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**Comments to the Legislature Council Panel on Constitutional Affairs
on
Mechanism for Amending the Basic Law**

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(1) The parties within the HKSAR who/which may initiate the amendment process

According to Article 159 of the Basic Law, three parties in Hong Kong are involved in the amendment process: deputies of HKSAR to the National People's Congress, the Legislative Council, and the Chief Executive. Therefore, logically, all three parties should be given the power to initiate the amendment process. To be fair to each of the three parties, there should not be any regulation on the sequence or order imposed in the process. That is, the amendment bill should be able to be initiated by any of the three parties. It will be a reduction in the power and influence of each of the three parties if only one of the parties may initiate the amendment process. For example, if the Chief Executive will be the only party who can initiate the amendment process, it will unavoidably reduce the involvement and the influence of the Legco. This can bring a profound impact on the current power relationship between the executive and the legislature.

In order to ensure that only amendment bills with at least some support will be proposed, it may be necessary to build a mechanism to guide the initiation from each of the three parties. This mechanism should ensure that all the amendment bills proposed will be of certain support and some significance.

However, a major balance must be struck in designing such a mechanism. On the one hand, we would not like that mechanism to be too loose so that the parties involved in the process may be overwhelmed by a huge number of amendment proposals. This will definitely lower the efficiency of the parties such as the Legco and the Chief Executive. Time and resources for other policy and administration matters will be sacrificed under this loose design. But, on the other hand, if the mechanism is built too strict, it may reduce significantly the chance of having some amendment bills of strong policy significance and of great public interest to be introduced. A balance may be reached by requiring a certain amount of support within each of the party for making the initiation.

For example, the support of one-fourth of the Legco members may be needed to initiate the process. In any case, the support required to initiate the process should not be above the two-third majority required in the Basic Law. In fact, it may be undesirable to require a support of larger than half of the Legco members to initiate the process. Such a requirement may disallow promising amendment bill from at least having a chance to be discussed. Further support may be gathered to obtain the two-third requirement after the arguments for the amendment are presented.

Certainly, this may not hold for the Chief Executive as he is only a single individual. Even if the agreement or the support of the Executive Council is required for the Chief Executive to initiate the amendment, this will not have any real effect on the process. It is because all

members in the Executive Council are appointed by the Chief Executive and it is expected that most of the members will support the view of the Chief Executive in most cases.

(2) The procedure for obtaining consent of the three concerned parties in the HKSAR

This should be a straight-forward case for the Chief Executive as he is only a single individual. He can give his or her consent formally in a written form. With regard to the Legislative Council, a vote can be taken. In order to support the amendment bill, as required in the Basic Law, a two-third majority will be required. As mentioned in the comments in (1), a certain number of votes supporting the amendment may also be needed in order to initiate the amendment process. Similarly, the same process can be applied to the deputies of the HKSAR to the National People's Congress.

(3) The form of the amendment proposal

Since amending the Basic Law is a serious and important issue, the form of the amendment proposal should be formalized. It can follow the form of the legislation, which have to be passed by both the Legco and the deputies of the HKSAR to the National People's Congress, and signed by the Chief Executive.

(4) The need to consult the public on the amendment proposal

The need to consult the public on the amendment proposal can never be overemphasized in this process. First of all, it is the principle of the Basic Law itself to have universal suffrage for the election of the Legco and the Chief Executive. Therefore, the element of democracy must be incorporated in the process. On the other hand, the principle of democracy is still not yet fully implemented in the existing political system in Hong Kong at the moment. Thus, even the Chief Executive and the Legco may not necessarily reflect all the interests and views in society. Consequently, it is very necessary to consult the public through all possible channels.

There are at least two more issues to tackle: period of consultation and method of consolidating the public opinions. The first is easier to handle. There must be a significant period of time for the public to digest the details of the amendment and the pros and cons. However, the second issue is much more problematic. In a democratic system, the public interest is consolidated and articulated by politicians through elections. Nevertheless, this is not yet the case in Hong Kong. As a result, one possible way to consult the public is having a referendum. This is an easy and direct way to test whether the amendment is accepted by a majority of the citizens. It is also a common practice for the state governments in the US in amending their constitutions.

Certainly, this will put the government or other parties involved in the amendment process in a difficult situation if they do not choose to go with the public view. In any case, if the interest of the majority cannot be reflected in a open and objective mechanism, at least, different ideas and voices should be encouraged in the discussion in society during the consultation period.

(5) 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

It should not be necessary to propose any formal means to ensure that the amendment proposal does not contravene the established basic policies of the People's Republic of China regarding Hong Kong. There are at least three simple but strong reasons for that. First of all, this is only an amendment proposal. When the Basic Law itself should not contravene the established

basic policies of the China Government, it is not required that the amendment should not contravene the basic policies. Indeed, it is not necessary or even not possible to do so.

Secondly, it may be difficult to decide clearly and precisely whether an amendment proposal contravenes the basic policies. Policies, by definition, have a certain sense of vagueness and abstraction. Policies may also shift according to different environments and tasks. The mechanism of ensuring no contravention may do nothing but discourage any desirable amendments from being put forward and discussed. It may kill the amendment for simply a “perception”, but not the real effect, of contravening the basic policies.

Thirdly and most importantly, since the ultimate power of amending the Basic Law is in the hands of the National People's Congress, all the amendments that contravene their basic policies will automatically be rejected. Consequently, it may be a waste of efforts to think of such mechanism by HKSAR. Such a mechanism is already embedded in the system.

(6) The mechanism for amending an amendment proposal

Since the Basic Law is the most important document and the most fundamental law in Hong Kong, it is recommended that all careful steps should be taken in handling the amendment proposals. While the strict steps taken may prevent some “good” items to be added on sometimes, most importantly, this will prevent some “bad” items to be added on during the amendment process too.

Given the difficulty that can be foreseen in coordinating the three parties involved within the HKSAR in the process of amending the amendment proposal, one of the best options is to redo the whole amendment process whenever amendments have to be made to the amendment proposal. This will ensure that each of the parties involved will have a chance to reexamine the impact of the amendment to the amendment proposal. While the amendment may be taken as a very minor “add-on” to one party, this may not necessarily be agreed by other parties in the process. Most importantly, any amendment may lead to a very significant and unforeseeable impact in the future.

(7) 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 National People's Congress discharge their constitutional duties and responsibilities

Assuming that the Legco is a “self-regulating” body, it will not be necessary for itself to pass a legislation to regulate its own behavior on the issue of amendment proposal. Nevertheless, since the local deputies of the HKSAR to the National People's Congress is relatively a less formal body as a whole, some form of legislation on them may be necessary and appropriate with regard to the amendment process.

One of the major concerns is that some local deputies may initiate amendment proposals that are without significant support among all the deputies, or the public in general. Because of the special status of the deputies, it may not be appropriate to pass local legislation to regulate their freedom of behavior per se. However, this “technical problem” can be resolved very easily by passing some regulations on the other parties in the process within HKSAR. For example, the Legco can state that it will not consider any amendment proposal from the deputies of the HKSAR if it is not supported by a majority of them. This will solve the possible problem without having to regulate the deputies formally.

(8) The need to consult the people of HKSAR on an amendment to the Basic Law proposed by the Standing Committee of the National People's Congress and the State Council

Since any amendment to the Basic Law will affect HKSAR significantly, it will be much more necessary to consult the people of HKSAR if the amendment is not initiated in Hong Kong. Again, as there is no full democratic system in Hong Kong, not all the interests and views of the HKSAR people can be represented by the existing political system, including the Chief Executive and the Legislative Council. Consequently, it is very important for the consultation be achieved through both institutional (e.g., voting in Legco) and non-institutional means (e.g., public opinion survey or even a referendum).