

(English Translation)

**Speech by the Secretary for Justice, Ms Elsie Leung,
in a motion debate on Article 23 of the Basic Law,
in the Legislative Council on Thursday, 12 December 2002**

Madam President,

The proposals on implementing Article 23 contained in the Consultation Document may not be perfect. But they are fully consistent with the Basic Law and with Hong Kong's obligations under international covenants on human rights. They are put forward in order that members of the public, and of this Council, may contribute to the development of ideas on this crucial subject.

2. Many comments received so far have been very constructive and will be seriously considered. However, alongside the constructive comments there has also been a lot of rhetoric. Cliches have been trotted out. References to "a chilling effect", "self-censorship" and even "police state" or "reign of white terror" receive wide media coverage. In such circumstances, it is not surprising that concerns are reported to have grown in the community.

3. Today's debate provides an opportunity for rational analysis to take place. The motion, and the proposed amendments to it, raise serious issues concerning rights and freedoms, the rule of law, and "one country, two systems".

Rights and freedoms

4. The Secretary for Security will demonstrate that the proposed new laws are in some respects more liberal than current laws, and in other respects are largely the same. The net effect will therefore **not** be to reduce rights and freedoms enjoyed by the people of Hong Kong.

5. I wish to emphasize that the **fundamental** rights and freedoms enjoyed by Hong Kong residents in accordance with the Basic Law will not, and cannot, be reduced by the new laws. In implementing Article 23, the

Administration accepts that it is constitutionally obliged to comply with other parts of the Basic Law that guarantee human rights. Article 27 provides that –

“Hong Kong residents shall have 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.”

6. Article 39 provides for the continued application of the International Covenant on Civil and Political Rights and precludes restrictions on rights and freedoms that are inconsistent with such continued application.

7. My department has advised that the proposals contained in the Consultation Document do comply with those human rights obligations. That view has been endorsed by a leading human rights expert – Mr David Pannick QC. Mr Pannick is satisfied that the contents of the proposals are consistent with human rights law and also considers that none of the proposals are objectionable as a matter of legal principle.

8. Honourable Members, in particular the Hon Albert Chan Wai-yip, criticised the Government for dismissing the views of the Bar Association. In fact, shortly after the receipt of the submission, both the Secretary for Security and I have stated that the submission made by the Bar is practical and rational, and we will carefully deliberate on details of the submission.

9. But neither the Department of Justice nor Mr Pannick have the final say on the consistency of the proposals with human rights law. That right is vested in our independent courts. Under Article 11 of the Basic Law, no law enacted by this Council shall contravene the Basic Law. If our courts decide that any part of the Article 23 laws is inconsistent with the human rights guarantees in the Basic Law it will not give effect to them. It can therefore be seen that the safeguard against improper legislation is already in place.

10. I accept that, after enactment of the laws, it will be essential to ensure that their application is consistent with fundamental rights and freedoms in individual cases. However, the Administration is **obliged** to apply the law in this way, and the courts will ensure that this is the case. To underline this

fact, the Administration proposes to include in the legislation an express provision to the effect that nothing in it is intended to contravene Articles 27 or 39 of the Basic Law, and that restrictions apply only in so far as they are lawful pursuant to those Articles. Adequate safeguards will therefore be in place to prevent improper implementation of the laws.

11. Some commentators have suggested that compliance with our human rights obligations is not sufficient; and that our laws should also comply with the Johannesburg Principles. However they are unable to point to any other jurisdiction or country (except possibly Peru) which has adopted that standard or which has laws which fully comply with the Principles. Nor is any country or territory, including Hong Kong, legally obliged to have such laws.

12. The Johannesburg Principles are nevertheless useful reference materials in respect of limitations on freedom of expression and access to information on the grounds of national security. Broadly speaking, the Article 23 proposals comply with most of the Principles.

13. For example, Principle 7 enumerates a list of protected expression which should not be considered a threat to national security, including expression that advocates non-violent change of government policy or of the government itself; and criticism of, or insult to, the government. The Article 23 proposals do not seek to prohibit any such forms of expression.

14. It is however true that our proposals in respect of treason and sedition do not comply rigidly with Principle 6 of the Johannesburg Principles. Principle 6 states that expression may be punished as a threat to national security only if a government can demonstrate that :

- (1) the expression is intended to incite imminent violence;
- (2) it is likely to incite such violence; and
- (3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

In our view, Principle 6 is unnecessarily restrictive.

15. If it were strictly applied, a state would be powerless to prohibit –

- (1) the broadcasting of enemy propaganda in wartime;
- (2) the incitement of terrorist outrages (say) six months in the future;
- (3) the indirect incitement of violence, for example, through the spreading of internet messages.

16. The fact that the Administration does not propose to follow Principle 6 does **not** mean that rights and freedoms in Hong Kong will in any way be reduced. Further, Hong Kong is a very free society and has entered into visa free arrangement with 123 countries. There is freedom of speech and no application for approval but notification only need to be made to carry out demonstration or procession. We cannot wait until the damage to life and property is done before measures are taken to safeguard national security.

17. Two other Principles, which neither the current law nor our proposals would satisfy, require defences of public interest and prior disclosure in respect of offences of unauthorized disclosure of official secrets. The possibility of including such defences will be considered as the proposals are further considered.

18. I would re-iterate that the proposals on implementing Article 23 fully comply with the human rights guarantees in the Basic Law and the ICCPR, and comply with most of the Johannesburg Principles. There is no basis for alleging that rights and freedoms in Hong Kong will be reduced by the proposals.

Rule of law

19. Let me turn to the rule of law. One fundamental aspect of the rule of law is that the government itself must abide by the law. This principle is expressly set out in Article 64 of the Basic Law.

20. Article 23 requires the Hong Kong SAR to enact specified laws. How ironic it is that many of those who claim to support the rule of law are telling the government that it should not comply with Article 23.

21. The indisputable fact is that there is a constitutional obligation to implement Article 23. In doing so, the government is **upholding** the rule of

law, not **damaging** it.

22. As to the substance of the proposed new laws, these too are entirely consistent with the rule of law. One of the guiding principles that underpin the proposals is –

“the need to ensure that all offences . . . to implement Article 23 are as clearly and tightly defined as appropriate, so as to avoid uncertainty and the infringement of fundamental rights and freedoms guaranteed by the Basic Law.”

23. In complying with this principle, the Administration proposes –

- (1) to repeal overly broad provisions relating to treasonable offences, and offences relating to the head of state;
- (2) to replace the current offence of sedition, which is antiquated and draconian, by a much narrower offence based on incitement;
- (3) to create new offences under the labels of “subversion” and “secession” that (broadly speaking) only cover activities that are offences at present;
- (4) to ensure that expressions of opinion and criticism of the government remain lawful;
- (5) to continue to deal with the theft of state secrets under the Official Secrets Ordinance, which is based on the British Official Secrets Act 1989;
- (6) to ensure that any proscription of organizations in Hong Kong based on national security grounds is governed by Hong Kong law, by Hong Kong’s concepts of national security, and by international human rights standards, and that safeguards are provided in the form of judicial review and appeals on points of fact and law.

24. These proposals fully comply with the rule of law. And, if they are enacted, the government would continue to be subject to the rule of law, and to judicial oversight, in respect of their implementation.

25. I fail to understand how the proposals will have any “chilling effect”, lead to “self-censorship”, or lead to the creation of a “police state” or the “reign of white terror”. So far as press freedom and the flow of information are concerned, the two most relevant laws are sedition and the theft of state secrets. The law of sedition will be liberalised under the proposals; and the law relating to official secrets will remain largely unchanged. How can these developments have such alleged negative effects?

26. Some commentators have referred to “grey areas” or ambiguities in the proposals. In so far as their comments identify particular areas of concern, they will be given serious consideration. As I mentioned earlier, one of the Administration’s guiding principles is that the new laws should be as clearly and tightly defined as appropriate. The Administration intends to ensure that, when drafted, the Bill should not give rise to rule of law concerns based on uncertainty. There is no cause for concern in this respect.

“One country, two systems”

27. Let me turn now to “one country, two systems”. I think we all agree that Article 23 is a litmus test of this principle. In my opinion, there can be no greater example of the existence of two systems than Article 23 itself. Where else in the world does a national government allow a regional government to enact its own laws on national security?

28. Of course, when the Administration implements Article 23, it should ensure that the “two systems” principle is adhered to. But that is precisely what we intend to do.

29. Mainland laws or concepts will not be introduced. The proposals are all based on common law principles and concepts. Let me compare some of the relevant laws under the two systems.

30. The equivalent of treason in the Mainland is found in Article 102 of the Criminal Law. The offence consists of colluding with a foreign state “to endanger the sovereignty, territorial integrity and security of the People’s Republic of China”. The Administration’s proposal for treason does not refer to such concepts, but to specific actions that are familiar to the common law - levying war, instigating a foreigner to invade the PRC, or assisting a public

enemy at war with the PRC.

31. The Mainland law on subversion is found in Article 105 of the Criminal Law. It refers to “subverting the state power or overthrowing the socialist system”. Our proposed law of subversion would only cover actions that amount to levying war, the use or threat of force, or criminal action that is akin to a terrorist act.

32. In relation to the theft of state secrets, our proposals involve retaining the current Official Secrets Ordinance. That means that Hong Kong law, and Hong Kong courts, will determine whether official information is protected from unauthorized disclosure. The manner in which a document is classified in the Mainland, and Mainland law, will be entirely irrelevant to that process.

33. The examples cited by the Hon Lee Cheuk-yan, the Hon Andrew Cheng Kar-foo, and the Hon Albert Ho Chun-yan would not constitute criminal offences in Hong Kong, if the facts of the cases are as simple as what they said.

34. In relation to the proposed power to proscribe organizations in Hong Kong on the grounds of national security, it has been frequently alleged that Mainland laws or decisions will be imported into Hong Kong. That is not correct. If an organization were banned in the Mainland on national security grounds, that would not lead to any automatic banning of an affiliated organization in Hong Kong. It would merely mean that the Secretary for Security would have the power to consider –

- (1) whether any organization in Hong Kong was a subordinate branch of that Mainland organization; and, if so,
- (2) whether there were reasonable grounds for believing it to be necessary in the interests of national security to ban that Hong Kong organization.

35. That decision-making process would be entirely separate from the process in the Mainland and, as I have said, would be subject to human rights guarantees and judicial scrutiny. It is entirely possible that an organization in Hong Kong, which was a branch of a banned organization, could not and would

not be banned. This is another excellent example of how two systems would operate in relation to the security of one country.

36. The Hon Martin Lee Chu-ming criticised the proposal to empower the Secretary for Security to proscribe a local organisation. He contends that it is wrong for the Secretary to be able to proscribe a local organisation which engages in peaceful demonstrations, simply because it had a previous conviction of obstruction of public places. The principles of human rights law have demonstrated that proscription under such circumstances would not be proportionate with the protection of public order. Mr Lee also disagrees with the formal certification system by CPG, even though such a certification would only serve to prove that a Mainland organisation has been proscribed on national security ground in the Mainland. He seems to suggest that the Secretary should ignore this fact, as if it has never happened. To adopt such an attitude is not a responsible way to protect national security. Mr Lee said that if the Mainland certification not only certified the proscription of a Mainland organisation, but also that Hong Kong organisation was subordinated to the former or that the Hong Kong organisation posed a threat to national security, then this would tantamount to letting the Mainland make a decision on the matter. But in such an event, the court would only consider the part of the certification concerning the Mainland proscription, it would not accept the other parts of the certification. Mr Lee is attempt to demonise this proposal is not supported by fact.

37. The ICCPR has yet to be ratified by the NPC of the People's Republic of China, and has no legal effect there. Hong Kong has obligation to give effect to the ICCPR and has done so through the Hong Kong Bill of Rights Ordinance. In accordance with Article 39 of the Basic Law, any legislation promulgated in Hong Kong cannot contravene the provisions of ICCPR as applied to Hong Kong. This is a distinguishing feature between the two places.

38. I can give other examples of the differences that will continue to exist after Article 23 laws are enacted; discussion of the independence of Taiwan, and even the advocacy of such independence by peaceful means, will be lawful in Hong Kong; and the unauthorized publication in Hong Kong of

state economic secrets will be lawful. Transcending all such differences is the fact Hong Kong alone will provide justifiable guarantees, not only that relevant laws comply with fundamental human rights, but also that the implementation of those laws will do so.

Response to comments

39. Many detailed comments have been made on the proposals during this debate. They will all be treated as submissions in response to the Consultation Document and, like other submissions, will be given serious consideration by the Administration. Therefore, the fact that I do not respond to them all immediately does not mean that I do not value them. I would, however, like to respond to some particular comments on legal issues.

Vague terminology

40. Some honourable members criticised what they consider to be vague terminology in the proposals. I accept that the proposed new laws should be drafted as tightly as possible. There is no intention to create vague laws and to enforce them selectively.

41. However, some of the expressions that has been criticised are found in most common law jurisdictions. These include “levying war” and “assisting a public enemy at war”. We will consider the comments made about them. However, there may be some advantage in retaining such familiar common law concepts, since jurisprudence in other common law jurisdictions can ensure that our laws on national security remain in line with those jurisdictions.

42. Moreover, I note that some of the critics of such expressions are the same people who have urged us to retain current laws, which include those expressions.

Appeal avenue

43. Comments have also been made on the proposed appeal channels in respect of a possible banning of a local organization. Under the general law, the only way in which such a banning could be challenged would be by way of judicial review. We do not propose to take away that remedy through the

courts. On the contrary, the Consultation Document proposes to add two further appeal avenues – an appeal to the courts on points of law, and an appeal to an independent tribunal on points of fact.

44. Some honourable members have suggested that both types of appeals should be to the courts. The Administration will give serious consideration to that suggestion.

Exceeding Article 23

45. Another comment that has been made is that the proposals go beyond what is required by Article 23. I wish to make two points. The first is that this Council's legislative competence is, of course, not limited by Article 23. Its competence is governed by the whole of the Basic Law. There are therefore no grounds for suggesting that the courts could strike down the proposed legislation if it goes further than Article 23 requires.

46. The second point is that laws to implement Article 23 cannot be dealt with in isolation from related laws. Take the theft of state secrets for example. It is not proposed to enact a new Ordinance to deal with this subject. Instead, the Government proposes that the current Official Secrets Ordinance (which is based on the English Act of 1989) should be retained. That Ordinance protects certain categories of official secrets in Hong Kong that may not be "state secrets". When amending that Ordinance in the context of Article 23, the Government has no intention of repealing provisions that protect Hong Kong's legitimate official secrets. And if the implementation of Article 23 involves plugging a loophole in the Ordinance relating to state secrets, it is perfectly legitimate to plug a similar loophole in respect of Hong Kong's official secrets.

47. The Hon Frederick Fung kin-kee quoted me as saying that it was a violation of the Official Secrets Ordinance for not revealing the source of information. The example that he quoted was wrong as I was referring to the situation of the Mainland. I invite Mr Fung to take a look at my article on the freedom of press dated 17 October 2002 which could be found on the Department of Justice website. The Hon Andrew Cheng Kar-foo quoted me as saying: "stringent legislation, relaxed enforcement". This is also a mis-quote.

I invite Mr Cheng to look at my response to Mr Ng Chi-sum's criticism in today's Ming Pao Daily.

48. Most Bills contain amendments that are connected to or consequential upon its main provisions. There is no reason why the Bill to implement Article 23 should be any different.

49. The principle of "one country, two systems" will therefore be both observed and reinforced by the proposals to implement Article 23.

Conclusion

50. In conclusion, I turn to the wording of the original motion, and see that it is entirely unjustified. A rational analysis of the proposals makes three things crystal clear : they would **not** reduce rights and freedoms enjoyed by the people of Hong Kong; they would **not** damage the rule of law; and they would **not** damage "one country, two systems". I would urge all members to reject the original motion.

51. I would like to thank the Hon Mrs Sophie Leung Lau Yau-fun for moving amendments to the original motion, which reminds the Government, while enacting laws to implement Article 23 of the Basic Law, to provide adequate safeguards to the rights and freedoms enjoyed by the people of Hong Kong against any erosion and to ensure that the rule of law and the 'one-country, two systems' will not be undermined. The Department of Justice has the obligation to ensure that all legislative proposals submitted to the Legislative Council must be consistent with the human rights provisions in the Basic Law. Article 11 of the Basic Law stipulates that any law enacted by the legislature of the HKSAR must not contravene the Basic Law, including the provisions concerning human rights. I believe that this serves as the best guarantee against any violation of the rule of law. The courts will not give effect to any law which is in violation of the Basic Law. Article 23 of the Basic Law offers the best guarantee for the protection of the 'one-country, two systems', as it authorizes the HKSAR Government to act in accordance with the HKSAR's own legal system in enacting Laws and implementing the Article.