(Translation)

In response to "The Crux of the Problem in Enacting Laws in Hong Kong : An Interview with Legislator Audrey EU" - an article published in the August issue of the Hong Kong Economic Journal Monthly

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In an article entitled "The Crux of the Problem in Enacting Laws in Hong Kong: An Interview with Legislator Audrey EU" published in the August issue of the Hong Kong Economic Journal Monthly, there were repeated references to the role played by the Secretary for Justice and the Department of Justice in enacting legislation to implement Article 23 of the *Basic Law (Article 23)*. I find that some of the points raised do not agree with the facts. Hence, I would like to make some clarifications here.

In the article, the Hon. Audrey EU was quoted to say that the Department of Justice had not done its job properly in the Article 23 legislative exercise. She also stated that the Department of Justice had an obligation to fulfil a special role in this "constitutional legislation". Instead of acting like a "hatchet man" or technician on legal matters for the Hong Kong Special Administrative Region (HKSAR) by packaging the laws to meet policy requirements, the Department of Justice should play the role of a goalkeeper and speak out against any matters which are against the rule of law. It had the duty to protect public interest.

I would like to point out that in my speech at the Motion Debate on the Policy Address in the Legislative Council on 17 January this year, I clearly indicated that the Department of Justice would continue to discharge the important responsibility for maintaining the rule of law in the future, for example (1) we would advise the Administration whether any proposed government measures could be achieved under the current law and, if not, in other lawful manners (such as by legislation or modifying the relevant proposal); (2) we would also advise whether any proposed policies or legislation were consistent with the *Basic Law* and the human rights guarantees and other provisions contained therein – if they were not, the relevant policies or legislation would not go forward. In addition to adhering to these principles and exercising the power to conduct prosecution independently and free from any interference, the Department of Justice, like other departments, has a responsibility to support government policies.

On the question of enacting legislation under Article 23, the Department of Justice acts in the same spirit in ensuring that the proposed legislation is consistent with the *Basic Law* and in line with international standards on human rights. Though Ms EU and I hold different views, it does not necessarily mean that the rule of law could be safeguarded only by following Ms EU's view. I wish to explain the role of the Department of Justice in the legislative exercise to implement Article 23 in the ensuing paragraphs. I would leave the question of what measures are necessary for protecting national security to the Security Bureau.

It has been an established practice, before and after 1997, that policy bureaux are to take up the responsibility for proposing all the bills. Before the Reunification, the *Crimes (Amendment) (No. 2) Bill 1996* (a bill intended for the implementation of Article 23) was moved by the then Secretary for Security Mr. Peter LAI. Last year, the *United Nations (Anti-Terrorism Measures) Ordinance* was passed after it had been moved by the Secretary for Security. This arrangement had not been objected by legislators. The fact that the Security Bureau is responsible for the *National Security (Legislative Provisions) Bill* is consistent with the established practice of the Government, and there is no question of the Department of Justice evading its responsibility. In fact, throughout the whole legislative process, the Department of Justice and the Security Bureau have worked hand in hand on the legislative and consultation work.

Before the HKSAR Government put forward its proposals to implement Article 23, the Department of Justice had done a lot of preparation work. In particular, the current legislation was reviewed and researches into relevant overseas legislation and case law were done. In addition, the Department of Justice has to ensure that the proposed legislation may not and would not lessen the basic rights and freedoms that the people of Hong Kong enjoy under the *Basic Law*. The Government also agrees that it is constitutionally bound to comply with the *Basic Law* and other provisions concerning human rights guarantees contained therein when it implements Article 23. Mr. David Pannick, QC, an internationally-renowned human rights expert, is also satisfied that the contents of the Government's proposals are consistent with the human rights law. According to his view, none of the proposals are objectionable with regard to legal principles.

Three provisions have been added in three areas of the *National Security (Legislative Provisions) Bill* to require the relevant legislation to be applied, interpreted, and enforced in a manner that is consistent with Article 39 of the *Basic Law* (which incorporates the stipulations of the *International Covenant on Civil and Political Rights*). In addition to the special right given

to the accused to elect to stand trial by jury, defences and immunities are also provided for in the Bill. All these seek to protect the freedoms of speech, assembly and conscience. The duty of upholding the rule of law has effectively been performed.

All these serve to demonstrate that the Department of Justice was not playing the role of "a hatchet man or a technician on legal matters for the HKSAR" in the legislative exercise to implement Article 23. The Department has been doing its best in playing the role of a goalkeeper by ensuring that the proposed legislation is consistent with the constitution and the fundamental rights and freedoms of the people.

Ms EU said that the law to implement Article 23 is a constitutional law. I do not agree with this. The *Basic Law* is a constitutional law and was enacted by the National People's Congress. Implementing Article 23 by way of legislation is like implementing Article 24 of the *Basic Law* by way of the *Immigration Ordinance*. It fulfils a constitutional obligation. But it is a local law, not a constitutional one.

Ms EU pointed out that "the Government took a wrong step at the outset. It should have taken the suggestion of different sectors of the community to consult the public by way of a White Bill. But it had no regard for the opposition of the public and intended to pass the Bill in a haste…" This is not true. Ms EU also said that "the Government wanted to pass the Bill hastily before the deadline of 9 July. As this has violated the necessary legislative procedures, I think the Department of Justice has a duty to speak out. The Department should not comply simply because the Government has such a policy." People who are conversant with the legislative procedures would agree that the endorsement of the House Committee of the Legislative Council must be obtained before the resumption of the second reading of a bill could be put on the agenda of the Legislative Council. On 19 June this year, the House Committee of the Legislative Council resolved to put the *National Security (Legislative Provisions) Bill* on the agenda of the Legislative Council for 9 July. This was done in full compliance with the legislative procedures. Some people are of the view that the legislative procedures have not been followed if consultation is not carried out by way of a White Bill. In fact, a White Bill is not a necessary component of the legislative process. On the contrary, it is not an oft-used method for canvassing the views of various sectors.

As the Government has already consulted the public by way of a consultation document, the use of a White Bill will only duplicate the consultation work. There is an opinion that a White Bill would give the legislators more room for making amendments. In fact, the scope of

amendment is only restricted by the long title of the bill in question. The long title of the Bill reads: "Amend the *Crimes Ordinance*, the *Official Secrets Ordinance* and the *Societies Ordinance* pursuant to the obligation imposed by Article 23 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* and to provide for related, incidental and consequential amendments". This title has a very broad scope. According the legislators have substantial power to make amendments within the parameters of Article 23, particularly as the implementation of the legislation does not have any implications on financial expenditure. It is therefore wrong to say that consultation must be done by way of a White Bill.

As we all know, a 3-month consultation period began in September last year to canvass views on the proposals to implement Article 23. During the consultation period, we received nearly one hundred thousand submissions tendered by different groups and individuals, including more than 3,800 submissions from people overseas, with more than 370,000 signatures. Opinions both for and against the proposals were expressed in the submissions. Government officials attended more than 250 related meetings, seminars and forums. The relevant panels of the Legislative Council held a total of 12 meetings and 271 groups and individuals expressed their views. The Bill was tabled before the Legislative Council in February this year only after the Government had given full consideration to these views. Nine important amendments[1] were made to the original proposals, including the abolition of the offences of misprision of treason and possession of seditious publications. This demonstrates clearly that the *National Security (Legislative Provisions) Bill* was not made behind closed doors by the Security Bureau and the Department of Justice. On the contrary, the Bill is a piece of proposed legislation which was drafted after having taken into account the views of political parties, the legal profession, the academia and the community.

Moreover, since the Bill was tabled before the Legislative Council, the Bills Committee have convened 29 meetings totalling more than 100 hours. Four public hearings were held to canvass opinions from all sectors. By mid-June, more than 50 amendments[2] to the Bill had been proposed by the Government, including the incorporation of the "likelihood" test of the Johannesburg Principles, that is, an incitement will not constitute an offence unless such act is likely to incite others to engage in acts endangering national security. Again, demands from the community had been addressed. It is therefore groundless to assert that the Government's consultation was not thorough, that it had turned a deaf ear to public opinions and that it wanted to rush the legislation through the Legislative Council.

The Government originally proposed to resume second reading of the Bill on Article 23 on 9 July. This was based on the Government's belief that the Bill had already struck a good balance between safeguarding national security and protecting the basic rights and freedoms of the people, and that it was the right time to do so. The Government also hoped that the issue of Article 23 would not continue to divide our society.

But the rally on 1 July showed that some members of the public had different opinions on the contents of the Bill and were not able to fully accept it. After taking into account the people's concern and the degree of acceptance of the Bill in the community, the Government, once again, put forward three major amendments to the Bill, namely, deletion of the proposed provision to proscribe an organization which is subordinate to an organization prohibited on the Mainland; deletion of the provision to confer on the police the power to conduct emergency searches and the introduction of "public interest" as a defence for the offence of making unauthorized and damaging disclosure of protected information that has been obtained illegally. It is hoped that these amendments could remove the public's worries. However, as the amendments were made at short notice, the public did not have the opportunity to fully understand them. As the opposition remained strong and the amended Bill did not gain the support of the majority of the legislators, the Government decided to defer the resumption of second reading.

Ms EU criticised that the HKSAR Government acted by second-guessing the views of the Central Government. If she comes to make a comparison between the Bill and Mainland law, she will know that the Bill has been drafted strictly under the Hong Kong legal system that we are familiar with and no Mainland law has been introduced into Hong Kong. Since the issue of national security is involved, the HKSAR Government should and did consult the Central Government. But this is certainly not an act of second-guessing the views of the Central Government. The intent of the Bill is to safeguard national security on the one hand and to protect the rights and freedoms of the public on the other.

Our department will in all modesty review Ms EU's criticisms of our drafting work on legislation. However, it is the power and duty of Ms EU as a legislator to examine and propose amendments to the Bill. I am sure that it is the objective of the Bills Committee to achieve the same during its 100-odd hours of meetings.

After 1 July, the HKSAR Government has seriously reviewed the reasons why 500,000 people took to the streets. It is evident that the communication channel, manner, strategy, etc., between the public and the

Government were inadequate. Moreover, the priorities of formulating and implementing policies need to be reset. In his speech of 17 July, the Chief Executive undertook to carry out a policy reform. As far as the legislative work on Article 23 is concerned, we have reviewed why the public strongly oppose the Bill even though we consider it to be acceptable. Apart from the inadequacies in communication, the fact that the Government did not conduct any interim review during the 3-month SARS outbreak and was therefore unable to accurately assess the situation gave the public an impression that it was all done in a rush. All these warrant a rethink by the Government. Having gained the experience from the legislative work on Article 23, the Government will consider things more thoroughly in its future legislative exercise. However, I think that it is necessary to explain to the public the entire incident and respond to Ms EU's allegations in order to avoid deepening the public's misunderstanding of the legislative exercise and misconception about our determination to uphold the rule of law. In the end, such misunderstanding or misconception would only serve to hamper the confidence of the local and expatriate communities in Hong Kong. This will not be of benefit to the people of Hong Kong.

Note 1:

- In the offence of treason, "war" is defined as and restricted to publicly declared war or open armed conflicts. Thus, demonstrations or riots do not fall within the meaning of war. The Bill provides for the deletion of the common law offence of misprision of treason. Besides, the offence of treason is not applicable to non-Chinese nationals.

- The element of "threat of force" is deleted from the offences of secession and subversion. The relevant offences could only be committed by engaging in war or by using force or serious criminal means that would seriously endanger the stability or the territorial integrity of the PRC.

- "Resisting ……its exercise of sovereignty" is deleted from the offence of secession.

- An intent to incite others to commit an offence of treason, subversion or secession is a necessary element of the offence of handling seditious publication. The offence of "possession of seditious publication" is abolished.

- For information related to relations between the Central and the HKSAR, only those affairs which are within the responsibility of the Central Authorities in accordance with the *Basic Law* are protected. Only those who endanger "national security" by unauthorized disclosure of information illegally obtained will be penalized. In addition, according to the newly proposed section 18(2)(d) of the *Official Secrets Ordinance*, a person commits an offence only if he, without lawful authority, makes a

damaging disclosure of the protected information acquired by means of illegal access such as hacking, theft, bribery, etc. Unauthorized and damaging disclosure of protected information which is leaked by public servants does not include information leaked by Mainland officials.

- Regarding a local organization proscribed by the Secretary for Security who makes the decision based on national security as the organization is found to be subordinate to a Mainland organization the operation of which has been prohibited on the ground of national security, appeal could be made against the decision to the Court of First Instance on points of law or points of facts.

- The investigation power to be conferred on the police by the newly proposed Part IIA of the *Crimes Ordinance* does not apply to journalistic materials. The proposal to confer additional power to investigate financial matters has been withdrawn.

- By ensuring that the application, interpretation and enforcement of all its new provisions must comply with Article 39 of the *Basic Law*, the Bill has provided safeguards for human rights.

- A defendant of any of the offences in relation to Article 23 has the right to elect to stand trial before a jury.

Note 2:

- The Government has made more than 50 proposed amendments, including the following 4 main items: (1) an incitement must be *likely to* induce others to commit acts that would endanger national security before it could amount to an offence of sedition. A two-year time limit for prosecution of the offence of handling seditious publication is imposed; (2) all the procedures for proscribing an organization on the grounds of national security are provided under new provisions which stipulate that any proscription may be appealed to the court on points of facts or points of law. Details of the rules of appeal are to be made by the Secretary for Security for the deliberation of the Legislative Council; (3) the emergency search power to be conferred on the police can only be exercised on the authorisation of a police officer at the rank of Assistant Commissioner of Police or above; (4) the application, interpretation and enforcement of the legislation must comply with all the provisions of Chapter III of the *Basic Law* which protect the freedoms and rights of the residents.