

**Speech by the Secretary for Justice,  
Ms. Elsie Leung, in a motion debate on  
the Appeal by the Hon. Lee Cheuk-yan to the people  
of Hong Kong to take part in 1st July march  
to oppose the enactment of legislation to implement  
Article 23 of the Basic Law in the Legislative Council on  
Wednesday the 25 June, 2003**

Madam President,

It was just six and a half months ago that in this Chamber, I spoke in the debate of the motion by the Hon. Albert Chan on the enactment of laws to implement Article 23 of the Basic Law. I went at length to illustrate why the rights and freedoms of Hong Kong citizens would not be reduced with the passing of such laws, why the rule of law would not be damaged as a result of the implementation of Article 23, and how the proposals put forward in the Consultation Paper on the subject published on the 24 September, 2002 would pass the litmus test of "one country, two systems". I also responded to the comments by the Hon. Members on drafting of offences, the appeal mechanism, and whether the proposals went further than Article 23 of the Basic Law required.

2. It seems that today, we are going over the same process once again. However, I can now speak with greater confidence, given that the National Security (Legislative Provisions) Bill 2003 has since been introduced into this Council, and will pass all these tests. After the full text of the bill was published, many of the worries have disappeared.

3. Shortly after the Reunification, the Department of Justice started to collect information on legislation relating to national security of other jurisdictions, including those with the common law system and with the civil law system. We studied the existing legislation, the international covenants, and principles and case law on the subject. We prepared ourselves for rendering advice to the policy bureau, namely, the Security Bureau, and for drafting legislation for the implementation of Article 23 of the Basic Law when the time was ripe to do so.

4. Throughout the process of preparation for the enactment of law, we have adhered to certain guiding principles. They were:

- Any legislation introduced into this Council must not contravene the Basic Law (Article 11).
- Any restriction of rights and freedoms must be consistent with the continued application of the International Covenant on Civil and Political Rights (Article 39).
- Offences to implement Article 23 should be clearly and tightly defined to avoid uncertainty and in accordance with the common law system.

5. Had we introduced a bill for the implementation of Article 23 of the Basic Law in September, 2002, the bill might have fallen short of the expectations of the people of Hong Kong. Crimes against national security are sensitive issues. Without listening to people's voices, we would not have been able to see the matter from their angle. For example, librarians worried about the offence of possession of seditious publication, although that has always been part of our law. However, the Administration arranged three months of consultation, meetings with various sectors of the community, and over 250 forums, seminars and meetings. It received more than 100,000 submissions from all walks of life (many of them containing knowledgeable and considered opinions) and some 250,000 signatures. As a result, the bill introduced into the Legislative Council on the 26 February 2003 was not the product of the Security Bureau and the Department of Justice alone, but also incorporated the views of a large number of people. The consultation and debates over the proposals were unmatched in the recent legal history of Hong Kong. Indeed, a survey on news stories published a couple of days ago showed that the implementation of BL 23 attracted greater public attention than the promulgation of the Basic Law itself.

6. The Bill incorporates following changes to the proposals contained in the Consultation Paper:

- The definition of "war" in treason is restricted to publicly declared war or open armed conflicts so as to exclude demonstrations and riots; the common law of misprison of

treason is expressly abolished; and treason will not apply to non-Chinese nationals.

- “Threat of force” is deleted as an element of secession and subversion so that the offences would be limited to those who engage in war or the use of force or serious criminal means that seriously endanger the stability or territorial integrity of the PRC.
- “Resisting the exercise of sovereignty” is deleted from secession.
- There must be an intention to incite treason, subversion, or secession in an offence of handling seditious publication and the offence of possessing seditious publication is abolished.
- Information relating to the relationship between the Central Authorities and Hong Kong will only be protected if it relates to affairs for which Central Authorities are responsible under the Basic Law, and the unauthorized disclosure of the same would only be penalized if it endangers “national security” as defined. Furthermore, under the newly added s.18(2)(d) of the Official Secrets Ordinance, the damaging disclosure of protected information acquired by means of illegal access would only be an offence if it is unauthorized, and the information is obtained through criminal means such as computer hacking, theft or bribery. Unauthorized disclosure of protected information leaked by public servants would not apply to leaks by mainland officials.
- Persons aggrieved by a decision of the Secretary for Security to proscribe an organization subordinate to a Mainland organization which is banned on the ground of national security may appeal to the Court of First Instance on points of both law and fact.
- Investigative powers of the police under the new Part IIA of the Crimes Ordinance shall not be exercised in respect of journalistic materials and the proposal to seek additional

financial investigation powers was withdrawn.

- Safeguards for human rights are added by ensuring that the application, interpretation and enforcement of the new provisions must be in a manner consistent with Article 39 of the Basic Law.
- Right to elect for trial by jury is made available to all Article 23 offences.

These changes were proposed by legal academics, legal professional bodies, Chambers of Commerce, consular representatives of several countries, political parties, media organizations, librarians, non-governmental organizations, etc. who made representations to the Government during the consultation period.

7. Honorable Members are aware that since the Bill was introduced into this Council, a Bills Committee was established and has to date met 25 times (more than 90 hours), in addition to hosting four public hearing sessions to receive the views and comments of more than 100 individuals and organizations. Some 100 information papers and 200 written submissions have been considered by the Committee. As a result, the Government has announced that it will make the following Committee Stage Amendments:

- A likelihood test is introduced so that the offence of sedition would be limited to situations where a person intends, and is likely to, induce others to commit treason, subversion or secession, or engage in violent public disorder; and a three year time limit is imposed for prosecuting an offence of handling seditious publications.
- The reference of “national security” is removed from the existing section 8 of the Societies Ordinance, so that the Secretary for Security could only proscribe an organization on the ground of national security in the limited situations specified in the new section 8A. In addition, the rules governing the special appeal arrangements shall be made by the Secretary for Security, subject to the positive approval of this Council (as opposed to what the Hon Yeung Sum said that the Secretary for Security was free to

make whatever rules she wanted), instead of by the Chief Justice as originally proposed.

- The exercise of emergency search powers under Part IIA of the Crimes Ordinance must be authorized by a police officer at or above the rank of Assistant Commissioner of Police.
- The application, interpretation and enforcement of the relevant Ordinances must be in a manner consistent with the human rights guarantees entrenched in Chapter III of the Basic Law instead of Article 39 only.

These changes were again made on the recommendation of Honourable Members, the legal profession, academics, the media and non-governmental organizations, etc. who made representations to the Bills Committee. They include, amongst others, the views of Prof. Albert Chen, The Hong Kong Bar Association, The Law Society of Hong Kong, The Association of the Bar of the City of New York, The Society of Publishers in Asia, News Executives Association, etc. The Government does listen to their views and takes the legislative process seriously.

8. Because of the sensitivity of the Bill, we have taken meticulous care to maintain a good balance between protecting national security and safeguarding the fundamental rights and freedoms of Hong Kong people. Indeed, the Bill contains more human rights safeguards than any other ordinance. To name a few, they are:

- An express provision that the application, interpretation and enforcement of the law must be in a manner that is consistent with Chapter III of the Basic Law.
- The use of force, violence, serious criminal means or public disorder is an element of the offences of treason, subversion, secession and sedition.
- The right to elect trial by jury.
- The repeal of overly broad provisions relating to treasonable offences and offences relating to the head of state.

- The retention of provisions to ensure that expressions of opinion and criticism of the government remain lawful.

We are convinced that the Bill complies with the human rights standards set by the ICCPR. The dispute is how far above this yardstick we should place our level of acceptance. The fact that we do not agree to certain demands of some Honourable Members does not mean that we are in breach of the ICCPR. The government must find a proper balance between national security and the rights and freedoms of the citizens.

9. Time does not permit me to deal with all the controversial issues in respect of which requests for amendments have not been acceded to. I would deal with some major ones:

- (1) Proscription of a local organization that is subordinate to a Mainland organization that has been banned on the grounds of national security: It has been alleged that this introduces Mainland law into Hong Kong, blurs the distinction between the two systems and is targeted at certain identified local organizations. All these allegations are incorrect. Since 1949, the British government made it known that Hong Kong should not be used as an anti-China base. Is it even more so when China has resumed the exercise of sovereignty over Hong Kong? Because of the free flow of information and people across the border, there is a need to prevent local organizations from being used for endangering national security. Crimes against national security cause calamities, resulting in the loss of lives and enormous damage to property, and every effort should be taken to prevent them from happening. Terrorist associates can be proscribed under the United Nations (Anti-Terrorism Measures) Ordinance without having committed any crime of terrorism. By the same token, it should be possible to proscribe local organizations if they are subordinate to organizations which endanger national security in the Mainland, and they are themselves a threat to national security. When we talk about national security, there is only one nation, that is, the People's Republic of China. But the manner in which

national security is to be protected and the procedure for proscription must be dictated by the laws of the respective jurisdictions, i.e. the laws of the PRC applies to Mainland organizations and the laws of Hong Kong apply to local organizations. If an organization in the Mainland is banned on the ground of national security, the Secretary for Security is, of course, put on alert whether a similar threat to national security would be perpetrated by a local organization whose funding comes mainly from such Mainland organization, or is under the direct direction or control of the Mainland organization, or has its policies determined directly or indirectly by the Mainland organization. Procedurally, the Mainland organization is banned in accordance with the Mainland law, and the Hong Kong organization may be proscribed in accordance with the Hong Kong law, which gives the Secretary for Security the discretion whether or not to proscribe. In the exercise of such discretion, the Secretary for Security must have reasons to believe that the proscription is necessary in the interests of national security and is proportionate for such purpose. On appeal, if the Court is not satisfied that the Secretary for Security has correctly applied the law, or that there is sufficient evidence to prove that the ground exists or that there is sufficient evidence to justify a reasonable belief that the proscription is necessary in the interest of national security and is proportionate for such purpose, it will set aside the proscription. It can be seen therefore, the provisions for proscription is an exact illustration of "One country, two systems": the enactment of the law is necessary for the protection of one country, but what would justify a proscription and the procedure for proscription are determined by the respective laws and procedures of the two jurisdictions. The issuance of a certificate is to facilitate the proof of the fact of proscription of the organization in the Mainland in accordance with the legal system in the Mainland, and does not affect the right of the court to set aside the proscription of the local organization if the Secretary for Security does not exercise his power properly.

- (2) The offence of handling seditious publications: It has been said that the retention of this offence is a threat to the free flow of information. This is untrue. The Bill defines sedition so narrowly that it takes away from the current law of seditious intention concepts such as “hatred”, “contempt”, “discontent”, “feelings of ill-will” or “enmity”. It replaces them with incitement to commit the offence of treason, subversion, or secession, or incitement to engage in violent public disorder. Furthermore, the proposed Committee Stage Amendment to add a “likelihood to induce” test introduces a further safeguard. The new offence cannot be a threat to the media or to the free flow of information.
- (3) Public interest as a defence to unauthorized disclosure of protected information: much controversy has arisen on this subject. Such a defence has never been provided either in Hong Kong’s official secrets legislation, or in the UK legislation on which it is based. The issue was thoroughly debated in the UK Parliament in 1989 and in Legislative Council of Hong Kong in 1997 when the Official Secrets Act was localized. Both legislatures rejected the call for such a defence. Unauthorized disclosure of protected materials would only constitute an offence if the protected materials were obtained through a leak by a Hong Kong public servant or through defined illegal means and the disclosure is damaging. It is unsafe to ask journalists or others to decide what is and what is not in public interest, because the damage would be irreparable if later on they are found to have made a wrong judgment. Without such a statutory defence, the public interest is still a matter to be taken into consideration in exercising the prosecutorial decision, and as a matter of mitigation.

10. Madam President, I speak against the resolution not because I am against people taking to the streets. The 1<sup>st</sup> of July is a day of celebration in Hong Kong: the anniversary of its reunification with the Mainland and the establishment of the HKSAR, and when families will come out in a jovial mood to enjoy themselves after overcoming SARS. The enactment of law and the scrutiny of a bill is best done in this Chamber, by those in whom the public has placed its



trust, and where the public has already had plenty of opportunity to express their views. Be that as it may, I respect people's freedom of procession and of demonstration so long as they exercise their right in an orderly way in accordance with the law. I rise to speak against the motion because I cannot agree that the enactment of legislation to implement Article 23 of the Basic Law should be protested against. It is our obligation to enact laws to protect national security in accordance with Article 23, and the Bill enables us to fulfil such obligation. All the talk about erosion of human rights and freedoms, damaging the rule of law and destroying "one country, two systems" is a repetition of what has been said in the past 6 years on almost every issue when people hold different views from the Government. In the Asian Intelligence published by the Political and Economic Risk Consultancy Ltd. on the 4 June 2003, our current situation in respect of the legal system was described as "Very good" with the perception trend of "improving". It said, and I quote: "There is probably no aspect of Hong Kong that better illustrates how the 'one country, two-systems' concept works in practice than Hong Kong's judicial system." It is unfortunate that we cannot appreciate our strength and use it in reviving our economy, improve our public hygiene and make Hong Kong a better place in which to live, but frighten people with doomsday prophecy that never come true, while people from outside acclaim our success in maintaining "one country, two systems", the rule of law and independence of judiciary, transparency and the combat against SARS. I urge Honourable Members to vote against the motion.