

**Speech by Miss Elsie Leung, Secretary for Justice
delivered at Forum on the Implementation of Article 23
and the Rule of Law
organized by Asia Pacific Law Association
on 7 December, 2002**

Dr. Henry Hu, Miss Maria Tam, the Hon. Andrew Liao, Judge Benjamin Liu, ladies and gentlemen.

I am glad to be given the opportunity to speak at this forum the theme of which is “The Implementation of Article 23 and the Rule of Law”. As you are no doubt aware, the Hong Kong Special Administrative Region (HKSAR) Government issued on the 24 September a Consultation Paper on “Proposals to Implement Article 23 of the Basic Law” and in order to help the audience to recapitulate on the contents of the Proposals, may I ask my colleague, Miss Annie Tam, Director of Administration and Development of the Department of Justice, to present a power-point production summarizing the Proposals.

Rule of Law

2. The rule of law, in brief, means the principle of legality, i.e. everything must be done in accordance with the law. It also means that nobody is above the law. In the context of the Government, its powers must derive from the law and be exercised in accordance with the law. Therefore, even where the Government is vested with certain discretionary powers, its discretion must be exercised rationally and without procedural impropriety, and the courts are in a position to prevent abuse. Citizens have the right to challenge in courts the legality of acts of the government (including the validity of the law under which it acts) and disputes are to be adjudicated by an independent judiciary. The law should be even-handed between government and citizens, striking a balance between the needs of fair and efficient administration and the rights of the individuals. The observance of the rule of law makes a government one of law, and not of men.

3. These principles are fully understood, not only by members of the Department of Justice, but by the Administration in general. They form the ground rules by which Government policies and legislation are formulated, and administrative decisions are made. Moreover, the many

court decisions involving the Government since the reunification indicate that members of the community understand that the Government is subject to law.

4. The mission of the Department of Justice is to uphold the rule of law, provide efficient and effective legal services to the HKSAR Government, and to maintain and improve the present legal system. Therefore, legal policy must be formulated that enshrines the rule of law; drafting of legislation must be in conformity with the Basic Law and its human rights provisions and in accordance with legal policy; prosecutorial decisions must be made and prosecutions must be conducted in accordance with the fundamental principles of justice in a process; legal advice must be given to government bureaux and departments that would maintain high standards of public administration in accordance with the rule of law and the Government's case must be presented impartially in judicial reviews and other administrative proceedings. These are fully reflected in the Policy Objectives of the Department of Justice which also contain others of our strategic plans.

5. How is our Policy Objectives reflected in the present proposals to implement Article 23 of the Basic Law? The fundamental rights and duties of the residents of HKSAR are set out in Chapter III of the Basic Law. In particular, Article 27 protects the freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions and to strike. Freedom of the person is protected by Article 28. Freedom and privacy of communication are protected by Article 30. Freedom of movement is protected by Article 31. Freedom of conscience, of religious belief and to preach and to conduct and participate in religious activities in public are protected by Article 32. Freedom of choice of occupation and to engage in academic research, literary and artistic creation and other cultural activities are protected by Articles 33 & 34 and right to confidential advice, access to the courts, legal representation of his own choice, right to social welfare, freedom of marriage and other rights and freedoms safeguarded by the laws of the HKSAR are protected by Articles 35, 36, 37 and 38 respectively. Article 39 of the Basic Law provides that the provisions of the ICCPR, the ICSCR and ILCs as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. It also provides that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions I have just mentioned, which means that the restrictions must be reasonable, rational, proportionate to the purpose and is necessary in a democratic society necessary for the protection of national security, public

safety, public order (ordre public), etc.

6. Article 11 of the Basic Law provides that no law enacted by the legislature of the HKSAR shall contravene this (the Basic) Law. Therefore, whether the current proposals are effective or adequate for the protection of national security is a matter for which we have to rely on the professional judgment of the Security Bureau, the Department of Justice must make sure that the proposals are consistent with the provisions of the Basic Law, and that they do not violate the human rights which are protected by Chapter III of the Basic Law that I have described, including, inter alia, freedom of speech, of the press and of publication, of association, of assembly, of procession and of demonstration, as well as freedom of conscience and of religious belief. Any law not in conformity with the Basic Law or the human rights provisions of the Basic Law will not be upheld by our courts. Indeed, every legislative proposal that goes before the Executive Council must contain a statement whether there is any Basic Law implication in it and the Department of Justice must certify whether the proposal is in conformity with the Basic Law and its human rights provisions. In the present case, the Department of Justice has certified that this is the case.

7. Before we gave such certification, we researched into the existing laws of Hong Kong and the laws of other jurisdiction relating to national security, in particular those of other common law jurisdictions. We looked at the development of such laws including the reports of various law reform commissions, international covenants, declarations and related literature, as well as norms such as the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR and the Johannesburg Principles on National Security, freedom of Expression and Access to Information. We also consulted the General Comments of the UN human rights committees which we find useful in understanding our obligations under Article 39 of the Basic Law. Although not all of these principles are widely accepted yet many of them provide guidance of aspired good practice which may be adopted insofar as local situations permit. We also have the benefit of opinions put forward on the subject, both before and after the Re-unification submitted by the Hong Kong Bar Association, the Law Society of Hong Kong, Justice (Hong Kong Section of the International Commission of Jurists), the Hong Kong Human Rights Monitor, the Hong Kong Journalists Association, and various political parties and legislators. Of course, we must look into the meaning of Article 23 the compliance of which is obligatory on the part of the HKSAR. With these researches, I and colleagues of my Department are confident that the current proposals are consistent with the Basic Law and are consistent with the human rights provisions of the Basic Law. I am glad that

since the publication of the Consultation Paper, our view has been endorsed by a leading human rights expert from the United Kingdom – Mr. David Pannick QC.

8. Another constitutional requirement we must observe is that the legal system practised in the HKSAR shall remain unchanged and the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained except for any that contravene the Basic Law (Article 8). Although Article 23 of the Basic Law was promulgated for the purpose of maintaining the state sovereignty, unity and territorial integrity of the People's Republic of China (PRC) as well as for preserving Hong Kong's long term stability and prosperity, HKSAR was entrusted with the responsibility to *enact laws on its own* to give effect to this Article in accordance with our own legal system. We treasure the privilege given to us and would implement Article 23 in accordance with the Basic Law, common law principles as well as our obligations under international covenants. Therefore, although some acts may constitute treason, secession, sedition, subversion, theft of state secrets accordingly to the laws in the Mainland, they may not necessarily be so under the Hong Kong laws or the laws to be promulgated in accordance with Article 23. We are careful that the implementation of Article 23 would not be the introduction of Mainland legal concept or Mainland legislation and that our separate legal system shall be maintained. For example, under the Official Secrets Ordinance, we do not use the term "state secrets", but what are prohibited from disclosure are "protected information" which is clearly defined in the Ordinance and is entirely different from the Mainland provision.

9. The fact that in the current proposals, the use of 'force, violence, public disorder or serious unlawful means' as a necessary ingredient of the offences of treason, secession, subversion and secession is a conscious decision to comply with our obligations under ICCPR although the PRC has yet to ratify the same international covenant. The proposal that the Secretary for Security has a discretion and not a mandatory obligation to proscribe an organization which is affiliated to one banned in the Mainland on the ground of endangering national security is another example of the observance of ICCPR.

10. The current proposal to repeal the existing provision in the Crimes Ordinance relating to seditious intention and replace it with a straight forward definition of inciting others to commit the substantive offence of treason, secession or subversion, or to cause violence or public disorder

which seriously endangers the stability of the state or the HKSAR is an enhancement of the freedom of expression since emotion like 'hatred', 'contempt', 'disaffection', 'discontent', 'ill-will' and 'enmity' are no longer the offensive elements.

11. We have also preserved the current exceptions of what constitutes a seditious intention: currently the law permits criticism of the Central People's Government (CPG) or other competent authorities of the PRC, pointing out the defects in the government or constitution of the HKSAR, its legislation or administration of justice or attempt to procure by lawful means the alteration of any legally established matter, e.g. provisions in the Constitution etc.. These will be retained. Therefore, if a person would advocate the change of the socialist system or the leadership of the Communist Party, he would be allowed to do so provided that he would not incite others to procure the change through treason, secession or subversion, or violence or public disorder. Nor will an organization be banned simply because it is formed for such purpose unless it posts danger to national security.

12. The proposals to implement Article 23 of the Basic Law is a good illustration that the concept of 'One country, two systems' is adhered to by the CPG and the HKSAR, which would only be successful when there is adequate understanding of the two very different systems so that whilst preserving our system, we do not infringe upon the other system in the Mainland. In respect of national security, Taiwan issue and international relationship, Hong Kong must follow the national policy: matters of defence and foreign affairs are the responsibility of the CPG for which Hong Kong understandably does not have any autonomy. In the current proposals, we find support in the 'Peaceful Reunification, One Country, Two Systems' policy of the CPG towards Taiwan for our proposal not to impose criminal sanction on acts, expression or publication that promote Taiwan independence unless it involve the use of or incitement to use force, violence, public disorder, or serious unlawful means. The proposed law will not punish mere thoughts and expression advocating the independence of Taiwan if they do not amount to the offences described.

13. The compliance with our obligations under the international obligations also find support in China's international policy: in recent years, China has committed to advancing economic and trade developments. She has also taken an active part in international affairs. At the diplomatic level, she has consistently adhered to the Five Principles of Peaceful Co-existence, Independence and Autonomy. She has fulfilled the duties and obligations of

a permanent member of the United Nations Security Council, and has gracefully handled some international problems, thereby building up a good international reputation. The PRC Government signed the ICCPR, and the ICESCR in October 1997 and October 1998 respectively. On 28 February, 2001 the ICESCR was examined and ratified at the 20th Meeting of the Standing Committee of the Ninth National People's Congress. It shows that the Chinese Government has taken a positive attitude towards international co-operation on human rights issues. It also indicates China's determination and confidence in promoting and protecting human rights. China has been advocating the development of human rights according to the national conditions and the wishes of the people. This is why the CPG adopts a relaxed and positive attitude towards the development of human rights in the HKSAR.

14. Ladies and gentlemen, those opposing legislation accuse the Government of impairing the rights and freedoms of citizens by making the proposals contained in the Consultation Paper, damaging the rule of law and the 'One country, two systems'. I hope that I have given some examples of what the Department of Justice have done to ensure that they do not. The Government never purported that the proposals are perfect – that is why we need to go through the consultation exercise. We welcome your views and I would urge you to write to the Secretary for Security before the 24 December 2002 or express your views in such manner as you chose. I assure you that your views will be taken into consideration. My colleague Peter Wong, Senior Assistant Solicitor General will assist me in dealing with your questions which may be raised in English or Cantonese. Thank you.