

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

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

Albert H Y CHEN

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.

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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MECHANISM FOR AMENDING THE BASIC LAW

Submission by Benjamin C. Ostroy

The Issues for Public Consultation (Appendix II) seem to me like a case of misdirection. When compared to an unlisted issue that I see as essential, they pale in significance. That unlisted issue is where the final power of amendment is vested, The National People's Congress. In my opinion, this is the crucial question. As far as I am concerned, as long as an amendment proposal does not concern foreign or defense policy, it should be left up to the people of Hong Kong. They are the ones who are directly affected by specifically local issues and nobody else. Fairness, and the high degree of autonomy promised by the 'One Country, Two Systems' formula demand that the power of amendment be left with the Hong Kong people.

Leaving the amendment power where it is vests too much faith in the Communist Party of China, the body which controls the National People's Congress. Even if well-intentioned, the Party's traditions and political culture are alien to those which have developed here in Hong Kong and feature principles such as the rule of law and freedom of speech. It would be unreasonable to expect the members of the National People's Congress to understand and appreciate these values as much as the Hong Kong people do.

Of course this proposed change begs the question of who is to decide whether or not an amendment proposal concerns these issues. I would say that should be left up to the National People's Congress. One may say that this still gives them a role. I would counter that they must have at least this minimal role - Chinese national sovereignty requires at least this much. Of course that still leaves some risk for Hong Kong people but I would say that risk cannot be completely avoided. At least,

officially, Hong Kong people would have the final say in most matters concerning amending the Basic Law.

As for the rest, Article 159 of the Basic Law is very clear and specific about who has a role in approving the amendment prior to its being presented to the National People's Congress. One can discuss modifications to the involvement of these actors in the process. However, I think this pales in significance to the fact that the final power of amendment is vested in the National People's Congress.

One might say that it is hopeless to attempt the modification in the amendment process which I propose. I would most likely agree - in the short run. However, the long run is a different matter. To fail to make the attempt dooms one to a self-fulfilling prophecy of defeat. An expert practitioner of politics named Margaret Thatcher once said, "In politics there are no final victories¹." If she is correct, then one can also say that in politics there are also no final defeats.

¹ Margaret Thatcher quoted in Peter Clarke, "The Rise and Fall of Thatcherism," *London Review of Books*, December 10 1998, 20.

(Translation)

Views on the mechanism for amending the Basic Law

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1. *The parties within the Hong Kong Special Administrative Region (HKSAR) who/which may initiate the amendment process*

While Article 159 of the Basic Law stipulates that three parties within the HKSAR, i.e. the Chief Executive (CE), the Legislative Council (LegCo) and the delegation of the HKSAR to the National People's Congress (NPC) may take part in the decision of submitting bills for amendments to the Basic Law to the NPC, it does not specify which one of them may put forward the proposal for amending the Basic Law. Theoretically speaking, all of the three concerned parties may initiate the amendment process.

2. *The procedure for obtaining consent of the three concerned parties in the HKSAR, the form of the amendment proposal and the mechanism for amending an amendment proposal*

Although the HKSAR Government may introduce bills and motions to the LegCo under Article 62 of the Basic Law, and individual Members of the LegCo may also introduce bills and motions to the Council under Article 74 of the Basic Law and the Rules of Procedure of the LegCo, the nature of these bills and motions is very much different from that of the bills proposed for amendments to the Basic Law.

The final decision on the passage of bills and motions, as well as the version to be approved, lies with the LegCo, irrespective of their being introduced by the HKSAR Government or by individual Members of the LegCo. However, the LegCo cannot decide by itself whether to approve bills for amendments to the Basic Law or not. It does not have the final and overriding power to do so.

A solution to the problem is to regulate by legislation the nature of bills proposed for amendments to the Basic Law, as well as the procedure for submitting, amending and approving the amendment proposal.

3. ***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***

It is essential to regulate by local legislation the manner in which the CE, LegCo Members and local deputies to the NPC discharge their constitutional duties and responsibilities.

A mechanism to this end is proposed as follows:

To establish by legislation a HKSAR Constitutional Council for Amending the Basic Law (Constitutional Council), which comprises the CE, all LegCo Members and local deputies to the NPC, and is under the chairmanship of the Chief Justice of the Court of Final Appeal, who shall have no right to vote. An amendment proposal may be submitted to the Constitutional Council by the CE, or by a certain proportion (such as one-third) of LegCo Members or local deputies to the NPC. The arrangement will ensure that the amendment process would not be initiated lightly.

As in the case for introducing bills, an amendment proposal shall be made by publication in the Gazette. Meeting of the Constitutional Council shall be convened sometime (such as one month) after the amendment proposal is gazetted.

The meeting shall be held publicly and every member of the Constitutional Council may, at a certain time before the convening of the meeting, propose amendments to the amendment proposal.

Every member of the Constitutional Council may speak during the public debates on the amendment proposal as well as the amendments moved to the proposal.

Voting on the amendment proposal and the amendments moved to the proposal shall be conducted in three groups, with the CE in group 1, LegCo Members in group 2 and local deputies to the NPC in group 3. The passage of the amendment proposal and the amendments moved to the proposal shall require the consent of group 1, i.e. the CE, together with a vote of two-thirds of the members in group 2 and group 3.

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

It is not stipulated in the Basic Law that the public should be consulted on the bills proposed for amendments to the Law. If the suggestions mentioned above are adopted, an amendment proposal will be publicized in the gazette and all debates will be held in public. Under such circumstances, public consultation is not considered an essential process.

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*

This is a really difficult task. A court of common law will not exercise its advisory jurisdiction before an amendment proposal is passed to examine if it complies with the established basic policies of the People's Republic of China regarding Hong Kong.

Even though the amendment proposal is passed by the NPC, the court may still not be able to review the proposal to ascertain if it contravenes the established basic policies of the People's Republic of China regarding Hong Kong and thus becomes invalid.

6. *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*

It is again not stipulated in the Basic Law that the people of HKSAR should be consulted under such circumstances. Given that the amendment proposal will not be publicized in the gazette, and that the debates on the proposal will not be held in public, public consultation will give the people of HKSAR a chance to express their views directly. The problem is that the laws of HKSAR cannot impose any requirement on the Standing Committee of the NPC and the State Council for conducting public consultation in Hong Kong. Only after authorization is given by these two bodies may the HKSAR Government conduct public consultation in Hong Kong on the relevant proposal. Yet, another problem also emerges as to how we should quantify the views collected and in what way would these views influence the final proposal for amendments to the Basic Law.

**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.**

11 March 1999

(Summary Translation)

(Submission from Mr King-kwun TSAO, Associate Professor, Department of Government and Public Administration, the Chinese University of Hong Kong)

System continuity and amendment to the Basic Law

Constitutional stability and the principles for amending the Basic Law

The Basic Law (BL) is the constitutional basis for the “one country two systems” policy to be implemented in Hong Kong. It ensures a high degree of autonomy for the territory and defines the relationship between Hong Kong and China. Similar to the constitutions of other countries or territories, the BL is designed and formulated to prevent arbitrary amendments. No amendment can be made easily unless it is endorsed by a vast majority vote. Even in the United States, the procedure for constitutional amendments is legally complicated and difficult. A proposal to amend the constitution of the United States requires a two-thirds majority vote in both the Senate and the House of Representatives, together with the endorsement of over 75% of all state legislatures. It is even far more difficult to pass a constitutional amendment than to impeach the President in the United States. Obviously, these requirements, which make constitutional amendments difficult, aim at protecting the constitution so that the existing rules and regulations can be consolidated.

However, certain provisions in the constitution may become outdated given the political, economic and social changes, and it is necessary to have a mechanism and a set of procedures to facilitate constitutional amendments. The BL only lays down the general principle that any amendment proposal requires the consent of two-thirds of all the Members of the Legislative Council (LegCo), the Chief Executive (CE) and two-thirds of the local deputies to the National People’s Congress (NPC) before the proposal can be submitted to the NPC, without detailing the specific amendment procedures. My personal view is that the provisions and procedures for amending the BL should be legitimate, reasonable and highly transparent, and that they should cause minimal changes to the current system. The relevant procedures should be observed and upheld disregarding the results of the amendments.

Procedures for proposing and voting on an amendment

- (1) Under the existing provisions of the BL, the BL cannot be amended without the consent of the LegCo, the CE and the local deputies to the NPC (the local deputies). Hence, amendments to the BL can be proposed by the CE, or by the Executive Council and government departments on the instruction of the CE, for the LegCo to debate on them, and the current procedures for a debate to be held in the LegCo can be followed. Similar to bills introduced by the Government, proposals to amend the BL should initially be gazetted for public consultation and comments by the media.
- (2) Alternatively, amendment proposals can be initiated by LegCo Members in two possible ways: (A) an amendment proposal can be initiated by a certain number of LegCo Members from either one of the two groups (e.g. Members returned by geographical constituencies/the Election Committee) for LegCo to debate on it; if the proposal is passed by two-thirds of LegCo Members, it will be forwarded to the CE and local deputies for voting; and (B) an amendment proposal can be initiated by a certain number of LegCo Members from both groups (i.e. Members returned by geographical constituencies/the Election Committee, and those returned by functional constituencies); if the proposal is passed by two-thirds of LegCo Members, it should be submitted to the CE and the local deputies for voting.
- (3) Under the existing provisions of the BL, amendments to the BL cannot be possibly made without the consent of the local deputies. It follows that the local deputies can have the power to initiate amendment proposals. However, in what way should the local deputies propose amendments to the BL under the existing political structure in Hong Kong? What is their specific role in the amendment process? Is there a need to formulate certain mechanisms to coordinate the relationship between the local deputies, the LegCo and the CE? What is their relationship with the executive and the legislature? All these questions need to be further studied and analyzed in order to be certain about the pros and cons.

Upon receipt of any amendment proposal agreed by the CE and LegCo Members, the local deputies are required to vote on it. If the proposal obtained the requisite support of the local deputies, it will be submitted to the NPC for discussion and voting. Given the difference in the organizational structure of the local deputies, the NPC can authorize the

local deputies to formulate rules and procedures in order that the local deputies can act accordingly in dealing with and voting on amendments initiated by the CE and the LegCo.

Preserving the continuity of the system

The above proposals can safeguard the existing relationship between the executive and the legislature, and preserving continuity in our system. This is a way to amend the BL without making significant changes to the present system. Besides, it is consistent with the existing legislature-led approach in making legislative amendments as well as the established practices in Hong Kong (e.g. the proposed gazettal of amendments for public consultation and comments). These arrangements, which are legitimate, reasonable and consistent with the principle of an open process and which keep changes to a minimum, are proposed for Members' consideration.

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

港九工團聯合總會的信頭
Letterhead of Hong Kong & Kowloon Trades Union Council
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19th March 1999

On implementing the Article 159 of the Basic Law and its procedure, we would like to submit the following opinions.

Basic Law entitle the Hong Kong people the right of self-governed and the high degree of autonomy. If Hong Kong is to maintain prosperity and stability, it will rely on two machineries, one is the good common law system, two is the freedom of expression. We have the following response:

1. Who and which organization can open the machinery of amending the Basic Law?

According Article 17 of the Basic Law, The HKSAR shall be vested with legislative power. However, it has not described the the range of its implementation. As the Legislative Council of SAR has the function of enact, amend or repeal laws, therefore, the Legislative Council has the power to enact laws without touching the diplomatic, defense and Central Government affairs. We assume the Legislative Council of SAR can open the machinery of amending the Basic Law.

2. Obtain the consent the the three parts and its procedure, the form of the amendment and is it necessary to consult the public.

We think the public should be consulted on this matter. According to Article 39 of the Basic Law, the three international covenants shall remain in force and the rights of the Hong Kong people shall not be limited. Therefore, any amendments should be consulted.

Secondary, we think the form of the amendment should adopt a simple majority, that is, over 50% is acceptable, not necessarily two third of the votes. It is because the Basic Law is enacted according to the Constitution number 31. It belongs to the kind of common law. It becomes effective if its votes are over 50%.

3. To ensure the amendment will not violate the basic policy of the PRC and its method.

The method is to submit the amendment to the Basic Committee. Secondary, since the Standing Committee of the NPC authorizes the SAR Court to interpret the Basic Law in the range of self governed, therefore, if there is any disputes, the Court of SAR can interpret, to make sure any amendment will not violate the policy before it is enacted and passed.

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4. The machinery to amend the amendment.

We think the Legislative Council has the power to amend. It is because the Basic Law permits them to do so. The Legislative Councillors can submit a private bill to submit the amendment.

5. Is it necessary for the Standing Committee of the NPC and the State Council to consult the Hong Kong people on the amendment?

Yes, we think they should. Since the interpretation of the law is different between China and Hong Kong, and the HKSAR maintains the common law system which is different from China, therefore it is necessary for them to consult the Hong Kong people.

(English translation prepared by the
Legislative Council Secretariat
for Members' reference only)

28 February 1999

To : Legislative Council Panel on Constitutional Affairs
From : People's Constitutionalist Society

**Proposals on the amendment of
Article 159 of the Basic Law**

(A) Comments on Article 159 of the Basic Law:

1. Under Article 159, amendment to the Basic Law can be proposed after obtaining the consent of two-thirds of the local deputies to the National People's Congress (NPC), two-thirds of all the members of the Legislative Council (Legco), and the Chief Executive (CE). With these stringent requirements, the opinions of Hong Kong people can hardly be reflected. As a matter of fact, only the Central People's Government (CPG) is in a position to exercise the right to amend the Basic Law.
2. At present, the CE, the Legco, local deputies to NPC and the Standing Committee of NPC are all lacking in public acceptability because they are not returned by universal suffrage. Therefore, it is inappropriate for them to be given the important task to amend the Basic Law.

(B) We are of the view that the power to amend the Basic Law should be vested in the people of Hong Kong and the representatives whom they elected. We, therefore, propose that:

1. a Constitutional Assembly should be established with all its members directly elected by universal suffrage. The Constitutional Assembly is responsible for matters relating to the review and amendment of the Basic Law. The amendment proposals passed by the Assembly should be put to a vote by all the people of Hong Kong on a clause- by-clause basis and require the approval of, for example, more than half of the voters or two-thirds of them.

2. the people's power to formulate their constitution should be established. Legislation should be enacted to provide that any amendment proposal jointly endorsed and submitted by a certain percentage of people (for example, it is 5% in California, USA) can be tabled in the Constitutional Assembly for a vote. If the number of people who endorsed the amendment proposal exceeds a certain percentage (for example, 8% in California, USA), the proposal can directly be put to a vote by all the people of Hong Kong on a clause- by-clause basis.
 3. all provisions in the Basic Law must be put to a vote for approval by all the people of Hong Kong before they can come into effect. Provisions approved by the people should be observed and implemented by the Hong Kong Government. The CPG and the Standing Committee of NPC do not have the power to raise objection or intervene in this regard.
 4. other than the mechanism proposed above, no authorities (be they in Hong Kong or in the Mainland) can have the power to amend the Basic Law.
- (C) Even though the CE and the Legco are to be given full power to amend the Basic Law, in which case obstructions from CPG in the procedure of constitutional amendment may be removed, given that neither the CE nor the Legco is returned by universal suffrage, the anti-democratic nature of CE and Legco is certainly a hindrance to the introduction and implementation of direct election in future. On the contrary, if the power to amend the Basic Law is vested in a Constitutional Assembly returned by universal suffrage and also in all the people of Hong Kong (who can participate in the formulation of constitution through the joint submission of amendment proposals), even though such power is limited to amending one single Article 159 of the Basic Law, significant improvement can still be made in the development of democracy in Hong Kong's constitutional system.
- (D) The Constitutional Assembly is not a governing authority. Its functions are restricted to the formulation of the Constitution - the Basic Law. The Constitutional Assembly has no executive power and its status overrides that of the powers that be. Therefore, the Assembly is not a redundant mechanism and its establishment is worthwhile and justified.

Contact Person: NG Kung-siu

(Summary Translation)

(Letterhead of the Neighbourhood and Workers Service Centre)

**Preliminary Proposals on
the Power of and Procedures for Amending the Basic Law
under Article 159 of the Basic Law**

17 March 1999

Principle

The Basic Law is a constitutional document of the Hong Kong Special Administrative Region (HKSAR). It stipulates the framework for constitutional development in Hong Kong and provides for the basic principles of human rights of the Hong Kong people. With the on-going development of democracy in Hong Kong's constitutional system and the growing concern on human rights issues, especially after last year's election of the Legislative Council (LegCo), it is obvious that the people of Hong Kong are expecting the pace of democratization to accelerate.

Given that the Basic Law is the fundamental law of the HKSAR, we hold the view that citizens of Hong Kong must have the chance to fully participate in the amendment process and discuss the proposed amendments. On proposals which involve contentious issues, the public should have the right to decide in a vote whether to accept the proposed amendments.

The power to initiate amendments to the Basic Law

Under Article 159 of the Basic Law, amendment bills proposed by the HKSAR shall be submitted to the National People's Congress (NPC) by the local deputies to the NPC only after obtaining the consent of two-thirds of the local deputies to the NPC, two-thirds of all the Members of the LegCo, and the Chief Executive (CE). Yet, it only provides for the requirements for amendment bills to be proposed by the HKSAR, without stating in clear terms which particular party in HKSAR has the power to propose amendments. In this regard, our understanding is that any one of the three parties concerned may introduce amendment proposals but this power should not be confined to these three parties exclusively.

As the Basic Law is the fundamental constitutional document of Hong Kong, the general public should be allowed to participate in the amendment process as well as the discussion process. Moreover, if members of the public generally see the need to amend the Basic Law, they should have the power to introduce amendment proposals. On the question of which party can trigger the

amendment process in relation to proposals introduced by Hong Kong, we are of the view that the citizens should have the power to introduce amendment proposals which are endorsed by the people. Besides, Members of LegCo may do so either individually or jointly with other fellow Members. The CE can also introduce amendment proposals to the Basic Law. As for the local deputies to the NPC, we consider it inappropriate to confer this power on them in order to uphold the principle of autonomy in Hong Kong (this point will be further elaborated below).

Submission of amendment proposals endorsed by the citizens

In our opinion, all registered electors are qualified to introduce amendment proposals which are endorsed by a certain percentage of all electors. Subject to verification by the Registration and Electoral Office (REO), the proposal should be published in the Gazette.

Subsequent to the gazettal of the proposal, the Constitutional Affairs Bureau shall table the proposal at the LegCo and the consent of two-thirds of LegCo Members is required for its approval. Subsequently, the proposal shall be submitted to the CE for his approval. Then, the REO shall publish it in the gazette for the local deputies to the NPC to decide whether the amendment proposal should be agreed to. The consent of two-thirds of the local deputies is required for the proposal to be approved.

Amendment proposals introduced by LegCo Members individually or jointly with fellow Members

On amendment proposals from LegCo Members, our view is that specific provisions should be incorporated in the existing Rules of Procedure of the LegCo to lay down the procedures for handling amendment proposals on the Basic Law. Proposals may be submitted jointly by Members. The proposals and the amendments concerned should obtain the consent of two-thirds of all Members of LegCo within the parameters of the Basic Law.

Amendment proposals introduced by the CE

For amendment proposals from the CE, reference can be made to the procedures for handling bills.

Amendment proposals introduced by local deputies to the NPC

We opine that we should avoid empowering the local deputies to propose amendments to the Basic Law. It is because under the Constitution of China, they can submit to the NPC proposals to amend the Basic Law through the Standing Committee of the NPC. The autonomy of Hong Kong will imperceptibly be jeopardized and the role of the LegCo in representing public

opinions will even be undermined if the local deputies to NPC are empowered to introduce amendment proposals to the Basic Law.

The public should be consulted on all amendment proposals and should have the right to vote on them

In any case, the public should be consulted on any amendment proposal initiated by the HKSAR. On matters which are substantially controversial, for example, when the LegCo, CE and local deputies to the NPC hold differing views on the contents of an amendment proposal, the public should have the right to decide in a vote the final amendment proposal for submission.

Besides, if amendments to the Basic Law are proposed by the State Council or the Standing Committee of the NPC, consultation with the people of Hong Kong is even more warranted and the people of Hong Kong should be allowed to decide in a vote whether or not to accept the proposals put forth by the Mainland.

**The Chinese University of Hong Kong
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Professor Wilson Wong

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

February 1999

(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).

(English translation prepared by the
Legislative Council Secretariat
for Members' reference only)

(A letter from a Hong Kong resident to the Legislative Council Panel on
Constitutional Affairs, Hong Kong Special Administrative Region)

February 1999

Dear Sirs,

I learn from the newspaper that the Legislative Council (LegCo) is soliciting public views on Article 159 of the Basic Law. As a Hong Kong resident, I would like to give my views on the matter as follows.

Many people think that it is not easy to amend the Basic Law but my view is that it may be very difficult to preserve the Basic Law (especially after three or four decades when all the people have been changed).

Noting that the Basic Law can be amended with the consent of two-thirds of the local deputies to the National People's Congress (NPC), two-thirds of all the LegCo Members and the Chief Executive (CE), one can imagine how easy it is to amend the Basic Law. If, say after 30 or 40 years, the local deputies to the NPC have all been replaced whereas the number of directly elected seats in the LegCo remain unchanged and a "yes-man" has become the CE, the provisions of the Basic Law which were originally drawn up in the interests of Hong Kong people may be amended and may turn out to be "neither fish nor fowl"!

Therefore, I think the following steps should be taken to preserve the essence of the Basic Law:

1. proposals for amendment to the Basic Law should be drafted by the LegCo in full consultation with the public;
2. the amendment proposals should be debated in the LegCo and passed by two-thirds of the LegCo Members after going through three readings;
3. LegCo should be fully returned by direct election to ensure its representativeness and credibility;

4. the amendment proposals, subsequent to their passage in the LegCo, should be forwarded to the local deputies to the NPC for them to consider if the proposals contravene the Constitution of China, and the proposals should be endorsed by two-thirds of the local deputies to the NPC; and
5. the amendment proposals should obtain CE's approval and subsequently be submitted to the NPC for scrutiny.

If we want the Basic Law to be amended for the better and not in such a way which smacks more of "Chinese characteristics" (as we have to know that being a melting pot of the Chinese and the Western cultures is the only advantage Hong Kong is left with), it is high time that a fully directly elected LegCo should be put in place.

Finally, it is my hope that "one country two systems" will be implemented in a truly practical and thorough manner.

願民安*

(* The name of the sender literally means that may the people be blessed with peace and contentment.)