power to introduce an amendment bill has to rest on an implied power under Art 159 itself.**

- 8. If there is an implied power to propose an amendment bill under Art 159, new legislation may have to be introduced to provide for the procedure. It should ensure that an amendment bill may be introduced either by the Government or by members of the Legislative Council. However, Art 74, which provides for restriction to initiating private members' bill, or similar restrictions shall not apply, as (1) Art 74 only applies to amendment bills to local legislation; and (2) a proposed amendment to the Basic Law is not the same as proposing a measure relating to public expenditure or political structure of the operation of the Government. The only problem is then in getting the two-third majority under the usual voting procedure as set out in Annex II, para II of the Basic Law.**
- 9. Alternatively, a proposed amendment may take the form of a motion. Art 73(6) empowers the Legislative Council to debate any issue concerning public interests. Amendment of the Basic Law must fall within this category. The difficulty is that there should then be a procedure to allow the SAR Government to introduce a motion of proposed amendment to the Basic Law and to speak on it. Art 74 will be inapplicable in case of a motion. The voting procedure on motion as set out in Annex II, para II of the Basic Law will apply, except that a two-third majority will be required.**
- 10. Under either option, if an amendment is proposed by private members, either by way of a bill or a motion, the SAR Government would have very little control over it. It cannot stop the bill or the motion. However, it is not powerless as the Chief Executive can refuse to consent to the amendment bill in due course.**
- 11. It is proposed that an amendment initiated at the Legislative Council, either by the Government or by private members, shall be considered by the Legislative Council first. If the proposed amendment receives the support of two-third majority, it will then be submitted to the Deputies for consideration. The Deputies may approve the amendment or reject the amendment, but they shall not enjoy the power of amending the amendment. An amendment can only be effectively approved when it receives the approval of two-third majority of the members of the Deputies as required by the Basic Law.**
- 12. The procedure of the Deputies is governed by the PRC Law on the Different Tiers of Local NPC and Their Organisation, and any procedural rules adopted thereunder. The existing Law and the rules do not seem to have any express provision governing the procedure of amendment to the Basic Law. We reckon, however, that this may be a matter outside the jurisdiction of the HKSAR.**

- 13. Once the proposed amendment has received the requisite support of the Legislative Council and the Deputies, it shall be submitted to the Chief Executive for his consent.**
- 14. The Basic Law contains the solemn promise of the PRC in the Joint Declaration that the policies of One Country, Two Systems shall remain unchanged for 50 years. Art 159 also expressly provides that no amendment to the Basic Law shall contravene the established basic policies of the PRC regarding Hong Kong. Hence the amendment process should not be lightly invoked. Given the constitutional importance of the amendment process, it is desirable that the general public should have an opportunity to express their views directly on the amendment, especially when the Legislative Council is not fully representative. One possibility is that a proposed amendment which has received the requisite support of both the Legislative Council and the Deputies should then be subject to confirmation in a referendum or plebiscite. Unless the proposed amendment receives the required support in the referendum, the Chief Executive shall not give his consent. If the Government is against the proposed amendment, it will be for the Government to convince the public not to accept the proposed amendment in the referendum.**
- 15. Once the consent of the Chief Executive has been given, the proposed amendment shall then be forwarded to the Deputies, who shall submit the same to the NPC through the delegation of the Region to the NPC.**

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