

*(English Translation)*

**Motion Debate on the Chief Executive's Policy Address:  
Speech by the Secretary for Justice, Ms Elsie Leung,  
on Friday, 17 January 2003**

Madam President,

Effective Governance by the Second Term Government of the Hong Kong SAR in the next eighteen months will be underpinned throughout by the Government's commitment to the rule of law. It is well recognized, both here and elsewhere, that the rule of law is one of the fundamental attributes of the SAR, and one of the keys to its success.

**Vigilance about the Rule of Law**

2. In his speech delivered at the Ceremonial Opening of the Legal Year earlier this week, the Chief Justice remarked that since 1997, the rule of law has continued to thrive. He emphasized that this was the result of vigilance, and that vigilance should be exercised by all – by those who have been entrusted to govern as well as by the public. I cannot agree with him more. I would add that vigilance should be exercised by the Legislative Councillors who represent the public.

3. In this Council, the question of the rule of law has come up time and again : one motion debate devoted exclusively to “Upholding the Rule of Law” on the 7 November 2001, and, on numerous other occasions, the Government answered questions relating to the rule of law and responded to motion debates touching on the subject. These events reflect the public vigilance that has contributed towards the thriving existence of the rule of law, which is of cardinal importance to Hong Kong.

**Rule of law**

4. My department will, in the months ahead, continue to play a key role in maintaining the rule of law. For example –

- (1) it will advise whether any proposed government action can be achieved under the current law and, if not, on other lawful ways forward (such as by legislating or modifying the proposal);
- (2) it will advise whether proposed policies or legislation are consistent with human rights guarantees and other provisions in the Basic Law – if they are not, the policies or legislation will not go forward; and
- (3) it will ensure that prosecution decisions are made in accordance with fair and transparent policies, and that prosecutions are conducted fairly and effectively.

5. We will contribute to “**Effective Governance**”. If you study the *Policy Agenda*, you will find that the work of the Department of Justice encompasses all five policy areas.

6. From time to time, critics allege that certain acts of the Government, or of the Department of Justice, have undermined the rule of law. I wish to respond to that criticism.

### **NPCSC interpretation**

7. The request for an interpretation of the Basic Law by the Standing Committee of the National People’s Congress in 1999 has recently been said to have undermined judicial autonomy. That is not the case. Judicial autonomy in Hong Kong is fully maintained in accordance with the Basic Law. The Basic Law gives the SAR courts the power of final adjudication but reserves to the Standing Committee of the National People’s Congress the ultimate power to interpret the Basic Law. The Standing Committee’s interpretation of provisions in the Basic Law was lawful and constitutional. It was a reflection of the rule of law operating in accordance with the Basic Law. Respecting the decision of the courts does not mean that the Government cannot or should not seek a constitutional remedy to alter the legal implication of the judgment of the court without overturning the particular judgment given, since failure to do so would cause unbearable consequences to the society. To seek a constitutional

remedy, without affecting judgments previously rendered, is in fact respect for the rule of law.

8. The Government has explained on numerous occasions that it would not lightly seek any further interpretation by the Standing Committee, and why it would be inappropriate to undertake never again to do so. I will not repeat those explanations here.

### **Equality before the law**

9. One crucial aspect of the rule of law is that all are equal before the law. That principle continues to be upheld in the Hong Kong SAR, despite allegations to the contrary.

10. With the greatest respect to the Hon Martin Lee, I was disappointed that he should raise the case of Sally Au as an example of inequality. No favouritism was involved in the decision not to prosecute. The decision was based on insufficiency of evidence.

11. I have also explained that the prosecution of **Leung Kwok-hung** and others for holding an unnotified public procession was not an improper use of the prosecutorial discretion. It was made quite clear, during the debate on the Public Order Ordinance in December 2000, that the police would enforce the law in accordance with announced principles. I would remind honourable members that laws are established not only to protect human rights and freedoms and to control government action, but also as a means of effective governance. Since this Council passed a resolution in December 2000 supporting the retention of the relevant laws, it is entirely proper for prosecutions to be brought in appropriate cases. It is indeed respect to the solemnity of the law and the rule of law.

### **Article 23**

12. The proposed implementation of Article 23 has also been the subject of criticism from a rule of law or human rights perspective. The criticism relates to both the substance of the proposals and to the procedures for implementing Article 23.

13. I do not agree with the allegation that the Government has rushed the drafting of the legislation. In fact, we have done a lot of preparatory work, particularly in researching relevant laws of other jurisdictions.

14. So far as the substance of the proposals is concerned, I wish to repeat the assurance given in my speech on the motion debate on Article 23, held on 12 December 2002. 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, for example Articles 27 and 39.

15. 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.

16. Moreover, the Government must ensure that the legislation that is enacted is also consistent with our human rights obligations. 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 it. The constitutional safeguard against improper legislation is therefore already in place.

17. So far as procedures are concerned, two issues have been raised, namely whether a white Bill should be issued, and whether it was appropriate for the Security Bureau to have policy responsibility for this project. In my view, neither issue touches upon the rule of law. It cannot legitimately be said that the way in which the project is being handled in any way undermines the rule of law.

18. The issue of a white or blue Bill is specifically raised in Dr Hon Yeung Sum's proposed amendment to the Motion of Thanks and will be fully

answered by the Secretary for Security. The decision as to what procedures should be adopted for involving the public in this legislative exercise is ultimately a question of policy and not law. However, I fully support the policy being adopted in this case. However, whether or not a White Bill will be published, we shall continue our consultation with the public, listen to the views of experts of relevant fields, in order that the drafting and passage of the Bill may be carried out in the best possible way.

19. So far as the Security Bureau's responsibility for the project is concerned, two arguments have been raised – neither of which I accept.

20. First, both the Hon Margaret Ng and the Hon Martin Lee Chu-ming have alleged that the Department of Justice is merely serving as a tool for the Policy Bureau. I have explained how the Secretary for Justice would ensure that legislation introduced by the Government and measures taken by the Government comply with the rule of law and not as passive as suggested by those Honourable Members. The Hon Martin Lee Chu-ming has two misconceptions. One, apart from independence in prosecutorial and certain other decisions, the Department of Justice is very much part of the Administration and not independent from the Administration. However, just as Mr Lee, we legal professionals do have the obligation to give proper and impartial advice and the Secretary for Justice is accountable for the advice given and accountable for upholding the rule of law. Second, I and my colleagues, particularly the Solicitor General, do our best to explain the Consultation Document to the public. This is because we firmly believe that the proposals strike a good balance between our responsibility to protect national security and to protect human rights under the Basic Law. Before Reunification, the Attorney General's Chambers had a similar role. Take, for example, the Crimes (Amendment) (No. 2) Bill 1996. That Bill, which dealt with treason, sedition, secession and subversion – four of the key areas covered by Article 23- was introduced into this Council by the Secretary for Security, not the then Attorney General. Similarly, the Official Secrets Bill 1996, which covered another area in Article 23, was also introduced by the Secretary for Security. The Attorney General did not have policy responsibility either for law and order issues or for legislation on human rights. The Hong Kong Bill of Rights Bill, for example,

was the responsibility of the Secretary for Constitutional Affairs. Mr Robert Allcock has just advised me that the Attorney General's Chambers did not carry policy responsibilities for the amendment Bill to the Independent Commission Against Corruption Ordinance as suggested by the Hon James To Kun-sun.

21. The second argument is that the project to implement Article 23 should have been passed to the Law Reform Commission. However, if a subject raises issues which are essentially ones of policy rather than law, that Commission would not generally be considered an appropriate body to take up the subject. Article 23 involves important and sensitive issues of national security and territorial integrity. The very nature of the acts to be prohibited raises questions which can only be determined as an expression of policy. For the Law Reform Commission to attempt to tackle this sort of referral would be to risk its standing as a neutral and autonomous commission. The implementation of BL23 through legislation is a constitutional obligation, and its perimeter is also fixed by the Basic Law.

22. It is noted that law reform agencies studied crimes against the state in England and Canada. However, the fact that their studies have not led to reforms perhaps indicates that such bodies may not be the most appropriate ones for achieving change in this area.

## **Conclusion**

23. In conclusion, I wish to re-iterate that the rule of law and protection of human rights will remain firmly protected in Hong Kong. The Government and some legislators have had disagreements on the right of abode issue, prosecution decisions, and the implementation of Article 23. But such disagreements do not mean that we are undermining the rule of law in any way. The measures to address those problems will **not** pose any threat to the cornerstones of Hong Kong's legal system. On the contrary, the effective governance of Hong Kong will be underpinned throughout by those cornerstones, and the uniqueness of Hong Kong may be maintained.