OFFICIAL RECORD OF PROCEEDINGS

Wednesday, 2 August 2006

The Council met at Eleven o'clock

MEMBERS PRESENT:

THE PRESIDENT
THE HONOURABLE MRS RITA FAN HSU LAI-TAI, G.B.S., J.P.

THE HONOURABLE JAMES TIEN PEI-CHUN, G.B.S., J.P.

THE HONOURABLE ALBERT HO CHUN-YAN

IR DR THE HONOURABLE RAYMOND HO CHUNG-TAI, S.B.S., S.B.ST.J., J.P.

THE HONOURABLE LEE CHEUK-YAN

THE HONOURABLE MARTIN LEE CHU-MING, S.C., J.P.

DR THE HONOURABLE DAVID LI KWOK-PO, G.B.S., J.P.

THE HONOURABLE FRED LI WAH-MING, J.P.

DR THE HONOURABLE LUI MING-WAH, S.B.S., J.P.

THE HONOURABLE MARGARET NG

THE HONOURABLE JAMES TO KUN-SUN

THE HONOURABLE CHEUNG MAN-KWONG

THE HONOURABLE CHAN YUEN-HAN, J.P.

THE HONOURABLE BERNARD CHAN, G.B.S., J.P.

THE HONOURABLE CHAN KAM-LAM, S.B.S., J.P.

THE HONOURABLE MRS SOPHIE LEUNG LAU YAU-FUN, S.B.S., J.P.

THE HONOURABLE LEUNG YIU-CHUNG

DR THE HONOURABLE PHILIP WONG YU-HONG, G.B.S.

THE HONOURABLE WONG YUNG-KAN, J.P.

THE HONOURABLE JASPER TSANG YOK-SING, G.B.S., J.P.

THE HONOURABLE HOWARD YOUNG, S.B.S., J.P.

THE HONOURABLE LAU KONG-WAH, J.P.

THE HONOURABLE LAU WONG-FAT, G.B.M., G.B.S., J.P.

THE HONOURABLE MIRIAM LAU KIN-YEE, G.B.S., J.P.

THE HONOURABLE EMILY LAU WAI-HING, J.P.

THE HONOURABLE CHOY SO-YUK, J.P.

THE HONOURABLE ANDREW CHENG KAR-FOO

THE HONOURABLE TAM YIU-CHUNG, G.B.S., J.P.

THE HONOURABLE ABRAHAM SHEK LAI-HIM, J.P.

THE HONOURABLE LI FUNG-YING, B.B.S., J.P.

THE HONOURABLE TOMMY CHEUNG YU-YAN, J.P.

THE HONOURABLE ALBERT CHAN WAI-YIP

THE HONOURABLE FREDERICK FUNG KIN-KEE, S.B.S., J.P.

THE HONOURABLE AUDREY EU YUET-MEE, S.C., J.P.

THE HONOURABLE VINCENT FANG KANG, J.P.

THE HONOURABLE WONG KWOK-HING, M.H.

THE HONOURABLE LEE WING-TAT

THE HONOURABLE LI KWOK-YING, M.H., J.P.

DR THE HONOURABLE JOSEPH LEE KOK-LONG, J.P.

THE HONOURABLE DANIEL LAM WAI-KEUNG, S.B.S., J.P.

THE HONOURABLE JEFFREY LAM KIN-FUNG, S.B.S., J.P.

THE HONOURABLE ANDREW LEUNG KWAN-YUEN, S.B.S., J.P.

THE HONOURABLE ALAN LEONG KAH-KIT, S.C.

THE HONOURABLE LEUNG KWOK-HUNG

DR THE HONOURABLE KWOK KA-KI

DR THE HONOURABLE FERNANDO CHEUNG CHIU-HUNG

THE HONOURABLE CHEUNG HOK-MING, S.B.S., J.P.

THE HONOURABLE WONG TING-KWONG, B.B.S.

THE HONOURABLE RONNY TONG KA-WAH, S.C.

THE HONOURABLE CHIM PUI-CHUNG

THE HONOURABLE PATRICK LAU SAU-SHING, S.B.S., J.P.

THE HONOURABLE ALBERT JINGHAN CHENG

THE HONOURABLE KWONG CHI-KIN

THE HONOURABLE TAM HEUNG-MAN

MEMBERS ABSENT:

THE HONOURABLE MRS SELINA CHOW LIANG SHUK-YEE, G.B.S., J.P.

THE HONOURABLE SIN CHUNG-KAI, J.P.

DR THE HONOURABLE YEUNG SUM

THE HONOURABLE LAU CHIN-SHEK, J.P.

THE HONOURABLE TIMOTHY FOK TSUN-TING, G.B.S., J.P.

THE HONOURABLE MA LIK, G.B.S., J.P.

PUBLIC OFFICERS ATTENDING:

THE HONOURABLE WONG YAN-LUNG, S.C., J.P.
THE SECRETARY FOR JUSTICE

THE HONOURABLE AMBROSE LEE SIU-KWONG, I.D.S.M., J.P.
SECRETARY FOR SECURITY

CLERKS IN ATTENDANCE:

MR RICKY FUNG CHOI-CHEUNG, J.P., SECRETARY GENERAL

MS PAULINE NG MAN-WAH, ASSISTANT SECRETARY GENERAL

MRS JUSTINA LAM CHENG BO-LING, ASSISTANT SECRETARY GENERAL

TABLING OF PAPERS

The following paper was laid on the table pursuant to Rule 21(2) of the Rules of Procedure:

Report of the Bills Committee on Interception of Communications and Surveillance Bill

BILLS

Second Reading of Bills

Resumption of Second Reading Debate on Bills

PRESIDENT (in Cantonese): Bill. This Council now resumes the Second Reading debate on the Interception of Communications and Surveillance Bill.

INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE BILL

Resumption of debate on Second Reading which was moved on 8 March 2006

PRESIDENT (in Cantonese): Ms Miriam LAU, Chairman of the Bills Committee on the above Bill, will now address the Council on the Committee's Report on the Bill.

MS MIRIAM LAU (in Cantonese): Madam President, in my capacity as the Chairman of the Bills Committee on the Interception of Communications and Surveillance Bill (the Bill), I now report the highlights of the deliberations made by the Bills Committee.

The main object of the Bill is to regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of public officers.

Members have questioned why the term "systematic" is included by the Administration in the definition of covert surveillance. These members are concerned that any surveillance which is not systematic or planned would not be covered by the Bill. They are also of the view that undercover operations without the use of surveillance devices can be highly intrusive and should be regulated.

Some other members are concerned about the meaning of "reasonable expectation of privacy" in clause 2(2) which seems to suggest that a person talking on a mobile phone on the street or with a friend in a restaurant may be subject to surveillance and audio recording by law-enforcement officers covertly without any requirement for authorization.

The Administration has explained that the inclusion of the term "systematic" is to exclude immediate response to operational circumstances or cursory checks that form part of a law-enforcement officer's routine operation. To address members' concern, the Administration has agreed to delete the term "systematic" in the definition of covert surveillance, and to amend paragraph (b) of the definition to the effect that covert surveillance does not include any spontaneous reaction to unforeseen events or circumstances. The Administration has also agreed to introduce a Committee stage amendment (CSA) to clause 2(2) to clarify that it would not affect the entitlement of the person in relation to the words spoken, written or read by him in a public place.

Regarding undercover operations without the use of surveillance devices, the Administration has explained that the Bill only covers covert surveillance operations using devices. Undercover operations in Hong Kong are governed by the relevant internal guidelines of the law-enforcement agencies.

The Bill proposes a two-tier system for covert surveillance. Members have enquired whether an authorization for Type 1 or Type 2 surveillance would be sought when more than one type of surveillance devices or operations are involved.

The Administration has responded that if an operation involves both Type 1 and Type 2 surveillance, the authorization of a panel Judge would be sought to carry out Type 1 surveillance. The Administration has agreed to add a new provision to spell out the policy intent expressly.

Some members have suggested that surveillance devices involving the implantation or swallowing of surveillance devices into a human body should be excluded from the Bill. These members are also concerned about the adverse impact of surveillance devices on the health of the subject.

The Administration considers that the proposed exclusion is unnecessary because it is unlawful to implant a device without the consent of the person or without express statutory authority. An authorization under the Bill would not constitute sufficient authority for authorizing such action. However, in view of some members' concern, the Administration will introduce a CSA to put beyond doubt that a prescribed authorization does not authorize any device to be implanted in, or administered to, a person without the consent of the person.

Under clause 3 of the Bill, authorization for interception of communications and covert surveillance should only be given for the purpose of preventing or detecting serious crime, or the protection of public security. In addition to the above specific purposes, authorization should only be given where the test of proportionality is met, taking into account the immediacy and gravity of the case and whether the purpose sought can reasonably be furthered by other less intrusive means.

Some members have queried whether the term "public security" includes national security and whether it is confined to the security of Hong Kong. They are concerned that in the absence of a definition, public security may be used for political purposes, or for suppressing the right to freedom of expression or the right of peaceful assembly, and whether interception of communication or covert surveillance would be carried out for offences under Article 23 of the Basic Law. They have asked the Administration to consider providing a definition for the term "public security".

The Administration has assured members that no interception of communications or covert surveillance would be carried out for offences under Article 23 of the Basic Law which have yet to be created. The Administration also assured members that the public security ground would not be used for political purposes, nor for suppressing the right to freedom of expression or the right of peaceful assembly, and that the Bill is unrelated to the offences under Article 23 of the Basic Law. The Secretary for Security has undertaken to state this assurance in his speech during the resumption of the Second Reading debate on the Bill.

Having considered the views of members, the Administration has agreed to introduce CSAs to define public security as the public security of Hong Kong, and to expressly provide that advocacy, protest or dissent (whether in furtherance of a political or social objective or otherwise), unless likely to be carried on by violent means, is not of itself regarded as a threat to public security. The Administration will also move CSAs to require law-enforcement agencies to include in the application for issue of prescribed authorization for interception or covert surveillance an assessment of the impact, both direct and indirect, of the threat on the security of Hong Kong, the residents of Hong Kong, or other persons in Hong Kong.

Ms Margaret NG and Mr James TO will propose CSAs respectively to define public security.

Regarding the definition of serious crime, some members have pointed out that the scope of serious crime under the Bill is too broad. In respect of interception of communications, offences punishable by over seven years' imprisonment will in effect include all indictable offences. For covert surveillance, offences punishable by three years' imprisonment will include all indictable offences and many summary offences. These members consider that the Bill should only cover the most serious offences. They also consider that some highly intrusive covert surveillance should require a higher threshold as in the case of interception of communications.

The Administration has explained that the serious crime threshold is but an initial screen. The other tests set out in clause 3 of the Bill, most importantly proportionality which in turn relates to the gravity and immediacy of the serious crime to be prevented or detected, must also be met. The Administration considers that for the purpose of initial screening, making reference to the maximum penalty level is appropriate.

Ms Margaret NG, Mr James TO and Mr Albert HO will propose CSAs respectively on serious crime.

Some members have expressed concern that the proportionality test is too restrictive. They suggest that authorizing authority should give sufficient consideration to the human rights implications of interception or covert surveillance operations, and that an express reference to the Basic Law, in particular Chapter III, should be included in the Bill.

In response to members' concern, the Administration will introduce a CSA to the effect that the authorizing authority would also consider other matters that are relevant to the circumstances. The Administration explains that the proposed provision is a wide one allowing the authorizing authority to take into account all matters that are relevant in the case. It does not preclude the consideration of relevant provisions of the Basic Law as appropriate. The Administration considers that an express reference to the Basic Law in the Bill is not necessary.

Ms Margaret NG and Mr James TO will propose CSAs on clause 3 respectively.

Clauses 4 and 5 of the Bill prohibit public officers from directly or through any other person carrying out any interception of communications or covert surveillance, unless pursuant to a prescribed authorization. Some members have pointed out that the Administration's stance is that the Chief Executive is not a public officer. They are concerned that the Chief Executive might conduct interception operations without being regulated. They suggest that an express provision should be included to prohibit the Chief Executive from conducting such operations.

The Administration has responded that in the case of the Chief Executive, there is no intention that he should be able to obtain authorizations to conduct interception operations under the Bill and therefore the legal procedures in the Bill do not extend to him. There is no need to expressly prohibit the Chief Executive from conducting such operations, since Article 30 of the Basic Law already prohibits interceptions and covert surveillance activities other than those carried out in accordance with legal procedures.

Under the Bill, the authority for authorizing all interception of communications and Type 1 surveillance operations will be vested in one of the three to six Court of First Instance Judges who have been appointed by the Chief Executive as panel Judges. Some members oppose the proposal that the panel Judges will be appointed by the Chief Executive. These members consider that such appointing power should be vested with the Chief Justice. They are concerned that if Judges are appointed to the panel by the Chief Executive, their independence in carrying out their judicial duties as Court of First Instance Judges or their eligibility as Court of First Instance Judges may be affected. Some members oppose that extended checking should be conducted on the panel

Judges prior to their appointment, as these Judges should have already undergone integrity checking prior to their appointment as a Judge.

The Administration has explained that prior to making the appointment, the Chief Executive would ask the Chief Justice for recommendations. Judges appointed to the panel will receive no advantages from the appointment. They will continue to be Judges and whatever they do while on the panel will in no way affect their continued eligibility as Judges. The Administration has pointed out that the power of the Chief Executive under Article 48 of the Basic Law includes, *inter alia*, the power to appoint and remove Judges of the Courts at all levels. There are many other statutory offices to which Judges may be appointed, and the Chief Executive is almost invariably the appointing authority.

The Administration has explained that extended checking is applicable to all people to be appointed to the most senior positions in the Government and those who have access to very sensitive information. The Administration has also explained that similar checks will be conducted on the panel Judges, the Commissioner on Interception of Communications and Surveillance, and their staff.

At the request of some members, the Secretary for Security has undertaken to state in his speech to be made during the resumption of the Second Reading debate on the Bill that the Chief Justice will be advised if the pre-appointment checking of the panel Judges indicates a risk factor.

Some members consider that the panel Judges should function as a Court and authorization should be given in accordance with judicial procedures. These members have expressed disagreement that the authorization given by a panel Judge should be called "judicial authorization". They have suggested that the term "judge's authorization" be used. The Administration has agreed to the suggestion and will introduce the relevant CSA.

Mr James TO will propose CSAs on the authority for authorizing all interception of communications and Type 1 surveillance.

Under the Bill, an officer of a department may apply to an authorizing officer of the department for the issue of an executive authorization for any Type 2 surveillance. The head of department of a department may designate any officer not below a rank equivalent to that of Senior Superintendent of Police to be an authorizing officer.

Members have suggested that the rank of the authorizing officer should be raised to that of a Chief Superintendent of police. Some members consider that stringent procedures should be put in place to guard against possible abuse.

The Administration has explained that having regard to the circumstances of individual departments, the level of authorizing officers in the case of the police, Customs and Excise Department and Immigration Department will be raised to the rank equivalent to the Chief Superintendent of Police or above. However, in the case of the Independent Commission Against Corruption, the level should remain at Principal Investigator or above, as the lowest directorate rank in its hierarchy is the rank of Assistant Director. The arrangement will be spelt out in the Code of Practice.

As regards emergency authorization, given that law-enforcement officers may make an oral application to the panel Judges and the panel Judges are on call 24 hours, members have enquired about the circumstances under which emergency authorization is needed.

The Administration has explained that emergency applications can only be made if it is not practicable to apply for a Judge's authorization, including oral applications to the panel Judge. For instance, emergency situations when authorization to conduct the operation is required as soon as possible, and there is an imminent risk of death or seriously bodily harm of any person, substantial damage to property, serious threat to public security, or loss of vital evidence. An application by the law-enforcement officer concerned in the form of an affidavit has to be made to a panel Judge within 48 hours of the issue of the emergency authorization. Where an application for confirmation of emergency authorization cannot be made within 48 hours, the information obtained pursuant to the emergency authorization would be destroyed immediately. A report will be submitted to the Commissioner on Interception of Communications and Surveillance with the details of the case.

Some members are of the view that even though an application fails to be made within 48 hours, the law-enforcement officer should still submit to a panel Judge the emergency authorization issued and explain why this cannot be done. The information obtained should be retained for the sole purpose of the investigation by the Commissioner. Ms Margaret NG and Mr James TO will propose CSAs on emergency authorization respectively.

Regarding oral application, the Administration has explained that requirements on oral application are laid down to cater for urgent cases where it is not possible to follow the written application procedure.

Some members are not convinced of the need for oral applications. Ms Margaret NG and Mr James TO will separately propose CSAs to delete the provisions for oral applications.

Madam President, another main issue of concern for the Bills Committee is the protection of legal professional privilege. Some members consider that sufficient statutory safeguards should be put in place to guard against any intentional or inadvertent access to and use of legal professional privilege materials by the law-enforcement agencies. They have suggested that in the course of a duly authorized interception of communications or surveillance operations, if certain communications are found to be subject to legal professional privilege, the interception or surveillance should stop immediately. In addition, without the consent of the person entitled to waive the privilege, the legal professional privilege materials should remain inadmissible as evidence before the Court.

To address members' concerns, the Administration has agreed to introduce CSAs to the Bill to expressly reflect its policy intent of prohibiting operations targeting the communications at a lawyer's office, or any other premises ordinarily used by him for the purpose of providing legal advice to clients or residence of the lawyer concerned, unless the lawyer or any other person working in his office or residing in his residence, is a party to any activities that constitute or would constitute a serious crime or a threat to public security; or the communications in question are for the furtherance of a criminal purpose.

As regards the use and destruction of legal professional privilege products, the Administration has taken into account members' concerns and agreed to introduce CSAs to the Bill to regulate the use and destruction of legal professional privilege products, hence expressly provide for the protection of this privilege. The Administration will propose CSAs to expressly provide that products obtained in the course of a duly authorized interception of communications or covert surveillance operation that is protected by legal professional privilege remains privileged.

Ms Margaret NG will propose CSAs on the protection of legal professional privilege.

As provided in the Bill, the functions of the Commissioner on Interception of Communications and Surveillance are to oversee the compliance by law-enforcement agencies and their officers with provisions of the Bill, the Code of Practice or any prescribed authorization or device retrieval warrant concerned.

At the suggestion of members, the Administration has agreed to introduce CSAs to explicitly provide that the Commissioner shall conduct reviews on the reports submitted to him on the failure of law-enforcement agencies seeking a confirmation from a panel Judge within 48 hours of an emergency authorization or an oral application, or non-compliance with any relevant requirement under clauses 23(3)(b), 26(3)(b)(ii) and clause 52 respectively.

The Administration has agreed to expressly provide in the Bill that on being notified of the findings in the reviews, determinations and recommendations of the Commissioner, the head of the department shall submit to the Commissioner a report with details of any measures taken by the department, including any disciplinary action taken in respect of any officer. Moreover, the Administration will introduce CSAs to provide that apart from information required to be included in the annual report as provided in the Bill, more detailed information should be included in the Commissioner's annual report to the Chief Executive.

Regarding the requirement that the Chief Executive shall cause a copy of the Commissioner's report to be laid on the table of the Legislative Council, members consider that the Legislative Council should be informed of any disagreement between the Commissioner and the Chief Executive on matters to be excluded from the copy of the Commissioner's annual report to be laid on the table of the Legislative Council. The Administration has agreed and will introduce a CSA to this effect.

Some members are of the view that matters which have been excluded from the Commissioner's report to be laid on the table of the Legislative Council should be reported to the Legislative Council. Any report made by the Commissioner to the Chief Executive under clause 48 should also be laid on the table of the Legislative Council. In addition, there should be in place a mechanism for the Legislative Council to monitor the overall compliance with the relevant requirements by the law-enforcement agencies. These members have suggested that the Administration should consider giving briefings to the

Panel on Security in camera on such matters which have been excluded from the Commissioner's report, and overall compliance by the law-enforcement agencies.

Ms Margaret NG and Mr James TO will separately propose CSAs on the contents of the Commissioner's annual report and the tabling of the Commissioner's report in the Legislative Council.

Madam President, the Bills Committee is also concerned about possible abuse of retention and use of intelligence derived from interception of communications and covert surveillance activities. Some members have suggested that a mechanism should be established for the keeping and destruction of intelligence derived from such activities. In addition, the Commissioner should be empowered to oversee the keeping of intelligence derived from covert operations.

The Administration has responded that the disclosure, protection and destruction of products obtained from covert operations are provided for under clause 56 of the Bill. Should there be any analysis which cannot be traced back to the products, such information will be kept by the law-enforcement agencies only if it is useful for the purpose of prevention and detection of crime or the protection of public security. Any information that constitutes personal data is subject to the Personal Data (Privacy) Ordinance. The Administration has undertaken that a comprehensive review of the intelligence management system of the law-enforcement agencies will be conducted and the outcome of the review will be reported to the Panel on Security.

Ms Margaret NG and Mr James TO will propose CSAs on information or intelligence derived from protected products.

Under clause 58 of the Bill, any telecommunications interception product shall not be admissible in any proceedings before any Court and shall not be made available to any party. Some members consider that the defence in criminal proceedings should be allowed to have access to telecommunications interception product and use it as evidence for the defence. These members have pointed out that the right to a fair trial is a fundamental right guaranteed under the Basic Law. The decision of disclosure should be left to the trial Judge, and not to the prosecution.

The Administration has responded that it is its established policy that telecommunications intercepts will not be admissible in evidence in court proceedings. Admitting in evidence material obtained through an interception of communications would require its retention for this purpose. This would run counter to the proposal of destruction of intercept products as soon as practicable. The use of intercept material as evidence would pose the risk of revealing the interception capability of the law-enforcement agencies. It would also adversely impact on privacy by entailing the public dissemination of personal information. In the event that exculpatory material is identified during the course of an investigation, the direction of the trial Judge will be sought and the Judge may order disclosure of information. Having regard to members' concern, the Administration has agreed to move CSAs to require the disclosure to the trial Judges exculpatory information which is favourable to the defence.

Ms Margaret NG and Mr James TO will propose CSAs to clause 58 respectively.

Members have queried why a person whose communication has been intercepted by law-enforcement agencies or he himself is the subject of covert surveillance operation will not be notified after such activities have discontinued. Some members have suggested that a requirement to notify targets of operations after such activities have discontinued should be put in place. Some other members, however, consider that only in cases of interception or covert surveillance mistakenly conducted should the persons concerned be notified.

The Administration has explained that there will be difficulties to impose a general notification requirement. It is possible that notifying the target after the operation is discontinued would still prejudice the long-term purpose which has led to the surveillance activity. Making such notifications may also reveal information on the capability and *modus operandi* of law-enforcement agencies.

Nevertheless, having considered members' suggestion, the Administration has agreed to put in place a mechanism for notification of the target in limited circumstances. Under the CSAs proposed by the Administration, if in the course of performing any of his functions under the Bill, the Commissioner considers that there is any case in which any interception or covert surveillance has been carried out by a department without the authority of a prescribed authorization, the Commissioner shall give notice to the person concerned. The Administration will introduce CSAs to revise the payment of compensation arrangement for both examination and notification cases.

Some members consider that penalty provisions should be added for non-compliance with provisions of the Bill or the Code of Practice. The Administration has responded that a breach under the Bill would be subject to disciplinary action, and this would be stipulated in the Code of Practice.

Ms Margaret NG and Mr James TO will propose CSAs respectively to add in penalty provisions.

The Bills Committee has discussed the issue of conducting a review of the Bill after its enactment. Members hold different views as to the timetable for such a review. The Secretary for Security has undertaken to give an account of the timetable for the review of the legislation during the speech to be given in the resumption of the Second Reading debate.

Ms Margaret NG will propose a CSA to provide for a "sunset clause". Mr James TO and Mr Albert HO will propose CSAs respectively for a mandatory review of the legislation.

The Administration has accepted many views and suggestions from members and will introduce a number of CSAs. As for CSAs from Members, I am afraid I cannot refer to each one of them here and since I have spent half an hour in making this speech, I may need to take three hours if I am going to talk about these CSAs. I would therefore leave Members to introduce their CSAs.

Madam President, the above is the report I have made on behalf of the Bills Committee. Thank you, Madam President.

MR LEE WING-TAT (in Cantonese): President, in a society which respects human rights and protects the privacy of its citizens, it is of paramount importance that the right of the citizens to take part in processions and rallies and their freedom of expression are protected. Just imagine if bugging devices and secret cameras are placed everywhere in our society, wiretapping and snooping our communications and everything we do, how horrible it would be and what a serious infringement of human rights would be caused.

Suppose government departments will use the information and intelligence derived from interception of communications and surveillance operations to tighten its grips on a well-known figure in the business world, in the media or a

political or social celebrity in what he or she speaks and does, this would be much worse than what an autocratic government will do to protect privacy. The reason is that wiretapping and covert surveillance can lead to much important and useful information, and so besides political surveillance, such activities can also be very helpful in the detection of crime and the protection of public security. It comes as no surprise that law enforcement officers love to carry out wiretapping and covert surveillance to get the information and intelligence they want to collect evidence for the detection of crime and to keep a close watch on criminals and dangerous elements. All these are vital to the protection of public security.

In many countries which respect human rights and freedom, there are constitutional safeguards on the privacy and freedom of their citizens which are not to be infringed upon unless by legitimate power vested in the law. The mini-constitution of the Hong Kong SAR, that is, the Basic Law, sets out in Article 30 and I quote:

> "The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences." (End of quote)

Article 17 of the International Covenant on Civil and Political Rights which is applicable to Hong Kong provides and I quote:

> "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." (End of quote)

On the contrary we see in Hong Kong that the Government has been delaying and refusing to enact laws to prohibit the interception of communications and covert surveillance. Before the reunification in 1997, the Democratic Party had issued a stern warning on this issue of privacy and whether or not the Government had fulfilled its international and constitutional obligations. It was when our attempts to persuade the Government were repeated rebuffed that on behalf of the Democratic Party, Mr James TO moved a Bill on this subject which was discussed in this Council and became law in 1997.

The Bill moved by the Democratic Party at that time made it a requirement that law-enforcement officers of the rank of Superintendent of Police, the Customs and Excise Department and the Independent Commission Against Corruption and so on should apply for a warrant from the Court to allow them to engage in interception of communications activities. After studying into the relevant systems in many countries, we were convinced that if vetting and approval of applications were to be made by an independent judicial system, that would mean the greatest safeguard to the people and the community. At that time we laid down the requirement that when a Judge was to decide on issuing a warrant, considerations should be made not only in the protection of privacy and human rights but there are also reasonable grounds to believe that interception of communications would be required in the prevention and detection of serious crime. The Bill was drafted with a view to balancing the detection of crime and the rights of individuals.

After the reunification, for years the SAR Government said on one hand that a review would be conducted of the ordinance, but on the other hand it would not submit any report of such a review. For eight years — I say once again — for eight years, no concrete report on the progress of the review was put forward, nor any proposal made. When Members posed a challenge to this, the Government acted in the style of "strong governance", and issued an administrative order to justify the unlawful acts it has been doing which infringe on human rights.

President, it is through an independent judicial system we have that a verdict is handed down by the Court that the Government has contravened Article 30 of the Basic Law. There is no explanation given by the Chief Executive Donald TSANG and the Secretary for Justice WONG Yan-lung on why they had thought that resorting to administrative measures instead of enacting legislation was constitutional. Donald TSANG and WONG Yan-lung have never made a public apology for this grave blunder they have made to the people of Hong Kong and all those who have been unlawfully wiretapped and put under surveillance. It is only after the Court's verdict that the Government has acted in contravention of the Basic Law that the Government has introduced this Bill to the Legislative Council with great reluctance. And what it is doing is to rely on the deadline set by the Court to force Members to accept the Bill, deliberate on it and pass it in great haste.

The Democratic Party holds that the SAR Government must legislate to prohibit interception of communications and covert surveillance, impose stringent regulation of the conduct of law-enforcement officers and protect the privacy of the Hong Kong people from being infringed upon for no justifiable reason.

With respect to the Bill introduced by the Government, first of all, the Government suggests that the Chief Executive shall appoint a panel of three to six Judges of the Court of First Instance for the issue of judicial authorization for interception of communications or for covert surveillance of a more intrusive nature, and authorization for other acts of covert surveillance is only to be issued by the head of department of a department.

This is in disguise permitting the Chief Executive to select the panel Judges he likes through political vetting to assist the Government in conducting lawful wiretapping and surveillance. We would not be surprised to see the affinity theory being applied to Judges. This kind of political vetting of the Judges will in effect destroy our independent judicial system. Why can we not trust all Judges of the Court of First Instance and think that they are autonomous and have the ability to give authorizations independently?

Second, on the definition provisions of the Bill, the Government permits the issue of authorizations for the interception of communications and covert surveillance by laying down some very broad definitions. The result is such authorizations may be given on grounds of protecting public security or the prevention or detection of serious crime. In the absence of any restrictions whatsoever, public security can take on a very extensive meaning which may even mean that the Government may carry out wiretapping and surveillance in financial or economic activities which do not have any acts of physical violence at all.

Third, "serious crime" as defined by the Government means any offence punishable by a maximum penalty that is or includes a term of imprisonment of not less than three years or a fine of not less than $1 million. The effect of this is to make anyone who knowingly takes part in an unauthorized assembly may be made a target of surveillance because the act carries a maximum penalty of five years' imprisonment.

Fourth, acts stated in Article 23 of the Basic Law such as treason, sedition, subversion, theft of state secrets and establishing ties with foreign political

organizations or bodies will also be included even though the element of physical violence is absent.

Fifth, the Government proposes that when law-enforcement officers have carried out interception of communications or covert surveillance unlawfully and in breach of the ordinance, they would not incur any criminal liability or penalty in law. This kind of legislative proposal is very irresponsible. When it is not an offence for law-enforcement officers to engage in unlawful — I emphasize, unlawful — wiretapping or surveillance, what kind of law is going to be enacted? Will unlawful wiretapping or surveillance by private parties not considered as an offence in future? If this is the case, then what kind of a deterrent effect or punishment will this law give?

Sixth, the Government proposes that the Bill only aims at regulating public officers and so the Chief Executive is not to be subjected to such a regulation, for the reason that in law he is different from public officers. This implies that the Chief Executive can carry out interception of communications or covert surveillance himself or through other persons without having to come under any kind of restrictions. As the head of the Government, the Chief Executive should not be considered as above the law. Why can the Chief Executive be immune from regulation? I have strong suspicions that the exclusion of the Chief Executive from this Bill is unconstitutional.

Seventh, comparing the Bill now with the relevant law proposed by the Democratic Party in 1997, the Government has on this occasion proposed that a Commissioner on Interception of Communications and Surveillance be appointed to examine complaints and oversee compliance matters. At that time the Democratic Party did not propose this because there would be financial implications. The Commissioner plays a vital role in overseeing the Government (including the Chief Executive who heads it) for non-compliance and abuse of power, it is therefore essential that the office should be completely independent and that the Commissioner should be able to gain recognition from all quarters. Unfortunately, the Government proposes that this Commissioner is to be appointed and removed by the Chief Executive alone.

Eighth, as proposed by the Government, the functions of the Commissioner are very limited. An examination will only begin when an application is made. As for notification and compensation, the targets of operations will only be notified when the Commissioner in the discharge of his duties discovers irregularities. The purpose of notification is to see whether an

application for examination should be made. As wiretapping and surveillance are highly secretive acts, the targets of which are not in a position to know easily that they are the targets of government operations. Therefore, we consider that the Commissioner should be allowed to start the examination procedures at his own initiative if he discovers any irregularities in the course of performing his duties.

Ninth, the Government also recommends that the Commissioner should disclose very limited information in his annual report such as the number of authorizations and renewals given and refused. However, we think that figures for emergency authorizations, tapping of telephone lines, fax lines, electronic mail and surveillance of residences and so on should also be disclosed so that the public knows whether there is any abuse.

Tenth, this is a very important point. On this occasion we see that the Government introduced a Bill for First Reading in March this year hastily after it had lost in a lawsuit and the Legislative Council is asked to rush through deliberations on the Bill and its passage. All these are meant to enable the Government to conduct wiretapping and surveillance lawfully. No consultation paper or white bill is prepared. For a Bill like this which is so complicated and has such great significance to the Hong Kong people, the Government has asked this Council to complete all deliberations on the Bill and its passage within such a short span of time as a few months. All these are done in great haste. We suggest that a report on the review of this law should be submitted by the Government within 27 months after the enactment of this Bill. This will enable the Council to consider the implementation of this law and decide whether it would be necessary to cause it to expire in order that the privacy and human rights of the Hong Kong people will not be infringed upon. This is a very sensible demand indeed.

President, with the advances in technology, the Government may use tapping and surveillance devices on a massive and all-pervasive scale and defying geographical boundaries. The primary aim which this Council should achieve when passing this Bill is to strike a sensible balance between fighting crime and personal rights, while protecting privacy and upholding the basic rights of the Hong Kong people. In view of this, I call upon Members to support the amendments proposed by Members of the democratic camp so that a Bill with better safeguards can be passed.

Thank you, President.

MS MARGARET NG: Madam President, in 1956, a distinguished English judge, Patrick DEVLIN, gave a series of lectures to the Yale Law School on criminal prosecution in England. He told them this, I quote:

> "We like to grant large powers so as to prevent any legal quibble about their extent, but we expect the holders of them to act fairly and reasonably and well within them. Similarly, if we have to curb an existing power, we are quite satisfied if we can get the holder to accept a policy of self-restraint, and we often think this preferable to any formal curtailment." (End of quote)

These words remind us that good governance is based on public confidence that power is used with discretion. If matters have to be pushed to extremes, public disapproval can be made effective by legal means.

But legislation itself must aim at being fair. Bad legislation forced upon the people will only foster hatred for those in power.

The Government does not seem to appreciate this. It is blinded by a sense of self-righteousness, that because the Government seeks only to act in public interest, and law-enforcement agents seek only to protect law and order, they are entitled to use these powers to the utmost, unrestraint by any thoughts about fairness or infringement of civil and political rights. Because the Government believes it knows best, it thinks nothing of keeping the public in the dark.

This is what has led to the crisis with the Bill before us. We are convened here today to patch up a gaping hole in the rule of law as a result of the Government's abuse of power and breach of the Basic Law.

Due process is put in jeopardy. However much the Government denies it, this Bill, which affects fundamental rights, has gone through no public consultation. A hundred and thirty hours of meeting between the Administration and the Bills Committee cannot replace the public's right to have a say. This is why we urge this Council to accept a "sunset clause" being put into the Bill. In this way, a legal vacuum is avoided while binding the Government to a thorough review with full public consultation within two years. To accept this obligation with all the dignity of law is to express proper remorse

and sincerity to recompense. This will help restore public confidence in the future.

We are not here to obstruct the law-enforcement agents in their job to protect the security of Hong Kong or to fight crime. We are here to ensure that they do so while also protecting the rights and freedoms and privacy of communication of the people under the Basic Law. In the Government's anxiety to ensure that the law-enforcement agents have all the power they need, it must never lose sight of this.

Issues of privacy is not only of intense sensitivity personally and politically, but also vital to our business and professional life. This is an essential aspect which makes Hong Kong different from the mainland of China.

The Court of Final Appeal has given valuable guidance on the law which Article 30 of the Basic Law requires the HKSAR to enact, and I quote: "covert surveillance is not to be prohibited but is to be controlled. Such control must sufficiently protect — and enjoy public confidence that it sufficiently protects — fundamental rights and freedoms, particularly freedom and privacy of communication. The 'legal procedures' requirement …… exists to ensure such protection." — I have just quoted from the judgement of Mr Justice BOKHARY.

To achieve this purpose, the legislation must meet several basic requirements.

First of all, the legislation must be simple and straightforward so that it can be understood by the men and women whose rights are affected by it.

Secondly, it must make clear to law-enforcement agents that interception and covert surveillance is inherently objectionable and an infringement of the constitutional right of the individual. It should not be used as a normal, convenient tool, but only exceptionally, sparingly and with great caution.

To ensure that it is used sparingly, interception must be confined to the protection of the security of the territory from serious threats such as acts of terrorism, and where it is necessary, for the detection of really serious crimes. It should be used only when there is no real alternative, and only when conviction is reasonably likely to result from it.

The procedure of application for authorization should ensure that authorization is given only when these conditions are met. It is essential that someone on a very senior level takes responsibility for using the power of interception. Hong Kong should learn from the best practice in other parts of the world.

In England, it is the responsibility of the Secretary of State. In the United States of America, it is the Attorney General who makes application to a Judge in Court. They make themselves the guarantor that the power is used sparingly and with the greatest caution. It is no guarantee for the public if at the end of the day, only the front-line officers who carry out the interception take the blame. They are indeed the very people entitled to immunity, so long as they act conscientiously and in good faith.

Finally, there must be effective monitoring by an independent external body, and adequate channel of complaint. Fairness must be seen and good faith backed up by willingness to recompense for wrongs committed, however inadvertently. Covert as wiretapping must inevitably be, open government requires the greatest utmost transparency possible. This means a genuine system of accountability to the public through their elected representatives, and an effective channel of complaint and redress.

In England, the expenditure, administration and policies relating to wiretapping for national security reasons are monitored by a statutory parliamentary committee. Complaints from the public are made to an Investigatory Power Tribunal of lawyers appointed by the Queen. They have power to cancel warrants and award compensation.

In the United States, the head of the Department of Justice is required by law to submit annual reports to Congress. Intercepting agencies are accountable to parliamentary committees. The reports contain detailed figures and overviews.

Hong Kong people are entitled to the same openness and accountability and fair treatment in the law which sanctions interference with their freedom and privacy of communication.

Regrettably, the Bill before us falls short of the basic requirements I have just outlined.

Instead of being clear and straightforward, the Bill is extremely difficult to understand. The language is opaque and artificial. Practically, no term can be understood on its own or given its natural meaning. Nothing is what it seems. Words do not mean what they say, but what they are defined to refer to. The ordinary lawyer, not to say the ordinary man or woman anxious to know his or her rights, is soon hopelessly lost in a labyrinth of definitions and cross references.

This hides a serious defect which comes to the fore after working everything out: This Bill does not protect privacy of communication. Your privacy comes within the protection of the law only if the law-enforcement agent concerned thinks you have a legitimate expectation of privacy in each circumstance. This is an open question and has been the subject matter of many court cases. You will never know if the law-enforcement agent gets it right. But if he gets it wrong, your privacy will be freely intruded upon without you, or anybody else, knowing about it. None of the application procedures or safeguards set up in the law will be engaged.

Even more shocking, this Bill does not even claim to regulate covert surveillance, contrary to Article 30 and the policy stated in the Legislative Council Brief on the Bill. The Government, in objecting to my amendment to amend the definition of "covert surveillance", blatantly said that it only aims to regulate "the use of surveillance devices". Likewise, my amendment to amend the definition of "communication" is objected to because, according to the Government, only postal service and certain telecommunication systems are regulated under the Bill.

In other words, by the admission of the Government, this Bill does not meet the requirement of Article 30 of the Basic Law where government law-enforcement agents are concerned. This Bill, if passed, will only invite litigation, not putting an end to it.

The central purpose of the Bill is supposed to create the legal procedures which a law-enforcement agent has to follow to get permission to do wiretapping or covert surveillance. These procedures are supposed to be very strict, and for the more seriously intrusive kinds of surveillance a Judge's authorization is necessary. While attention is concentrated on how strict the procedures are, it is easy to miss the weakness that a great deal is excluded by the use of convoluted definitions. It is easy to name other examples: articles sent by courier can be

intercepted; email messages can be read from the server without the need for any authorization; undercover agents can tape conversations and inspect private records without involving any permission given by any Judge.

By giving wide definitions to "public security" and "serious crime", the door is open for wiretapping and covert surveillance to be used extensively. Intelligence gathered from these operations may be put to any use and not confined to public security or detection of serious crime. It is simply unregulated. There is nothing in the Bill to prohibit their use for political or economic purposes.

Grave concerns for the protection of legal professional privilege and fair trial, and implications on judicial independence and separation have been voiced by the legal profession. These go to the root of our legal system. If the public cannot be sure that their communication with their legal advisors is safe from interception even when they and their lawyers are not in a criminal conspiracy, fairness in the administration of justice is no longer possible.

There are many other problems with the Bill, too many and too fundamental to be corrected by Committee stage amendments.

Madam President, taken as a whole as well as in its several parts, this Bill does not meet the threshold requirement of inspiring public confidence. By right, this Council should reject this Bill. This is only balance against the public's grave anxiety of a "legal vacuum".

To resolve the dilemma, I, with the support of several of my colleagues, have put forward a "sunset clause". The name might be fanciful, but the device is actually a familiar one which sets the expiry date for certain provisions. The Copyright (Suspension of Amendments) Ordinance is just a recent example. It made possible a transitional arrangement while the Government works out a long-term solution in consultation with sections of the community whose interests are affected. As a stop-gap measure, this Council may be able to pass the present Bill; as a permanent settlement, this must be out of the question. A government acting fairly will see no difficulty with this. I urge the Secretary for Security to tell us that he will accept this clause in his speech in reply.

Finally, Madam President, I would like to share this with my Honourable colleagues. In an interview on this Bill, I was asked whether I realized we will

have to pay a political price if we reject this Bill. It is ironical that one has to pay a political price here today for defending the constitutional right of the people, but more importantly still is that the public will have confidence in this Council only if we instinctively put their interests above ours. I am in no doubt of where our duty lies.

Thank you, Madam President.

MR LI KWOK-YING (in Cantonese): Madam President, before speaking on the Second Reading of the Bill, I am glad to point out to everybody here that Hong Kong is one of the safest cities in the world. Our overall annual crime rate is lower than that of many major international cities like Toronto and Tokyo. One of the most important reasons for which we are able to live safely and work happily in Hong Kong is that our law-enforcement agencies have been standing fast at their posts to safeguard law and order and public security of the territory day and night. The law-enforcement agencies of course do not just sit and wait, that is, they do not wait for crimes to expose themselves before taking action to protect the lives and safety of the general public. Instead, they take proactive prevention measures to forestall the occurrence of crimes. Therefore, they must have certain power to enable them to lawfully detect and prevent crime. The topic of the motion today, that is, interception of communications and covert surveillance, is truly an indispensable means of investigation on which law-enforcement agencies must rely to achieve the objective of preventing crime.

Undeniably, in exercising the relevant power, law-enforcement agencies will cause some intrusion into the privacy of members of the public. Therefore, the striking of a balance between law-enforcement privileges and the basic rights of members of the public and reducing the conflict between the two has long been a subject of considerable concern.

The Court of Final Appeal (CFA) stated explicitly earlier in its judgement on the case related to the Executive Order issued in respect of covert surveillance that the Government could, during the period in which the suspension order was in force, continue to conduct covert surveillance and wiretapping but it is not shielded from legal liability. On the face of it, the CFA has robbed the Government of its power with this move, which is not conducive to the discharge of duties by law-enforcement agencies. On the other hand, the CFA made an

exceptional order to postpone the date of declaration of unconstitutionality of the aforesaid mechanism to 9 August. This fully reflects the CFA's concern about the problem of legal vacuum and its awareness that covert surveillance and wiretapping are of importance to the maintenance of good law and order in Hong Kong and is of great public interest.

Therefore, for members of the Bills Committee present at this meeting, they have spent 130 hours in attending 53 meetings, it is their unshirkable responsibility to exert persistent effort to expedite work on the Bill. Just think how serious the consequences can be if the law-enforcement agencies lose these two major means of crime detection and prevention, that is, covert surveillance and wiretapping. I believe that no one is able to bear the grave consequences. To enable law-enforcement agencies to carry out effective enforcement to maintain law and order of the community and safeguard the rights of the public, protect the reasonable expectation of privacy of the public and their rights to be protected by law, we must carry out our deliberations very carefully and should not impose any unnecessary hindrance and limitation on the Bill. On the contrary, we should take a pragmatic approach to facilitate the smooth passage and implementation of the Bill.

As a matter of fact, every piece of legislation aims at perfection. However, even the finest piece of legislation could have inadequacies. If it is not the case, it is only because it has not met with any challenge yet. In any case, in dealing with the legislative work on covert surveillance and wiretapping process, we should give prime consideration to striking a balance between the detection and prevention of crime and the protection privacy.

Lastly, I would like to say something about the legal professional privilege. This is another major concern of the Bill. As a practising solicitor, I fully understand the worry of fellow solicitors and agree that it is of utmost importance to protect the privacy between lawyers and their clients. Many professional bodies put forth their views earlier when the Bill was being deliberated. On hearing the views expressed, the Government also took the relevant advice readily and made a large number of relevant amendments and strengthened the protection of legal professional privilege. However, I understand that some of my fellow solicitors still have worries about the Bill. They fear that if interception is to be conducted in a case which involves a solicitor or his clients, the authorities might hit the wrong target. In wiretapping and intercepting the conversations of a lawyer, the authorities might

be intercepting the conversations of unrelated clients. Therefore, some solicitors have jokingly said that upon passage of the Bill, they will definitely meet their clients in a public place and speak face to face to them in a low voice, so as to avoid the interception of their communications by the authorities. Some solicitors have even indicated that they would, as if in the movie "Casablanca", put on a hat and disguise themselves before talking.

However, I trust that the situation just mentioned is a joke made by some solicitors only and they would not put scenes in the movie into reality upon passage of the Bill. In any case, in order to enable the smooth passage and future implementation of the Bill, it is incumbent on the authorities to relieve solicitors of their worry and fear about the Bill. What is more important is that the interest of other clients should be taken care of and their privacy be protected. I am not too bothered about this worry because when the Bill was being deliberated, the Security Bureau indicated that the law-enforcement agencies would be required to state explicitly in their codes of practice the specific arrangements on protecting legal professional privilege and that the Ordinance would not override the common law. I hope that the authorities will carry out their promise and further enhance enforcement transparency, thereby relieving the community, in particular, the solicitors, of their worry in this regard.

In sum, in order that Hong Kong may have good law and order, it is the unshirkable responsibility of all Honourable colleagues to support the passage of the legislation concerned to enable law-enforcement agencies to carry out crime prevention work as usual.

Madam President, I so submit.

DR KWOK KA-KI (in Cantonese): Madam President, now we finally have the Second Reading of this long-awaited Bill in the Legislative Council.

Actually this Bill should not be discussed at this point in time because as a matter of fact, Mr James TO had moved a Private Bill on interception of communications and surveillance in the former Legislative Council in 1997. Unfortunately, it was not endorsed by the SAR Government. As a result, all wiretapping and interception of communications conducted since 1997 were unconstitutional.

I would like to cite the judgement of the Court of Final Appeal (CFA) made on 12 July, which points out, "Let justice be done, though the heavens fall." Many Honourable colleagues have said that it owes to the rule of law and the brilliant disciplined forces that Hong Kong has good public order. However, what is more important is that Hong Kong abides by the law and everyone is protected by the law and gets equal treatment. It is because of this spirit and approach that Hong Kong is what it is today and there is justice and fairness in Hong Kong.

Honourable colleagues of the Legislative Council have spent more than 100 hours in deliberating the Bill. Their aim is not to avoid the passage of the Bill but to perfect the Bill to be enacted. As a matter of fact, it is definitely the SAR Government's obligation to have the Bill passed. Article 30 of the Basic Law stipulates, and I quote, "The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences." All of these are stipulated in the Basic Law, but unfortunately and regretably, through all these years since 1997, it was not until 2005 when the SAR Government was facing legal action that the Chief Executive signed an order by executive means, which led to a series of legal proceedings. The judgement handed down finally by the CFA on 12 July still ruled that the Government was unconstitutional.

If a government clearly knows that certain acts are unconstitutional, it should know that these acts should not be done — no matter how lofty the objectives of these acts may be. Everybody knows that many people could be killed in the name of good will. That is why law comes in to protect the general public.

Honourable colleagues of the Council will be anxious because besides having to uphold the law, they also happen to be victims. We can all see that there are anti-bugging devices emitting noises in the offices of some of our colleagues. I do not know if there are such things. I have no way of knowing and I have not tried to find it out because I have assumed that I am being bugged. However, the most important point is not this but that all Members of the Council have to maintain a balance between the power of the Government to do certain administrative acts (including wiretapping) and public interest.

Madam President, the goddess above our heads (that is, on the roof of the Legislative Council Building) has a very important meaning. She will not be partial to anyone or maintain a closer relationship with some people while distancing herself from others. She will just strike a balance between public interest of the community and the administrative interest the Government is after.

Then the Legislative Council would make law in half a year's time and as the scope of this law is so wide, the task is a very difficult one. I am respectful of and grateful to Honourable colleagues of the Bills Committee for having sat so many hours to make clarifications on viewpoints and issues requiring clarification and propose amendments which they considered to be appropriate for this Bill. I feel that this is a responsible approach to take and that is what the public is glad to see.

As time is very tight and in any case we have to enact legislation within a very short time in order to justify wiretapping operations of the Government and to protect the community (in particular the disciplined forces) as it is necessary to perform duties necessary for law enforcement and maintaining public order. We all know that many Honourable colleagues have proposed amendments. I figure they may not be passed. As the legislative process is so hasty, some colleagues have requested for the enactment of a "sunset clause" in the hope that the following two years will provide enough time for the public and the Legislative Council to examine the Bill once again. This Bill is going to affect every member of the public, and I wish to ask the Government, at what time will the public get a thorough consultation on the contents of the Bill?

Let me cite the words of a legal academic Mr ONG Yew-kim (WANG You-jin), who has written numerous articles. He says that the provisions of the Bill are written in a complex and repetitive manner and they are so difficult to understand that members of the public will not know what they are about at all, but the Government says that it wants to help them with this law. He queries whether this is just and responsible. The "sunset clause" should have been introduced by the Government, because if it is felt that something is done hastily and there may be something wrong with it, any responsible government will allow the opportunity of correcting, amending or perfecting the law. A law that is originally sound will still be sound two years later. Madam President, a law that is originally sound will not become unsound two years later. No, it will not. Why does the Government reject all necessary amendments, including the "sunset clause"?

Shortly after this Bill was introduced, six Members of the Council, including me, met the Secretary. We expressed that there was a very important point and that is "public security" had to be defined. We also hoped that "public security" would not be so broadly defined as to mean the national security mentioned in Article 23 of the Basic Law. We did not oppose wiretapping conducted by the Government on grounds of national security, but the Government should not have hastily and forcibly incorporated something of unclear and ambiguous legal meaning into the Ordinance related to wiretapping without having it clearly defined and without going through a proper legislative process. This was not fair.

We spoke about this for a long time and Honourable colleagues in the Bills Committee have also repeatedly requested the Government to define "public security", but I believe up till now the Government has not been able to give a clear definition or make us feel happy. This issue remains unsettled.

The second point is related to the issue of authorization by Judges. As at today, Judges are still to be appointed by the Chief Executive and they are designated. And even the Commissioner has to go through checking before assuming office. Basically, this is already against the principle of fairness. Our original request was that both the Judges and their appointments be free from checking. However, what we have got is that all those who can take up the position of Commissioner have to be checked and weighed.

What worries me is that the Government has recently made several moves, which when added together really make me feel all the more uneasy. For example, the Government recently expanded political appointment. We saw that the authorities went to a certain country in Southeast Asia recently and said that the purpose of the trip to the so-called democratic country was to do the so-called experience-borrowing. I can see that many things in that country are not under any protection. I do not know whether wiretapping in that country is protected, but perhaps there is no such need at all. I am very scared that on the face of it, the Government's mouth is saying that the road it is taking is a road to democracy and the public will be protected, but actually it is not and it is just riding roughshod over the people.

The law that we want must be able to provide clear definitions and protect the public. If the Government wants to conduct lawful wiretapping and say that the purpose is to maintain public order, it will not be able to pass these tests.

All of us can see clearly that that there is no problem with these tests, but the Government has said no to many of these tests.

Another point that worries us even more is about the Chief Executive whom I have mentioned, because the obligations of the Chief Executive are not provided for in this piece of legislation. It can even be said that the Chief Executive can give an order or sign one he deems necessary to carry out wiretapping. This is restricted by law. We have no intention of requesting to go to a brave new world or a so-called police state or place, but the Ordinance related to wiretapping that we are going to enact allows such things to happen and allows a certain official (that is, the Chief Executive of the SAR) to have powers beyond the constraints of law. This is very dangerous unless it is agreed by the public and enjoys its mandate.

Very unfortunately, not all Members sitting in the Legislative Council today are returned by direct election. The decision that they are making now is in fact a flawed one. The Government has not conducted the necessary consultation and Members have not had the opportunity of expressing public opinion on behalf of all members of the community. If we still allow this Bill to be passed and even implemented, we will deeply regret in future. Of course, we hope that this Bill can be passed. We also hope that all disciplined forces and law-enforcement agencies in Hong Kong will have a legal basis to act on instead of doing unconstitutional things everyday.

However, it is the SAR Government that has caused the matter to be handled in such a great haste. It is also the SAR Government that has caused the matter to be handled within such a short time. How can this be fair? For things that can be controlled, the Government has given up its control of them. For what can be done in a better way, the Government has given up and the responsibility is passed to the Legislative Council. If Members of the Legislative Council put forth any amendment now or cause the legislation to be enacted not in accordance with the requirements of the Government, the Secretary or the Court, the responsibility will fall on us. Furthermore, why is a normal act like perfecting a law in the course of making clarifications on it criticized or even reprimanded? This is something that the Government should do and it should have been done at the drafting stage and not under such hasty conditions. Therefore, in order to make remedies to this matter, we have proposed amendments. To remedy things, we hope that the "sunset clause" can be enacted.

However, very unfortunately — although I do not have a crystal ball with me, I can predict that when the Bill is put to vote, it will not be passed at this point in time in a Legislative Council that does not fully represent the public. This is no responsibility of the public. Rather, it is a constitutional failure, due to the lack of universal suffrage and government blunders.

Madam President, although the votes are not cast yet, I can already tell what the voting result will be. However, justice lies in people's heart. Since 1997, the Government has repeatedly made blunders in respect of the Ordinance on wiretapping. The Government used to have a good opportunity of rectifying the blunders, but it has repeatedly gave up the opportunity. Inside the Legislative Council today, a result much to our regret may appear, but I believe that the public will understand that all Members have made all necessary efforts on this matter and have pointed out some areas that may not be in line with public interest. However, the voting result is not in our control. In any case, we still hope that Members will support the amendments proposed by Members of the pan-democratic camp, including me.

Thank you, Madam President.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

MS EMILY LAU (in Cantonese): President, the citizens of Hong Kong treasure very much their freedoms and rights. But there is one thing about privacy that citizens do not know too much about. However, when someone tells them that they are put under surveillance and being constantly bugged, many of them would feel very worried. And yet, there are relatively few discussions on this in the community. The situation this time around is different from that in 2003 when we discussed the enactment of legislation to implement Article 23 of the Basic Law (Article 23). At that time, everybody was very keyed up. However, people are so calm today. President, when I came to the Legislative Council today, I did not see many people at the entrance. This perhaps reflects truly the fact that the people are unaware of the seriousness of the problem.

I heard Prof LAU Siu-kai indicate in a recent radio interview that even the middle class thought that it was no big deal and any major demonstration without

the participation of the middle class was not "very okay"; and as in the case of enactment of legislation to implement Article 23, it was seen that the middle class was also not saying anything this time. President, perhaps the middle-class people just have not "spoken in a loud voice". But if this Bill is passed and an increasing number of problems are found, I believe that many people are going to say to the Secretary, "See you in Court."

This is also a great problem of Hong Kong. Even in Beijing, there are people who say that Hong Kong is now being ruled by the Judges because many proposals put forth in the Legislative Council are not accepted by the authorities and it is not until the matter is taken to Court and all the way to the Court of Final Appeal that the authorities are compelled to accept the proposals. Therefore, it is like the Judiciary that is ruling Hong Kong. This is not a normal state of affairs.

President, all along, the people of Hong Kong do not know what protection is given to their rights. In 1976 when many countries signed the newly adopted International Covenant on Civil and Political Rights (ICCPR), the British Government extended its application to Hong Kong. However, I trust that most people were not aware of this at that time and it was not until the late 1980s that I learned that the United Nations was holding hearings in relation to the ICCPR.

However, the massacre in Beijing which occurred in June 1989 greatly scared the citizens of Hong Kong. Firstly, it was feared that there would be no democracy. Secondly, it was also feared that there would be no freedoms. President, you will remember that you were already in the Legislative Council at that time. On 8 June 1991, the authorities announced the implementation of the Hong Kong Bill of Rights Ordinance (Bill of Rights), which mainly contained most of the provisions of the ICCPR. We did not have direct election at that time yet, and this Bill of Rights came into effect in June 1991. President, Article 17 of the ICCPR, and that is, Article 14 of the Bill of Rights, stipulates, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." I trust that this topic has been seldom discussed in the Legislative Council. It was here that Article 17 of the ICCPR became Article 14 of the Bill of Rights. The ICCPR came into force in 1976 and the Bill of Rights was enacted on the basis of the ICCPR in 1991, but what have the authorities done through all these years?

Mr LI Kwok-ying said earlier that such interception of communication and covert surveillance was something that had to be done. We feel that this may perhaps be the case. It may be necessary to do such work for security purposes. But it is just because such work has to be done that there should be legislation to govern the exercise of such power by the authorities. Therefore, we absolutely have reason to believe that such work has been going on in Hong Kong during these several decades, but there has been no governing legislation at all. It was not until the sovereignty was about to be transferred that Mr James TO introduced a Private Bill. But what happened after the Bill was passed? The authorities did not endorse the Bill and did not allow it to come into effect. The matter was brought to the United Nations, and the United Nations knew what the situation in Hong Kong was. The Human Rights Committee of the United Nations mentioned repeatedly In 1995, 1999 and even recently in March this year that Hong Kong was not governed by this kind of legislation, and that the infringement of the privacy of the citizens of Hong Kong on the basis of section 33 of the Telecommunications Ordinance and section 13 of the Post Office Ordinance was against Article 17 of the ICCPR. Of course, they could not say that this was a contravention of the laws of Hong Kong as there is no such law at all. They also mentioned that the Interception of Communications Ordinance was passed in 1997 but had not come into effect. There are just countless comments made on it.

Sometimes, it is really impossible not to speak rather harshly. President, Mr Vincent FANG has said that before he got into the Legislative Council he did not understand why Members were so unrespectful, but now he fully understands. He is going to join a procession on Sunday too. There are just countless comments. I feel that the authorities — I am not pinpointing any official — as people say, have no sense of shame. In Hong Kong, we discussed the Bill on our own. We agreed that something was to be done but it was not done. When the matter was brought to the United Nations — I am going to take a plane to the United Nations next week to discuss the Women's Convention — when the matter was brought to the United Nations, the authorities said they were willing to endorse the Bill and submit a report. However, although repeatedly reminded by officials of the United Nations, the authorities had never done it. Therefore, I asked Secretary Ambrose LEE what the reason was at a panel meeting. The Secretary said that they had other work to attend to in these few years. What was the other work? President, it is actually Article 23, right? Therefore, does the priority of work of the authorities not give people an impression that it is not normal?

Taking about the rule of Hong Kong by Judges, in 2005, the District Court made a judgement on unconstitutionality. Afterwards, the Executive Order was issued and it was said that the Executive Order could be regarded as the legal procedures mentioned in Article 30 of the Basic Law — what I have not said earlier is that Article 30 of the Basic Law explicitly states that our privacy are protected, but the authorities do not bother about this. When asked about the legal procedures, the authorities issued the Executive Order in the place of the legal procedures. Therefore, a challenge was posed by "Long Hair". After the challenge, there came the judgement on unconstitutionality. After the judgement on unconstitutionality was made, there was six months' time for the authorities to handle the matter. Now, even the Court of Final Appeal (CFA) says that this cannot be done (but there are still people who dispute the judgement of CFA). Let us not bother about whether the judgement is meant to allow the authorities to delay or otherwise first. In sum, it has to be fixed, as the Judge said, on 8 August the latest and there will be no more tolerance. By that time, there will be a legal vacuum. It was not until the situation was such that the Bill was proposed. However, there has been no consultation. Nothing at all has been done. Therefore, public discussion is presently not too mature. Many people do not know very well what the authorities want to do.

President, there is one thing that I worry about this Bill. What is the actual purpose of the Bill? It is, as considered by the Democratic Alliance for the Betterment and Progress of Hong Kong (DAB), that the authorities should be allowed to do such acts and these are what the authorities ought to do. Therefore, the first purpose is to protect public security; the second one is to investigate into criminal offences.

The first thing that has to be done is to say clearly what public security is. The authorities refuse to say it. The Secretary would at most say later that he would make amendments to the effect that it is about the public security of Hong Kong. Talking about public security, many people worry that political bugging and tracking might be introduced, and information might even be collected for the purpose of attacking political opponents. Will these things be so interpreted as to fall within the meaning of "public security"? And does "public security" involve the crimes stated in Article 23? If due to the long lapse of time, everybody has forgotten what those crimes mentioned in Article 23 are, let me read them out once again, they are: treason, secession, sedition, subversion against the Central People's Government, theft of state secrets, prohibiting foreign political organizations from conducting political activities in the SAR,

and prohibiting political organizations of the SAR from establishing ties with foreign political organizations.

People then ask, "Legislation in respect of this has not been enacted. Will these means be employed to deal with such crimes?" "No." "In that case, how about having these things explicitly stated in the Bill?" Consent is not given for them to be explicitly stated and it is only said that they can be explicitly stated in the Code of Practice. When the last meeting was held yesterday, we saw that they were not explicitly stated in the Code of Practice but only among the notes of the Code of Practice. I do not know what effect the Code of Practice has. Now that they are even put in note 3 and note 11 of the Code of Practice, what effect will they have? Yesterday, the authorities said, "All right, if you want to, they will be put into the text proper and not in the notes." However, so far we have not seen the Code of Practice yet. It is really disastrous. We are going to enact legislation and pass the Bill today, but we still have not seen the original text of the Code of Practice. Is what the Permanent Secretary Stanley YING said yesterday really going to materialize? To be frank, there are things that I will not believe until I see them in black and white. Therefore, we are worried about whether "public security" will be abused.

Furthermore, there are two types of serious crimes. The threshold for the serious crime of interception of communications is as high as seven years, and for covet surveillance, it is only three years or a fine of $1 million. Covert surveillance covers many areas, and so is the penalty not too light? We also feel that there might be a need for legislation to govern the law enforcement agencies. But the problem is the threshold and the balance. If a balance cannot be maintained and there is partiality, people will feel that there is abuse.

President, furthermore, there is one thing that is very interesting. What I am talking about is covert surveillance, which involves two things. One of them is interception of communications, which requires the authorization of a panel Judge. However, covert surveillance does not necessarily require the authorization of a panel Judge. The title of the Bill does not refer to "covert surveillance" and the Bill is trying to cheat as the title of the Bill contains "surveillance" only, but what is being discussed is actually "covet surveillance". No one knows what kind of work it is.

President, "reasonable expectation of privacy" is mentioned in relation to "covert surveillance". To be frank, if we go to the streets to interview 10

members of the public, none of them would know what it is. So, what is reasonable expectation? We have discussed it over and over again. Firstly, there must be privacy in the residence. Both Article 30 and Article 29 stipulate that privacy of citizens inside their residence is protected. However, the authorities say that it is not so. This has been said by the Secretary, and he might say it again in a while. He has said that if there are windows in the residence so what could be seen by residents in the opposite building is no privacy. Then how can there be privacy? One will have to get some thick cloth for window curtain and pull the curtain close. There can then be reasonable expectation. It was even more ridiculous yesterday when discussion was made on the Code of Practice. It was stated that there could be reasonable expectation for those who lived on the higher floors where no one could see or those whose residence faced the sea. There could be no reasonable expectation if the residence was on a lower floor and could be seen by others. Alas, I myself feel that it is the tragedy of Hong Kong that its people have to live under such crowded circumstances and the rich only get even richer. But that does not mean that those people whose residence can be seen by others cannot have any reasonable expectation. This is one of the most important points.

There is another example. We have pointed out many times that, for instance, if I go with Mr Albert HO to a restaurant to eat, there is of course no reasonable expectation as everybody knows that we are eating. But if we talk, we can have reasonable expectation. What was stated in the code of practice yesterday? On the basis of what was stated, the explanation was that there was reasonable expectation if the two of us talked when no one was standing beside us and no one was sitting at the next table. Then I said how I would know whether anyone was standing beside us or whether anyone was sitting at the next table as these were out of our control. That is what was said. Later on, the authorities said that it would be deleted. This shows that an example has to be given to enable us to get the big picture through observing the minute details and to let us know what reasonable expectation is. Otherwise, we would only say that there can be no reasonable expectation if there is someone standing or someone sitting next to us.

There is another example. One has no reasonable expectation when giving a speech. But when one is talking to the person beside him, one should have reasonable expectation of privacy. However, the authorities says that it is not so. One can have reasonable expectation only if one goes to talk at the backstage. President, there are countless examples like this. We may have to

debate for three days, four days, five days, six days or seven days until 8 August. But the problem is that these examples make us feel that the authorities do not care much about the privacy of the public.

Because of time constraint, there is one more thing I must say quickly because members of the press have told me that they are very worried. There are two types of reporters who are feeling particularly worried. One of them are those who are responsible for public order news because there are frequently such news items. The other one are those responsible for political news. President, many reporters have indicated that if this Bill is passed, they would not dare to continue to work as reporters and that many people may not dare to talk to them because they feel that they would definitely become wiretapping targets. Why? Because it is necessary to detect crimes and it is necessary to see that public security is not threatened. Therefore, as members of the press are working under very difficult conditions, why can they not be allowed to feel at ease when at work and why can they not be told that there will be no problem for normal activities to be carried out? Those who wish to contact reporters in future will be under the same situation because what is most important to members of the press is that there are sources of information. We have not only to let reporters feel at ease but also let the sources feel at ease, or otherwise all these so-called sources will disappear. In that case, how can we have freedom of the press and freedom of information? And is this what the Secretary wishes to see?

Furthermore, President, I have a strong opinion about the checking on Judges. There are three types of checking, and now the highest level of checking is to be employed. Even for the appointment of the Chief Justice of the CFA, just the second level of checking is employed. But now the third level is to be employed applied on the reason that there would be risk as the person will be in touch with a great number of very sensitive issues. I trust that the Judges hearing cases in the Courts are also required to get in touch with numerous sensitive issues, and yet they can do their job. Therefore, it is difficult for us not to feel that this checking is just a means that the authorities employ to pick candidates that they trust or to eliminate candidates that they do not trust. As a result, the process is not conducted in accordance with any court procedure. If it is formally submitted to the Court for consideration and approval, there is a procedure to be followed. However, the authorities have stirred too many things up. Firstly, the people will feel that the Judges are not trusted. Of course, they are already feeling very furious when people comment

that Hong Kong is ruled by Judges. Moreover, by so doing, the authorities are also interfering with judicial independence.

As some Members have said, we have too many things to discuss, but there are five or six more days for us to make discussion. President, I am of the opinion that if this matter is not dealt with, I will have no way of giving an account to the citizens of Hong Kong. I also support the "sunset clause". I hope that a last opportunity can be provided, but the Secretary has vetoed it. Therefore, I oppose the resumption of the Second Reading of the Bill.

MR LEUNG KWOK-HUNG (in Cantonese): First of all, I want to speak about the amendments proposed by Ms Margaret NG, Mr James TO, Mr Albert HO, Mr LEE Wing-tat and Mr CHEUNG Man-kwong. I would like to express great regret to the President's ruling that some of the amendments are not allowed to be proposed. However, I am not talking about this today.

Firstly, when I came here earlier, I saw that some people fighting for the right of abode were demonstrating. Someone lied years ago in this Legislative Council, saying that 1.67 million people would come to Hong Kong if the legislation related to the right of abode was passed. The situation now is that not even the daily quota of 150 persons is exhausted. Inside this Chamber, with the exception of a very limited amount of it, time has always been spent in telling lies, in particular by the Government, which tells lies every time it speaks. The Government said that if legislation was not enacted to implement Article 23, the territory would sink into chaos and would be a dead city. There was no way for legislation not to be enacted. Is it dead now? It now seems that it is those who wanted to have legislation enacted to implement Article 23 that are dead. Someone has a sore foot. Someone went to study……

(Mr Martin LEE pointed out that a quorum was not present)

PRESIDENT (in Cantonese): Clerk, please make a head count to ascertain if a quorum is present.

(The Clerk reported to the President after he had counted the number of Members present that a quorum was not present)

PRESIDENT (in Cantonese): We do not have a quorum now. Please ring the bell to summon Members to return to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

PRESIDENT (in Cantonese): A quorum is now present. Mr LEUNG Kwok-hung, you may continue to speak.

MR LEUNG KWOK-HUNG (in Cantonese): Will my speaking time be counted again from the start?

PRESIDENT (in Cantonese): No. We had been keeping a record while you were speaking earlier. We must be fair. Please continue to speak.

MR LEUNG KWOK-HUNG (in Cantonese): Thank you. The President is right in saying that we must be fair.

The Government deceived many people on the issue of the right of abode. Then, seeing that it had successfully deceived them, it got bolder. Having found that it could be done for the enactment of legislation to implement Article 23, it tried to deceive the people of Hong Kong again.

What I was saying just now is that those people who shouted with all their might at the top of their voice that if legislation was not enacted to implement Article 23, Hong Kong would sink into chaos and so on and so forth have now left. Mr TUNG said he had a sore foot. Now he has roamed the whole of China. Recently, he has even established with LIEN Chan a large enterprise that does logistics business. It surprises me that someone who has a sore foot can be like this. His political reward is very rich indeed. He insisted on enacting legislation to implement Article 23. Although he failed and was cast away by the people, his business is growing. Let us take a look at Ms Regina IP too. She was cast away by the people of Hong Kong. Half a million people asked her to step down. She took a trip to Beijing, had some meals and then returned to say, "See you again." She has a large number of acquaintances there. She said she had meals until her mouth got sore. Then she came back here.

Why am I telling this story? Basically, inside this Chamber, it is the buttocks that make the decision, that is, the buttocks direct the head. In other words, the buttocks direct the brain. And that is to say, what one is going to say depends on the position where one is seated. In today's debate, we are discussing whether or not the Second Reading should be passed. Actually, the Second Reading has a chance to be passed. Mr Ambrose LEE has gone out. He heard me condemning his superior. I once said to Ambrose LEE, "What is the problem with enacting the 'sunset clause'? If you are superstitious, it would be okay to make a 'morning sun' clause, that is, we just say something the other way round. If we do not say 'set', we may say 'up' just as long as something would come 'up' two years later." He said that he was not superstitious. He said that the reason for his disagreement was that he could not always do so. Is the answer not baffling?

Let us think about this. Executive Order No. 1 was issued by Donald TSANG. He has only one "boss". Upon issuing Executive Order No. 1, he was slapped on the face. He was slapped thrice on the face successively. Other people said that his action was unconstitutional and even said that it would not be allowed again. Do you think that the Chief Executive would dare to issue Executive Order No. 2? Perhaps he could. Secretary Frederick MA, when you fail in promoting your sales tax, if Executive Order No. 2 is issued, you will surely succeed. We have tried every way and still cannot win. We cannot win, just like we cannot win against the President's ruling on us, and there would be people who support it. They who sit there will think of new reasons to support their saying that actually this is quite good.

Ladies and gentlemen, Secretary Ambrose LEE owes us an explanation, and that is, why can he not give the people of Hong Kong an opportunity of discussing this Bill on the basis of the legal vacuum of which he said must be filled? This piece of legislation has profound influence on them and has a decisive effect on the basic human rights in Hong Kong, that is, freedom of communication and privacy of communication, and on the future enactment of legislation to govern the private sector, for example, the paparazzi, weekly magazines. And even people sent here by outside jurisdictions to monitor Hong Kong people would be governed. Today, just the foundation is built. Why can we not consult the public again on this matter? Secretary LEE cannot give an answer to this. When Secretary LEE said that this could not always be done, Ms Margaret NG immediately retorted, "What about the Copyright Ordinance at that time?" The Secretary could not answer either. That is why he has left. I guarantee that he will not return while I am speaking because he cannot give an answer.

It is of course okay to speak behind closed doors. He hopes to fool us by just saying that he would not do it. Today, he should tell us here why that cannot not be done. Otherwise, he will be in dereliction of his duty. Otherwise, he will be deceiving the people of Hong Kong. Why can it not be done? Is it so disastrous? Will anyone die if the people of Hong Kong are allowed to have the right of being consulted again? Let us take a look at Article 23 and Article 30 of the Basic Law. They are actually similar in nature in that the Government did not enact legislation to turn these two Articles into local legislation when they became constitutional provisions. As a result, the common people cannot take legal action because there is no such legislation.

The Government has been in dereliction of its duty for 10 years. Today, it tells me that as it has lost a lawsuit to "Long Hair" and KOO Sze-yiu, legislation has to be enacted expeditiously for the benefit of the people of Hong Kong. I also believed in these lies and co-operated with it. However, when it was proposed that the "sunset clause" be enacted, it was out of the question. Why was that done for Article 23? Article 23 is similar in nature. It is also because the Basic Law was not enacted by the people of Hong Kong but by a group of people who were called the Basic Law Drafting Committee and a group of people under them called the Basic Law Advisory Committee. They divorced themselves from the masses and worked out everything behind closed doors. They built a house and asked us to live in it. Therefore, no decision was made at that time on anything where there was doubt, because it was said that no conclusion could be reached. Both Article 23 and Article 30 fell into this category. Why do people from the Government, including Ambrose LEE, the Law Officer Ian WINGFIELD and Mr YING, suddenly say today that consultation cannot be made again? What kind of society is this? What is wrong with consultation?

Ladies and gentlemen, pan-democratic Members cannot agree to such insane logic. Therefore, we can only express our responsibility to the people of Hong Kong with our votes. We are not doing this for ourselves. If we are, we might as well go home earlier to sleep. There are a large number of people who want to go on vacation. Why should two more years be spent on consultation? That is because our discussion of the law was conducted behind closed doors, save being captured by the cameras for a short while. And most of the meetings were conducted while people are in their office working. It is a fact that the Government has not issued any paper to conduct consultation. Why should we accede to its request and give it a chance to fill the so-called legal vacuum, so

that the people of Hong Kong, including the media, will be denied of freedom? Members of the media are all sitting up there. Can they say anything? They can only tell Emily LAU that will not do. Emily LAU then relates what they have said to the President and the President then answers them. Is this consultation?

Making no consultation is tantamount to "fooling" the people. Consultation must be conducted before any important decision is made in this Legislative Council. Even for sales tax, the imposition of which is said to be uncertain, nine months has to be spent on consultation. Just put on a show though it may seem pretentious and let Donald TSANG declare later that sales tax will not be imposed and seize the opportunity to play the role of a wise and competent ruler. How does the Government treat the people of Hong Kong. The people of Hong Kong have already told the Government not to introduce sales tax and even Mr Vincent FANG has initiated a procession of not less than 1 000 people and has got it fixed in a short period of time. How does the Government perform its duty? Things which the people of Hong Kong do not want, the Government asks the people to express their views. And for what they have not been allowed the opportunity of asking questions, when they requested to ask questions again two years later, Secretary Ambrose LEE said it was not necessary. Excuse me, is this not reversing the order of things? Is the brain to be taken as the buttocks and the buttocks taken as the brain?

Now it surprises me that this approach has won the support of so many people. It is no wonder that recently when I went to the market and tried to buy a pig brain for stewing and take it to cure my headache, the man at the market said, "Oh no, Mr LEUNG. We are not selling pig brains now because people do not like pig brains. They only like pig buttocks. These things are popular these days." He went on to say, "Nowadays, people do not take pig brains but pig buttocks as a tonic for their brain because too many people use their buttocks to direct their brain."

Ladies and gentlemen, what do we see now? What we see is that in May last year when the Court made the judgement that section 33 of the Telecommunications Ordinance might not work, Donald TSANG acted arbitrarily and told all people of Hong Kong that his Executive Order was invincible and would certainly work. He said those things here. Later on, he was slapped twice on the face. It was not until then that he found that he was actually incapable of achieving his intended target. He had no alternative but to

plead the Court to give him six months' time for enactment of legislation. We now only have six months' time. This urgency has been caused by him. If he was a wise leader, he would have proceeded to enact legislation after his defeat in May. How many months' time do I have? I have tried using a month's time for preparation. It has been 12 months since June last year. Do Members need to complain bitterly that it is because of "Long Hair" that they cannot go on vacation? Members should blame Donald TSANG. It is Donald TSANG's Executive Order. So far, I have not had the chance to ask WONG Yan-lung whether he agrees to this opinion. Donald TSANG is a tyrant. He is a tyrant and will soon be a traitor of the people. He said that there was no need to bother about the Legislative Council; that there was no need to bother about this group of idiots. That is why he has got into such a plight. He lost three lawsuits in a row, but he has not said a word in apology. I now give him a chance to back down with good grace: Mr TSANG, you need not apologize. "It is better to tell the truth than to adopt a vegetarian diet." You need not adopt a vegetarian diet. Can you just give us the "sunset clause"?

Mr TSANG went to the Mainland to give speech together with Mr ZHANG Dejiang. However, he just told stories and took pork rib soup. And regarding this matter of utmost importance, I asked five times for his apology and mentioned the "sunset clause". I told him that there ought to be material action for an apology. One could not just say that he was wrong and will not do it again. He had to make remedies. In the Court, the Judge asked me, "Mr LEUNG, do you want to carry out a community service order?" I answered that I did not want to because I had no sense of regret. I felt that I was right in demonstrating. Now Donald TSANG is like this. There is no sense of regret in him. Not the least. Not even the community service order would be carried out. But he is completely wrong. The Courts have handed down their judgement thrice. He is now serving the community and serving the people. Therefore, he should bring up the "sunset clause" for discussion by everybody. Remember, not just let us discuss it but let the general public discuss it first, so that we may not act against public opinion when discussing the matter. This is similar to the situation under which Mr James TIEN behaved in response to the proposed enactment of legislation to implement Article 23. What was done when the public opinion was known? However, I do not know whether all of us are going to take to the streets after the discussion ends. That is the most valuable thing. In other words, if a Government gets such a great power to rule, it must take great care in exercising this power.

The Chief Executive does not do so and those people under him definitely do not do so. Ambrose LEE does not do so. However, Mr YING has to do so now. Mr WINGFIELD has to defend them. It can be seen that because of the mistake of a single person, all the people of Hong Kong have to defend him as if they are insane. What kind of situation is this? I tell all of you, this is like the situation at the Laoshan meeting when Chairman MAO gave a speech. He said, "Our country is great. The great leap forward..... and so on and so on." No one dared to say anything. Eventually, 30 million people died of hunger. At that time, out country even exported cereals because Chairman MAO thought that as the great leap forward was so successful that granaries might not be built in time, it would be better to sell some cereals to other people. And so cereals were sold.

I tell all of you, 60 people are here today. Whoever feels that not even the "sunset clause" should be there really owes everybody an explanation. He may be cleverer than I, but that does not matter. What we want now is fairness. That is, after the Government has done something wrong, it should give back the people of Hong Kong an opportunity. This is of vital interest to them. Let the legal sector and the media, for example, state what their rights are and whether there are errors or omissions. Is even this not allowed? There is a 12 month warranty even for things we buy, right? Therefore, this is a matter of common sense. The Secretary cannot answer a question asked with common sense. That is why he has left. However, it seems that common sense does not work for this problem. What is more, I have been blamed by other people, "'Long Hair', why are you still pursuing the matter? You have already slapped him thrice on the face. Let it go at that. Give him a way out." Hey, man, it is not giving me a way out. I want to give everybody a way out.

No wonder the news reporters are feeling worried. In the past, a warrant was required for the "taking of stuff" from a newspaper office. After the present event, there is no need for a warrant. This need not to be done now as communications in the computer or mobile phones can be intercepted any moment. Hey, do they know about these changes? They do not know about them at all. At most they will sit and laugh here. Therefore, the question is: I now challenge Secretary Ambrose LEE to come back to explain why the "sunset clause" will not do. If he cannot do it, he will be an official in dereliction of his duties. He will definitely go to America to study. He will definitely have a sore foot.

Thanks, everybody.

MS AUDREY EU (in Cantonese): President, covert surveillance and wiretapping by law-enforcement agencies has all along been in breach of human rights law and the Basic Law. It is an issue raised not only recently. As a matter of fact, the Law Reform Commission pointed out in its report 10 years ago, that is, in 1996, that section 33 of the Telecommunications Ordinance is giving law-enforcement agencies far too much authority in intercepting communications and this is inconsistent with the Hong Kong Bill of Rights and the International Covenant on Civil and Political Rights, and that the Government is likely to lose its case once a judicial review is sought against it.

For this reason, before the handover, the former Legislative Council had in June 1997 passed the Interception of Communications Ordinance. However, eight years on, the Chief Executive has delayed in appointing a day for it to come into operation. Neither has he carried out any review of the subject. The Government is extremely irresponsible when it has overlooked such a legal flaw and crisis.

Last year, when the Court twice ruled the covert surveillance activities of the Independent Commission Against Corruption inconsistent with Article 30 of the Basic Law, the Government still refused to enact the law to regulate covert surveillance activities.

What is more outrageous is the Chief Executive's grossly inappropriate decision to compound his mistake after losing the lawsuit to declare the Law Enforcement (Covert Surveillance Procedures) Order (the Executive Order), claiming that the Executive Order was consistent with the necessary legal procedures, in order to provide legal authority to law-enforcement agencies to carry out covert surveillance. Many in the legal profession pointed out at the time that there was no legal base for such Executive Order, that it could not substitute legislation, that the Chief Executive was no substitution for the Legislative Council and he could not mend the flaws of the law.

The Court's judgement proves that these criticisms are correct. On 9 February 2006, in the judgement of *Koo Sze Yiu and Leung Kwok Hung v Chief Executive of the Hong Kong Special Administrative Region*, the Court of First Instance held that insofar as it authorizes or allows access to, or the disclosure of, the contents of telecommunication messages, section 33 of the Telecommunications Ordinance is inconsistent with Articles 30 and 39 of the

Basic Law and article 14 of the Hong Kong Bill of Rights. Hence the Chief Executive's Executive Order is not valid.

In view of the legal vacuum which would be caused by the judgement, the Court of Fist Instance made an order that section 33 of the Telecommunications Ordinance and the Executive Order continue to be valid and of legal effect for a period of six months. However, the Court does not have the authority to take the place of the Legislative Council. Since the Court thinks that the Executive Order is unconstitutional, it does not have the power to extend the validity period of the order. The Court's judgement is puzzling.

The Court of Final Appeal made a judgement on the appeal of the case on 12 July 2006. It made an order setting aside the temporary validity order of the Court of First Instance and substituted suspension of the declarations of unconstitutionality so as to postpone their coming into operation. Such postponement will be for six months from the date of the Court of First Instance's judgement of 9 February 2006. The Court of Final Appeal stated that, "the Government can, during the period of suspension, function pursuant to what has been declared unconstitutional, doing so without acting contrary to any declaration in operation. But, despite such suspension, the Government is not shielded from legal liability for functioning pursuant to what has been declared unconstitutional". In other words, there is no legal base for the Government to continue intercepting communications during this period of time.

I am taking the trouble to repeat this part of history hoping to put it on record. I wish people to know under what circumstances the Interception of Communications and Surveillance Bill is written, should it eventually be passed. I wish people in the future generations will know what this part of history tells us and how this Bill has come about. It tells of a government, which purportedly attaches great emphasis on and respect for the rule of law, could have overlooked under public eyes the basic human right of the freedom of communication that is protected under the Basic Law. It tells us that the Government is unwilling to deal with the problem in the proper light, even after the facts have been officially revealed by the Court, and hopes to cover up its fault and to muddle through with an Executive Order. It further tells us that this Bill, involving the basic human rights of the freedom of speech and personal privacy, was passed in a haste under the repeated push by the Government within a period of less than six months. There has not been any public consultation in the most rudimentary form. It is a disgrace to Hong Kong, a self-proclaimed society under the rule of law.

The remarks made by and attitude held by Mr Ambrose LEE, Secretary for Security, who is behind the move for the legislation, is regrettable. The Government has procrastinated in the legislation work ever since the handover. It is only when time is running out that it submitted the Bill in March this year to the Legislative Council and asked it to complete scrutiny within a short period of five months. It is the Government's fault which has resulted in the requirement for the Legislative Council to study this Bill of great importance in such a short time. Members of the Bills Committee often had to continue their meeting into lunch time or Saturday afternoons. It is not that Members would like more time to enjoy their meal or that they are not willing to work or have meetings on Saturday afternoons. It is that such arrangements will adversely affect the quality of scrutiny work. However, Mr LEE chose to criticize publicly the progress of the Bills Committee's scrutiny as unsatisfactory. He has not come to the Bills Committee for any exchange of views with Members. He has not shown the basic etiquette and respect to Members of the Legislative Council. He has expressed words of threat, saying that, for example, should the Bill not be passed before the deadline, "disciplined services will not be able to enforce the law, and criminals will thrive and be left unchecked. Such behaviour is typically irresponsible, intending to shift the blame of administrative fault to the Legislative Council.

The Interception of Communications and Surveillance Bill was deliberated against such background and in such circumstances. The Civic Party will later propose a series of Committee stage amendments, including the "sunset clause", that is, to lay down an effective period for the interception legislation, up to 8 August 2008. The purpose is two-fold. The first is to deal with the issue of legal vacuum as raised by the Government and to provide law-enforcement agencies with the necessary legal base to carry out covert surveillance and interception of communications. The other one is to ensure that the Government would carry out a more lengthy discussion and review during the period. I would like to point out specifically that the "sunset clause" has gained the support of The Law Society of Hong Kong, but the Government is unwilling to accept it. This shows that Government's repeated emphasis on the so-called urgency of the Bill is nothing but an excuse. It is only an instrument for the law-enforcement agencies to obtain greater administrative convenience and power.

Today, not only today actually, but in these few days, the Civic Party will propose a series of amendments to the Bill with a view to correcting its major flaws. Nonetheless, despite these amendments, we are still extremely worried if the Bill is passed, for the following reasons:

(a) The basic right to the freedom of communication is a personal and political freedom protected under the Basic Law. As pointed out by Margaret NG, that we have deliberated on the Bill for 130 hours or that we will be debating the Bill in the next few days is no substitute for public consultation. Without public consultation, the Legislative Council does not have the power to forfeit this right and freedom on behalf of the citizens.

(b) A major clause of the Bill is to vest the authority in the Judge for authorizing all interception of communications. In requiring the Judge to exercise such power, however, there lacks a legal procedure to ensure fairness, including:

(i) the absence of an open trial;

(ii) the absence of a hearing of both parties' arguments;

(iii) the absence of a requirement for the Judge to give the reasons of his decision; and

(iv) the absence of a provision for appeal or an application for a judicial review, as the persons involved in most cases do not know that they have become the targets of surveillance.

(c) We feel extremely uncomfortable with the fact that the so-called "products" of the communication interceptions and covert surveillance can be used as intelligence. There is no provision, in this or any other legislation, to regulate the use of this so-called intelligence or product. Personal privacy of the citizens is hardly under any protection.

(d) Under the proposed system, the Commissioner on Interception of Communications and Surveillance, who reports to the Chief Executive, is the final gatekeeper. There is no provision for a tribunal which is accountable to the public and with the participation of the people's representatives. Just as pointed out by Margaret NG, the system is different from that in the United Kingdom and the United States.

In the United Kingdom, the Government has to report to the Select Committee on Communication Interception and Covert Surveillance of the House of Commons, whereas the United States Government is answerable to the

Intelligence Committee of the House of Representatives. There is, however, no provision of any system in the Hong Kong Special Administrative Region Government which is accountable to the public in such matters as the interception of communications and covert surveillance. The Government even rejects Members' proposal that the Legislative Council should be involved.

Based on the many reasons stated above, the Civic Party, like other Members in the pan-democratic camp, cannot support the resumption of the Second Reading of this Bill. Thank you, President.

MR LEE CHEUK-YAN (in Cantonese): President, to put it simply, the only issue concerning this Bill is whether Hong Kong citizens trust in the Government. There are many debatable points about the Bill. The key issue however, is whether the Government is trustworthy.

Is this Government trustworthy? It is not, as seen from a historical point of view. Why should I put it this way? It is because this Government is not law-abiding. If this Government went about its way according to the law, it should have put the legislation proposed by Mr James TO which was passed before the handover into force. The Government has not done that all along, but it has all along been tapping telephones, carrying out covert surveillances and intercepting communications. Getting things done without being caught is all it cares. This Government has not paid any attention to the constitutional rights of the citizens; otherwise it would have put the legislation into operation, and there would otherwise be no need to do it in haste now. Even so, the Government is not doing this voluntarily. It is because the Government has lost a lawsuit and that the Executive Order has been proved as unconstitutional that the Government hastens to put the law into effect. From a historical point of view, this Government is not trustworthy.

The second reason, as seen from reality, we all know this is not a government formed by a democratic election. I am not putting my faith blindly in democratically elected governments. Democratically elected governments too are not trustworthy on issues like this, because governments will always believe that they are above all, and they will always enjoy more powers. On matters like this, all governments in the world are not trustworthy. Democratically elected governments are no exceptions. Governments that are not democratically elected are more untrustworthy. The second reason not to trust this Government is that this Government is not subject to any democratic monitoring at all.

The third reason not to trust this Government is that it lacks independent thinking on certain matters. We know that it is a government "apple-polishing" the Central Authorities. It is a fact, not a criticism. The Government apple-polishes the Central Authorities and it is carrying out the wishes of the Central Authorities. Accordingly, this is the third reason that this Government is not trustworthy.

(THE PRESIDENT'S DEPUTY, MS MIRIAM LAU, took the Chair)

The *South China Morning Post* conducted a survey concerning this law on communications. Most of the interviewees are distrustful of the Government. The question in front of us is very simple: those who trust in the Government will cast a supporting vote. The pro-government party will support the Government. They think they can trust in this Government — they may indeed not trust in this Government, but they will have to indicate to the Central Authorities that they have confidence in the Government even though they may consider that the Government is abusing its powers. They will cast a supporting vote even if they do not trust in this Government. However, as a citizen, if we do not trust in this Government, not trusting in it even if we appeal to our conscience, then we must cast a dissenting vote.

Freedom of communication is the foundation of human rights. Think about this: If the action of each and every citizen is under covert surveillance without their knowledge, what a society of terror it will be? Technology advances of human beings have already brought about this society of terror. ORWELL's *1984*, a book I often talk about, tells of a "Big Brother" who is watching the citizens. In our society, the Government is the "Big Brother" who is always watching the citizens. Only that ORWELL's society is one of communism and totalitarianism. A democratic society can be very totalitarian, this is more so the case of Hong Kong which is not even a democratic society.

Human society has developed to such a stage that human beings are gravely intruded upon. Let us imagine: What will we feel if each and every act of us is watched? What will we feel if our contacts and conversations with others are tapped? Petty citizens may think that this is nothing of their concern, because they do not care about politics, or indeed about anything. Lawyers are not concerned about politics, and they too are not concerned about anything. Why then is The Law Society of Hong Kong concerned so much about the issue,

as you may all have come to know? It is because in their course of their practice they may come across customers or clients who are under surveillance, or they themselves may be under surveillance in the process. It is similar to the case of the reporters. Some may say that reporters are immune, because they are employed to do a job. However, the Hong Kong Journalists Association has written to us expressing clearly its keen concern about the implications of this legislation on interception of communications. Journalists may be implicated unknowingly in the course of their duties. Members may think that they are but petty citizens and will have nothing to do with the matter. This is not the case. There may come a day that you are under surveillance and you have no idea how you have become involved "in the soup."

For example, we are most concerned about — Deputy President, is "in the soup" not quite decent an expression?

DEPUTY PRESIDENT (in Cantonese): You may decide it for yourself. You may revise your statement if you like.

MR LEE CHEUK-YAN (in Cantonese): Perhaps I should revise my way of expression. Citizens may think that the matter does not concern them. However, when they are intercepted and when their human rights are intruded upon, their rage and feeling of injustice will not be appreciated by those whose communication has not been intercepted. Therefore, I would wish petty citizens not to think that the matter does not concern them, particularly when there are grey areas in certain provisions of the proposed legislation, to the effect that everyone can become a target of communication interception.

Why would I say that participating in society would make oneself a target of wiretapping? Apart from the question of criminal implications, there are provisions relating to public security. We pointed out at the first meeting that the definition of "public security" is very broad. The Secretary, noting the point, said that since Members were concerned about the overly broad definition of public security, he would include provisions of exclusion to exclude peaceful assemblies, peaceful non-violent assemblies and processions. It would appear that it would not be law-breaking for citizens expressing their opinions. The Secretary yesterday again expressed that he would be drafting a declaration to the effect that there would be no covert surveillance for political reasons. It would sound that the Government is giving way once again.

Finally, Deputy President, it boils down to the original question, which is whether or not we trust in the Government. Employers are always telling their employees that they will not be fired for participating in union activities. When an employee is fired, he will be told that he is fired not because he is involved with the union. He is fired for some other reasons. It is the same with the Government. It will say that it will not be intercepting communications for political reasons. It will say that is done for other reasons, for example reasons of public security. Such interception of communications will then not be done for political reasons, such activities will become plausible under the law. However, how is it different from an employer firing an employee and saying that it is not because he is involved with the union or that she is pregnant?

Therefore, it is in fact only a matter of playing with words. There is no safeguard for the citizens. The point on political reasons can not be trusted. The Secretary has also mentioned the exclusion of peaceful assemblies and processions. We must note, however, that the law empowers the Government to monitor assemblies and processions. This is exactly the purpose of Mr Albert HO's proposed amendment to the Public Order Ordinance.

We know that there will be a two-tier system for interception of communications. Type 1 surveillance involves criminal offences pertaining to a three-year imprisonment. Type 2 involves offences punishable by an imprisonment of seven years. According to section 17A of the Public Order Ordinance, any person in an assembly contravening the rules imposed by the police pertaining to the conduct of the assembly will be, if convicted, subject to a maximum penalty of five years' imprisonment. In view of the broad coverage of the Public Order Ordinance, the conduct of people taking part in peaceful assemblies may also be regulated. Furthermore, any assembly comprising more than three persons without prior application, and thus without authorization, is a breach of the law. The offenders are liable to a five-year imprisonment. There will be a back door for the Government with the provision of this five-year imprisonment penalty. The Government will be able to keep citizens participating in a peaceful demonstration under surveillance. Not because they are participating in a peaceful demonstration, but for the criminal offence they commit pertaining to the breach of section 17A of the Public Order Ordinance. The Government will then be able to intercept their telephones or communications. What can we do about it?

We shall not forget that, assemblies, processions and demonstrations are the basic right of Hong Kong people. Everyone may participate in assemblies

and processions. Just now quite a few Members mentioned the example that Vincent FANG has not planned to participate in the procession. It is because of the issue of sales tax that he has decided to participate in this week's procession. Perhaps Ambrose LEE may take to the streets one day, you can never tell. Everyone may take to the streets to participate in a procession. If Ambrose LEE takes to the street one day to join a procession, he will be kept under particularly strict surveillance. Former senior government officials or Directors of Bureau will certainly be kept under surveillance if they take to the streets. Their telephones will be tapped, their communication intercepted. Everyone speaking up to express their views will be liable to overstepping the confines of public security.

There is yet another area of public security which is worrying. The Secretary has expressed that public security involves only the security of Hong Kong, not national security. This is the way he plays with words. I remember when the proposed legislation was deliberated, there were repeated mentions that international security and the security of Hong Kong are related, not only China's national security. At the time, it was mentioned that when foreign terrorists made their way through Hong Kong, even if the terrorist activities were not going to take place in Hong Kong, in order to prevent terrorism, Hong Kong would have to intercept communications on behalf of that foreign country. This is because if we cannot prevent terrorism in foreign countries, Hong Kong's own security will be affected. If Hong Kong is to be concerned about the terrorist activities of foreign countries, how can it not be concerned about national security and subversive activities which are related to Article 23 of the Basic Law? Will this become another back door for the Government to let in national security within the definition of the security of Hong Kong, whilst national security covers subversion? If so, the enactment of legislation to implement Article 23 of the Basic Law, one thing we would not wish to see, would materialize.

The Secretary may later stand up to speak and deny all these. In the end, however, as I have mentioned earlier, do we trust in this Government? The Government would always like to demonize matters such as terrorism and serious crimes. Of course we are concerned about these problems. The most important problem is, when we adopt communication interception as a means to prevent demonized matters, we would turn ourselves into a demon. If we are to create another demon to intrude upon the private life of everyone whilst attempting to prevent a demon, we are not fulfilling our duty as law-makers to balance the needs of the two. We are not advocating that we should ignore

criminal offences, serious crimes or terrorism, or the question of fighting crime which is the concern of most citizens. It is that we should not create another more dreadful demon for the sake of preventing one. As law-makers we must strike a balance. This proposed law, however, is not a product of balance.

The greatest problem about this proposed law is its total black box operation. When the law comes into effect, we will not know what the Government will be doing. There is one point which I notice: the Commissioner's final report will not be revealed to anyone and that people will not know where he will introduce covert surveillance and what the statistics are. If we wish to know how many cases where surveillance has been carried out for public security reasons, and what those activities are which require actions from the Government on consideration of public security, they would not be made available publicly. At most would be a set of general statistical figures. There would not be any details. This is a black box operation. The victims, that is, people who have been under surveillance, would not have any opportunity to defend themselves. The decision would be made unilaterally. Are we comfortable with such a black box operation?

If Members of this Council do not wish Hong Kong to be governed by evil laws, we must object to this Bill. If a proposal like the "sunset clause" is not accepted, we should object all the more to the passing of this Bill. Therefore, on behalf of the Hong Kong Confederation of Trade Unions, I oppose this Bill.

Thank you, Deputy President.

MR FREDERICK FUNG (in Cantonese): Deputy President, I have got influenza, common cold and coughing today and also an unpleasant voice. However, there is one thing I feel is more unpleasant to the ears than my voice. It is that this legislation should have been enacted years ago, but the Government procrastinated in doing it. When the Government really wanted to do it, it adopted the way of introducing an Executive Order. Only when the Executive Order was held by the Court as being inconsistent with the Basic Law did the Government hasten to begin the discussions. However, citizens were not consulted when the Bill was drafted. There are many grey areas and flaws in the provisions to the effect that human rights and privacy of the people are violated. Furthermore, the Government is unwilling to include a "sunset clause" in the Bill and wishes only to force through the passage of the Bill. The

Hong Kong SAR Government inherits the rule of law from the British but it is now completely ruined. The process and the situation sound very unpleasant, more extremely so than my voice.

Deputy President, first of all I would like to express my sincere thanks to the Bills Committee and the Secretariat. After more than 50 meetings and over 130 hours of discussion, Members and the Secretariat have done their best in the line of their duty to examine the Bill, as a result of which we can make the Second Reading of the Bill in time. I would also like to thank Members of the Democratic Party and the Civic Party sitting on the Bills Committee. They have studied the Bill in great detail in their best endeavour, having proposed a record-breaking number of over 200 amendments. The purpose is to improve various provisions of the Bill, and most importantly, to prevent loopholes from appearing in the law which may lead to an infringement of the citizens' freedom of communication and privacy by the authorities.

Of course, I do also admire the Government's attitude towards the Bill's deliberation. Although the Government has only accepted part of the proposals of the Bills Committee, it has proposed a total of over 100 Committee stage amendments and this number is rarely seen in the history of this Council. Deputy President, admiration it may however be, it is the Government's own fault that it has brought itself into such a dilemma, and in such a great haste. The Government has since the handover adopted a procrastinating strategy towards the enactment of the law on the interception of communications, riding its luck, until a Judge questioned the legality of the way in which the law-enforcement agency has obtained evidence through intercepting communications. The Government wakes up only after it has lost the legal battle. This mentality is the root of very grave problems in the future. It would lead to the hasty enactment of the Interception of Communications and Surveillance Bill, a law that has a very far-reaching effect on the citizens' basic rights, without proper debate and sufficient public consultation. It would in the end lead to more legal disputes and greater risks of judicial reviews. More importantly, the citizens' freedom of communication and privacy would be violated for no justifiable reason because of the flaws in the law.

It is obvious that Government's way of discussion without decision in the past is a root of the many problems. Back in 1997, the then Chief Executive shelved the Private Bill proposed by Mr James TO, that is, the Interception of Communications Ordinance and refused to appoint a day for it to come into operation. It is a common knowledge that Article 30 of the Basic Law provides

that "no department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences." At that time, the Government, however, paid no regard to the relevant provisions of the Basic Law, and allowed the law-enforcement agencies to intercept communications and conduct covert surveillance without any sufficient legal backing.

It is obvious that the law-enforcement agencies acting on its internal guidelines or section 33 of the Telecommunications Ordinance which empowers the Chief Executive any public officers authorized by him to obtain or disclose any messages, on the ground of public interest, is inconsistent with Articles 30 and 39 of the Basic Law. The question is, on the basis of so vague a consideration on the so-called public interest and the lack of statutory monitoring and a balancing mechanism, there is no way for the general public to know whether this power is properly used, or whether the stringent requirement of the provision of Article 30 of the Basic Law that "the freedom and privacy of communication of Hong Kong residents shall be protected by law" is actualized.

The Legislative Council has over the many years requested the Government to review the Interceptions of Communications Ordinance and to proceed with the necessary enactment with a view to plugging the loopholes. Members of the Democratic Party in particular, never gave up in moving relevant amendments each year when the Appropriation Bill was debated. Both the incumbent Secretary for Security and his predecessor have undertaken that a review of the Interception of Communications Ordinance would be conducted soon. The fact remains, year after year, that there has been no progress in the review. The Government's procrastination strategy has eventually led to the emergency of today's crisis that law enforcing agencies' method of collecting evidence by way of wiretapping has become illegal.

I remember back in April 2005, a Judge of the District Court, while trying a bribery case, questioned the Independent Commission Against Corruption (ICAC)'s authority in tape-recording the conversations of the suspects in the absence of any authorization under any prevailing communication interception legislation, and ruled the ICAC's way of evidence collection by taking photographs secretly and wiretapping, as unlawful and in contravention of Article 30 of the Basic Law. A similar court judgement came up again in less than three months later.

The truth suddenly dawned on the Government. It however went about in the wrong way and attempted to regulate covert surveillance activities of the law-enforcement agencies with an Executive Order and sought to equate it with the legal procedures as prescribed in Article 30 of the Basic Law. With an intent to deceive, the Government attempted to substitute with an administrative procedure the legal procedures by enacting laws as required by the Basic Law. In a place of the rule of law such as Hong Kong, it is totally unacceptable to the general public. To put it in simple words, the only way to resolve the problem is through legislation, and to establish a comprehensive law to regulate communication interception and covert surveillance activities of law-enforcement agencies.

Later in February and July of 2006, The Court of First Instance and the Court of Final Appeal both held that the power under section 33 of the Telecommunications Ordinance was unrestrained, lacking statutory supervision or independent monitoring. There will be no legal protection to citizens' freedom of communication and the provision is therefore inconsistent with the Basic Law. It was also held that the Executive Order issued by the Chief Executive cannot be regarded as law, and that the making of this Order is not equal to the legal procedure as required by Article 30 of the Basic Law.

The Court of Final Appeal also set aside the temporary six-month validity order of the Court of Final Instance and substituted suspension of the declarations to avoid the legal vacuum that might arise. However, law-enforcement agencies are not shielded from legal liability for carrying out communication interception or covert surveillance carried out during this period of time. It has created a situation of extreme embarrassment and law-enforcement agencies are in a limbo.

Deputy President, I have taken the trouble of repeating the whole sequence of events only to point out that the Government is to blame for the predicament of haste we are facing today. It is a great haste to resume the Second Reading of the Interception of Communications and Covert Surveillance Bill today and there is the risk of causing more legal disputes in the future. The Government should take remedial measures in order to relieve the misgivings of the general public.

Deputy President, the Hong Kong Association for Democracy and People's Livelihood (ADPL) considers that to make it legal and reasonable, there are broad principles that the communication interception and covert surveillance legislation must comply. I shall go on to explain a few of the principles, and the contents of related provisions and proposed amendments.

I should first emphasize that drafting and legislating on the interception of communications and covert surveillance must be based on the premise of Article 30 of the Basic Law. The law should be made to protect the freedom and privacy of communication of Hong Kong citizens. It should not be merely for the convenience of the law-enforcement agencies. Cracking down on criminal elements is important. It is more important, however, to defend the freedom of communication and privacy of citizens.

I shall work towards the above direction according to the following three principles.

Firstly, an independent vetting and approval mechanism must be introduced to authorize law-enforcement agencies to intercept communications and conduct covert surveillance. Clause 6 of the Bill proposed the authority for authorizing "Type 1 surveillance" to be vested in panel Judges to be appointed by the Chief Executive from the Court of First Instance. The proposed arrangement for the panel Judges to be appointed by the Chief Executive and be subjected to character checking is not satisfactory. There are negative implications to the independence of the authorization mechanism which give rise to allegations of administrative intervention in the judicial procedures. The ADPL considers an independent and comprehensive judicial authorization system an important defensive line for the protection of the freedom and privacy of communication. The authorities should therefore consider direct authorization by the Court of First Instance to the law-enforcement agencies for them to carry out communication interception or covert surveillance activities to avoid duplication of efforts. More importantly, this will ensure independence and fairness of judicial authorization.

Secondly, the threshold for communication interception and covert surveillance should be raised as high as possible and all related activities should be included under an independent Judge's authorization. Under clause 3 of the Bill, authorization for interception of communications and covert surveillance should only be given for the purposes of preventing or detecting serious crime, or the protection of public security. However, are "serious crime" or "public security" too loosely defined? Will trivial crimes and political activities be taken as targets of communication interception and covert surveillance? Is there a need to raise the relevant threshold? Some Members have proposed amendments to the effect that, for the purpose of communication interception and covert surveillance, serious crimes should refer to any crimes entailing an imprisonment not less than seven years. As to the question of public security,

the definition must be specific and clear enough to remove any opportunity of the authorities to achieve other political objectives on the pretext of public security, oppressing the right of peaceful assembly and freedom of speech of the public. Therefore, I support the amendments proposing a clear definition for "public security" and that basic political rights of the public should be excluded from such a definition, in order to avoid civic rights being wantonly intruded upon by law-enforcement agencies.

The ADPL has doubts as to the need to categorize the intrusive levels of covert surveillance, the effect of which will be to exclude most surveillance activities now undertaken by law-enforcement agencies outside the jurisdiction of "Judge's authorization." The Bill provides a two-tier system for covert surveillance whereby the authority for authorizing "Type 1 surveillance" is vested in a panel Judge, whereas "Type 2 surveillance" is authorized by the head of the respective law-enforcement agency, that is, "executive authorization". It is against procedural justice, since there is no independent system of check-and-balance for such authorization and it is all left to the head of department to watch and monitor his own actions.

Thirdly, a statutory system should be established to review the implementation of the law. As mentioned earlier, it is because of the Government's delaying tactic and lack of action that has led to the situation today that we have to rush through the legislative process, bypassing the normal legislative procedure without proper consultation through a White Bill. The Bill will be passed without a proper debate and without a consensus from the public. The sole purpose is to avoid the immediate legal vacuum that will arise. The problem is that the legislation concerns the citizens and whether their basic rights are protected. For the lack of a proper public consultation, coupled with the many grey areas prevalent in the Bill, questions like the following are not examined: whether citizens' freedom and privacy of communication is adequately protected, whether checks and balances to law-enforcement agencies are adequate, whether there is the risk of causing judicial reviews, and whether there will be legal controversies. These problems would otherwise be resolved with a full public consultation and a proper scrutiny in the Legislative Council. It is a regret that we are faced with the reality of legislating in great haste. The only redress is that Government must introduce some remedial measures in the legislation, for example, the "sunset clause" proposed by the Civic Party and the Democratic Party, mainly to set up a deadline for certain major provisions, to require the Government to submit a review report in two years, and to provide that, if the Bill is not passed by the Legislative Council, the legislation will cease

to be effective. The objective of the amendment is, obviously, to formulate regulating provisions to ensure that the Government will undertake a full review of the legislation, and not to rely solely upon the Government's verbal promises which in the past more often than not did not materialize. It will ameliorate the flaws and inadequacies of the legislation and make up for the lack of public consultation before its enactment.

Deputy President, I so submit to object to this Bill.

MR RONNY TONG (in Cantonese): Deputy President, originally, my Honourable colleagues all asked me to defer giving my speech. However, just look at the scene today. It is more or less the same as what one would normally see in this Chamber: Only Members of the democratic camp choose to speak and one cannot hear any opposing voices.

When it comes to the woes that Hong Kong is facing, this is not the only one. I know that tomorrow, some media would report that Members in the pro-democracy camp tried to drag their feet in enacting this piece of legislation by engaging in a drawn-out battle and speaking as much as possible, in the hope that this Bill cannot be passed smoothly. Such is the political woe that Hong Kong finds itself in.

Today, the fact that we in the pan-democratic camp have proposed hundreds of amendments shows that this Bill is not just controversial but also fraught with innumerable omissions and oversights. However, when the Legislative Council is discussing such a controversial Bill with so many faults and omissions, it turns out that only a dozen people are present in the Chamber. What is more, we cannot even hear any voice from the pro-government Members. This is indeed highly regrettable.

Deputy President, I will now speak to the question. Many Honourable colleagues have talked about why we have to oppose this Bill. Ms Emily LAU even cited Article 17 of the International Covenant on Civil and Political Rights (ICCPR). In fact, we do not have to look at the ICCPR because basically, Article 30 of our Basic Law has already given us a very clear guideline. Whenever I pick up the Basic Law, I often ask myself what the value of the Basic Law is? Why do I always carry it and take it out to refer to it? This is because it is stated clearly in the Basic Law that "The freedom and privacy of

communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.". Deputy President, what is the most important is probably the two words "the needs".

We all understand that a government has to respect human rights. However, it is equally important to note that human rights cannot be disregarded in the detection of crimes. To respect human rights, it is necessary to strike a balance between respecting human rights and maintaining law and order. The position of us in the pan-democratic camp today is not that we disagree or even oppose giving the Government ways of detecting crimes. We are not saying that the Government cannot intercept communications or carry out covert surveillance. We accept that when necessary, human rights may be infringed.

Both the Basic Law and our public law tell us that we must strike an appropriate balance between upholding executive power and fundamental human rights. Nevertheless, where does such an appropriate balance lie? If we say that we have to infringe certain fundamental human rights because of the need to detect serious crimes, this is something that we understand. However, if it is said that fundamental human rights are violated for the sake of convenience in detecting crimes, I find this unacceptable.

Today, the focus of our debate is probably on the two aspects of "necessity" and "convenience". What we are demanding is to give Hong Kong people an appropriate protection, not prohibiting all actions that are necessary but will violate their rights. However, I cannot understand why, given that our point of departure is the same, the Government is so bent on opposing all the various amendments proposed by the pan-democratic camp? Since our goal is the same, why do we have to spend so much time debating in this Chamber? Where do the contradictions actually lie?

Because of the time constraint, I cannot possibly put forward all the justifications. However, broadly speaking, we have the following five reasons:

First, there must be a clear definition for an "appropriate balance". The clear definitions we are talking about refer to such fundamental terms such as public security, serious crime, and so on. In this Bill, we cannot find any clear

definition on what "public security" actually means and what is considered "serious crime". Secretary Ambrose LEE will say later that serious crime has been specified in the Bill and crimes punishable by more than three years of imprisonment can be considered serious crime. He has also said that he will not carry out bugging and listening for political reasons. However, the problem is that, as Mr LEE has said, it is very easy for people to find an excuse to carry out bugging or conduct covert surveillance. In our Public Order Ordinance, nearly all offences are punishable by imprisonment of more than three years, that is to say, in respect of nearly all crimes under the Public Order Ordinance, the police can carry out covert surveillance without applying for authorization from a Judge. This is the lowest threshold.

The second major guarantee is to demand an effective review arrangement. How is the review arrangement like in this Bill? The only arrangement is that the Commissioner will carry out a random check each year, but what will result from this check? What he can do is very limited. He cannot request law-enforcement agencies to assume responsibility over individual cases, nor can he inform the person whose rights have been violated of the losses he has suffered or the situation without any constraint, nor can he spell out the reasons that he believes law-enforcement officers have violated the law.

Thirdly, does this Bill have any deterrent effect on offenders? Throughout the Bill, we cannot see any provision that stipulates clearly what the legal consequences are if the Government contravenes the legislation. The Government is saying that should anyone break the rules or if there is any abuse of power, disciplinary action will be taken. However, all of us know that up till now, the Government's position is that disciplinary actions or the results will not be made public. Even the identity of the person involved will not be disclosed. That is to say, there is no way of knowing if anyone is punished because of mistakes or the abuse of power. In such circumstances, what deterrent effect is there on law-enforcement officers? They may think, "If I abuse my power or do something wrong, it does not matter because apart from my superiors and I myself, nobody in Hong Kong will ever know about it.". Will this have any sufficient deterrent effects? Besides, what we must ask is that, concerning this so-called the most important document under the "one country, two systems" arrangement — the Basic Law — what is set out in it is nothing out of the ordinary either. If it is contravened, only disciplinary action will be taken and after a rap on the knuckles, no one will ever know. Therefore, when I got up

just now, I was asking myself why I was still carrying this booklet with me and why I was still referring to it like the *Bible*. In fact, as an English saying goes, it is probably that "it's not worth the paper it's printed on" and in Chinese, this means that it is not even worth a penny.

Fourthly, the present provisions do not provide for any definite mechanism that tells us that innocent members of the public whose rights have been violated without good grounds will be duly informed, so that they will understand in what circumstances their rights have been violated, and that they have definite legal channels to protect themselves and seek redress for the losses they have suffered as a result of such violation of their rights.

Fifthly, I have told many Honourable colleagues that this Bill does not respect the right to privilege that the legal profession is entitled to. I am sorry but once again, I have to pick up the Basic Law, which is not worth a penny. Article 35 of the Basic Law says that Hong Kong residents shall have the right to confidential legal advice. Article 35 does not say that the Hong Kong residents are entitled to confidential legal advice only in a lawyer's office or his abode. However, this Bill is saying that unless it is in a lawyer's office or his abode, otherwise, you are not entitled to such fundamental protection. However, even in a lawyer's office or his abode, one is not always safe because the authorities only have to make a covert application under the application mechanism and no one will ever know that an application is made. There is no way of knowing whether such an application is appropriate or whether there is any mistake or oversight. Can such a mechanism be considered to have shown due respect for legal professional privilege?

Deputy President, I am very sorry but we are facing a rather difficult decision. How should we vote? On the one hand, we agree that there must be a law to regulate bugging and covert surveillance and we agree that law-enforcement officers should have a fair amount of power to detect crimes; on the other hand, when executive power tramples on fundamental human rights and disregards the fundamental rights of innocent members of the public, what is our choice? I was sleepless throughout the night. If we really vote down the Bill, what will be the consequences? A lot of friends have said to me that covert surveillance and wiretapping are not the only ways to detect crimes and there are many other ways, so the importance of this Bill should by no means be exaggerated.

Secondly, a lot of my friends have reminded me that the present situation is entirely the Government's own making and it only has itself to blame. However, I have asked myself if we should punish the Government because of this. Should we punish our law-enforcement officers because of this? I do not think so. As responsible Members, how should we vote and how can we be accountable to members of the public? I have thought over this again and again and I believe that the only thing we can do is to follow the example of the Court of Final Appeal and give the legislation a limited period of legal effect. This is because it is only by doing so that this amendment known as the "sunset clause" can be proposed. This is not a request designed to cause delays; it will only facilitate members of the Hong Kong public in focusing their discussions on this controversial Bill and give the Government and Members sufficient opportunities to improve this indispensable piece of legislation. This is the only option available. However, the Government may say: the public is not important, public opinion matters little and there is no need for consultation. The Government may also say: there is no need to allow time for all these since there are now enough votes for the Bill to be passed and we have the upper hand.

Honourable colleagues, when I stood up to speak just now, I talked about our political woes and here lies another kind of political woe, that is, we have a Government that disrespects the rule of law, its constitutional duties and human rights. When it can have its way by means of the sufficient votes in this legislature, this is a political woe for Hong Kong. Do not forget that this is not a popularly-elected Government and do not forget that in this legislature, most of the votes do not represent the views of the majority of Hong Kong people. If this is a popularly-elected Government and if most of the votes in this legislature represent public opinion, frankly speaking, we will accept the result with grace even if we lose. However, this is not the reality. Precisely because of this situation, when we encounter matters of principle, our political shortcomings …… *(the buzzer sounded)*

DEPUTY PRESIDENT (in Cantonese): Mr Ronny TONG, your speaking time is up.

MR RONNY TONG (in Cantonese): …… make us think that a system of universal suffrage must be put in place.

MR ALBERT HO (in Cantonese): Deputy President, today we are debating a very important Bill, yet this debate is now being conducted in such a deserted setting. I really find this highly regrettable.

One can say that this Bill has finally made its appearance only after repeated calls and exhortations for more than a decade and the attitude displayed by the Government in the face of such repeated calls and exhortations is really shocking, regrettable and heartrending to people all over the world concerned about this matter, that is, to people who have knowledge of this matter.

The drafting of this Bill involves the issue of the Government fulfils its constitutional duties under Article 30 of the Basic Law, how the Government implements the requirements of Article 17 of the International Covenant on Civil and Political Rights (ICCPR) on the protection of privacy and similar provisions in section 14 of the Hong Kong Bill of Rights Ordinance, which came into effect back in 1991. However, after the Law Reform Commission (LRC) made its recommendations in 1996, alarms calling on the Government to take measures immediately and without further delay to enact legislation were sounded repeatedly. They include the recommendations made by the United Nations Commission on Human Rights (UNCHR) on three occasions when reviewing the implementation of the ICCPR, as Ms Emily LAU has mentioned. The UNCHR reminded and urged the Government to legislate to protect privacy expeditiously. In 1997, the Democratic Party proposed the Interception of Communications Bill through Mr James TO, which was passed and became legislation, and the Government was urged to take the right course of action immediately. However, the Government turned a blind eye and a deaf ear to the views of the LRC and the United Nations and dilly-dallied on the Bill proposed by Mr James TO, which had been passed into law, by presenting such pretexts as conducting a review. However, in reality, it broke its promises time and again and did not submit the relevant matters to the Legislative Council for the necessary decisions or simply assign a commencement date to this Bill.

Deputy President, it was not until the District Court had given its rulings on two cases that the Government felt some heat. However, its responses turned out to be none other than promulgating an executive order, an action that was unanimously ruled by the Courts at all three levels in Hong Kong to be unconstitutional.

Deputy President, I want to stress that in talking about these matters and recounting the foregoing series of developments even though I may sound

tedious, I only want to point out that the mistakes made by the Government are not just technical in nature but that they are mistakes in the fundamental principles concerning how the Government fulfils its constitutional duties and how it protects human rights and upholds the rule of law. It is on these matters of principle that the Government has made mistakes. The second point is that it did not make these mistakes just once but did so continually. It made mistakes many times over the span of more than a decade. Even though it was reminded repeatedly and warnings were sounded repeatedly and even though the Court has made its decision, the Administration still adopted a passive and resisting attitude.

Deputy President, the Government should assume political responsibility for such a serious mistake. Both the former Secretary for Security and the incumbent, Mr Ambrose LEE, cannot deny their responsibilities. Simply apologizing to the public will not be enough to make amends for the mistakes made. This is because irreparable damage has been done to Hong Kong as a place with the rule of law and a society with the rule of law as its foundation. Our image has been seriously tarnished. Deputy President, I will see how the Secretary will respond later. Today, since Members have made such serious allegations together, how will the Secretary respond and show that he assumes the responsibilities?

Deputy President, some Honourable colleagues have raised some issues concerning trust in the Government. In fact, such issues should not be raised in a modern society that has the rule of law. They do not make the grade and reflect a tunnel vision. We in present-day society should know that any power should be subject to checks and balances as well as monitoring. We are aware that it is necessary to empower government law-enforcement agencies to maintain law and order and ensure our safety. However, any power so vested should have clear goals and a clearly defined scope. Such powers should be absolutely necessary and proportional and they should be subject to the adequate monitoring and checks and balances of a sound system. In fact, the debate on this piece of legislation should precisely proceed in this direction and follow these principles. Anyone who simply closes his eyes and appeals to us to trust the Government and the powers will become the laughing-stock of people who know better.

Concerning the issue of privacy, a lot of people may not attach much importance to it, thinking that it does not matter much to let others know about

their private lives. Recently, some people went so far as to say that if one has done nothing wrong, why should one be afraid of letting others know their private lives? This will not affect one's work or one's life. Some people really think this way. Does letting others know about one's private life really pose such a great threat? I hope that people who take such matters lightly will think twice. This kind of right and freedom is very fundamental. Concept-wise, some people call it passive freedom. Passive freedom is freedom from intervention and interference. This type of freedom is far more fundamental in nature and in the most fundamental sphere of your own life, including in your family and your workplace, such freedom allows you to enjoy peace and freedom from being subjected to constant surveillance and disturbance by other people. Can one say that this is not one of the most important freedoms? Without such freedoms, the faith and freedom of thought of a lot of people will be subjected to harassment and even suppression. In view of this, we believe that members of the public should by no means take this kind of freedom lightly. Should we find in future that bugging devices have been installed everywhere, every telephone line is probably tapped or a lot of people are being tracked without good reason, it would already be too late.

Deputy President, a lot of controversies surround this Bill. It would be time-consuming to elaborate on them seriously. In fact, it would be possible to write a thesis or two on each subject matter. However, I only wish to talk about several more important points. Firstly, the Government said that the aim of enacting legislation is to implement Article 30 of the Basic Law, however, the Government has confined the scope of the legislation to the use of devices. Deputy President, this point is already the greatest flaw. Does Article 30 of the Basic Law stipulate that surveillance can be carried out only with a device? What if the device is replaced by a human being who keeps me under surveillance in my office or at my home, listens to my private conversations with my family members or other people in my workplace and records all such conversations, or sneaks a look at my papers for other purposes and betrays my integrity as an employer or head of the family to someone employed? However, if all such acts are not covered by this Bill, what is more, if there is no legislation to regulate them and not any set of legal procedures to restrict and prescribe how such powers should be exercised under the Basic Law, do you think that in this way, the stipulations of Article 30 of the Basic Law are put into practice?

Can the Secretary tell me later whether he means that according to Article 30 of the Basic Law, if an undercover operation is adopted instead of some

surveillance equipment, such an operation will no longer be subject to the stipulations of Article 30 of the Basic Law because this is not considered to be surveillance on someone's privacy. Deputy President, obviously, this piece of legislation has not fully put into practice the stipulations of Article 30 of the Basic Law. In other words, undercover operations will continue to be illegal and unconstitutional because there are no legal procedures to prescribe and regulate them and they will be challenged.

Deputy President, the second point is that the Democratic Party has pointed out repeatedly throughout the process of scrutiny that at present, what was called judicial authorization in the legislation, which was subsequently changed to Judge's authorization, will in fact seriously mislead outsiders into thinking that there are independent Judges like those in the Judiciary who can exercise judicial monitoring and approve such authorizations. Moreover, the trust of the public in the Judiciary is manipulated to secure public support for the judicial authorization in this Bill. However, if we have gained some understanding of the design of the entire legislation and even other measures not included in the legislation, including the third-level, that is, the highest level of extended integrity checking, we cannot help but query if the selected Judges who are selected and placed in a special mechanism can still uphold the tradition of judicial independence and work independently, selflessly and autonomously, just as we expect them to be?

(THE PRESIDENT resumed the Chair)

Madam President, of course, I am not saying that the answer is absolutely in the negative. However, I have a lot of concerns and doubts and these concerns and doubts serve to remind us that if this group of Judges are placed in and separated by a mechanism which is an extension of the executive authorities and if they operate in a black-box environment, then I am very worried and I have good reason to be worried that this will not be the judicial authorization that the outside world believes in and trusts so easily.

Madam President, concerning integrity checks, there is a lack of definite criteria. The relevant party will look at the personal social connections of the Judges concerned. In future, if they are selected or screened, no explanation or account is required. How then can the Secretary allay our concerns and tell us that this is not tantamount to the executive authorities selecting the Judges?

Madam President, the only check and balance is the Commissioner. However, the powers of the Commissioner are subject to too many constraints. He does not have the power to carry out independent investigations, so it is just one person *vis-a-vis* the whole system. Even among the Judges, since there is not any open procedure, they will have no idea what other people are doing or what the colleague in the next room is doing. All powers rest in the executive authorities. What can this Commissioner conducting the so-called reviews achieve? This is also one of our major queries.

Madam President …… *(the buzzer sounded)* therefore, we wish to express the greatest doubt on this Bill.

MR MARTIN LEE (in Cantonese): President, it seems that a quorum is not present again.

PRESIDENT (in Cantonese): Will the Clerk please ring the bell to summon Members back to the Chamber?

(After the summoning bell had been rung, a number of Members returned to the Chamber)

PRESIDENT (in Cantonese): Mr Martin LEE, please speak.

MR MARTIN LEE (in Cantonese): Madam President, today, I wish to talk about the importance of judicial independence, especially in the context of the separation of powers. First of all, I would like to read out a passage from the book *What Next in the Law*, written by Lord DENNING in 1982. It says, "…… judges must be independent. They must be free from any influence by those who wield power. Otherwise they cannot be trusted to decide whether or not the power is being abused or misused."

Madam President, actually, the doctrine of separation of powers is clearly stated in the Basic Law. In 2003, the Court of Final Appeal (CFA) stated clearly in *Solicitor vs Law Society of Hong Kong and the Secretary for Justice* that the Solicitors' Practice Rules (Cap. 159) stipulates that the decision of the

Court of Appeal concerning the appeal from The Law Society of Hong Kong shall be final. That means no further appeal to the CFA could be made. However, the CFA considered that that was wrong. If it were said now that the appeal made by The Law Society of Hong Kong can only go before the the Court of Appeal, then other cases cannot go before the CFA either. For example, in the future, will appeals against political cases not be allowed to come before the CFA? Therefore, this ruling violates the Basic Law and the doctrine of the separation of powers, that is, the Legislative Council has no power to erode the power of the Court. Similarly, how can this Executive Order of the Chief Executive replace the legal procedures prescribed by Article 30 of the Basic Law? However, our Chief Executive still did such a thing.

Consequently, KOO Sze-yiu and LEUNG Kwok-hung applied for judicial review. The decision of the trial Judge was correct. He said that the executive could not seize legislative power. However, it is a shame that he granted a temporary validity order, which enabled an unconstitutional executive order to remain legally valid. Although the Court of Appeal was of the opinion that an executive order could not be allowed, it still upheld the temporary validity order. However, the CFA said that this could not be allowed. Madam President, in fact, the answer is very simple. If the executive authorities cannot make an unconstitutional executive order effective, then how can the Judiciary make an unconstitutional executive order legally valid? The reasons are the same.

At present, it is stated in this Bill that the panel Judges will consist of three to six Judges of the Court of First Instance. This means only they can hear this type of cases and only they can authorize executive officers to conduct wiretapping. The question is: Why are only three to six Judges allowed to do that? Why can other Judges not do so? The Democratic Party will propose amendments in this regard. Madam President, what worries us is that if we are now saying that this type of sensitive cases can only be tried by the three to six Judges appointed by the Chief Executive but not other Judges, then in the future, after we have passed the law on those offences relating to Article 23 of the Basic Law, does it mean that another panel of Judges will have to be tasked with conducting the trials and making rulings on the relevant offences, whereas other Judges cannot hear such cases? Why should we impose such a restriction?

The Commissioner as mentioned in clause 38 worries me even more. According to that provision, this Commissioner can be selected from serving or former Judges. That means the Commissioner can be a serving Justice of

Appeal of the Court of Appeal, a serving Judge of the Court of First Instance, a former permanent Judge of the CFA, a former Justice of Appeal of the Court of Appeal or a former Judge of the Court of First Instance. If the Chief Executive selects a former Judge, I am not that worried; but if the Chief Executive selects a serving Judge, the problem will be very serious.

Madam President, in fact, I have also been a temporary Judge before. I love the job. However, since I am now a Member of the Legislative Council, I cannot continue to serve as a Judge. Similarly, counsels of the Department of Justice cannot serve as temporary Judges either. Why? This is because of the doctrine of separation of powers. If a person is a Member of the Legislative Council, he cannot be a Judge; if someone is working in the executive authorities, he cannot be a Judge. However, why can a serving Judge perform executive duties? After the three-year tenure, if he becomes an ordinary Judge again and if it so happens that a member of the public takes legal action against the Government and applies for judicial review, and if this Judge has to hear the case, how can this member of the public trust this Judge?

Madam President, just now, Mr Albert HO has also said that the Government is very clever. They know that the public does not trust them. This is an iron-clad fact. However, the public trusts Judges. In that case, what can the Government do? The Government seeks the help of a Judge. In some circumstances, the Judge may be required to do something bad. In other words, if something bad has to be done, the Government will find a Judge to serve as a scapegoat for the Government. This Commissioner was originally a Judge but now he has to assume a lot of administrative duties. Since the public continues to have confidence in Judges and the Judiciary, the Government thinks that by doing so, the people will continue to trust the Government. Clearly, they do not trust the Government in exercising those powers, but now they do. Why is this so? This is due to the participation of Judges. However, given that the common law has a tradition of several hundred years, if a Judge is to be separated from the judicial system, can he still win the trust of the public after leaving the system? When you see a saint — a saint has a halo around the head — if this saint is working for the Devil, will there still be a halo around the head of this saint who is working for the Devil?

Madam President, why do our Judges wear wigs and robes and why do barristers do the same? This is to let members of the public understand that it is not just any Tom, Dick or Harry working as a Judge who sentences them to jail

but a Judge in this judicial system who sentences them to jail. Since he is wearing a wig, his name does not matter anymore and it makes no difference. So, when members of the public are found guilty or ordered to make compensations in civil cases, they will not think that the Judge involved is targeting them because they trust and have faith in the system. Now that the Government wants this Judge to do those things, it is actually causing damage to our judicial system. May I ask this: If this Judge on transfer serving as the Commissioner repeatedly makes some decisions that arouses resentment, apart from feeling resentment against the Commissioner and losing confidence in him, do you not think that the public will also lose confidence in all our Judges as a whole? Therefore, if the Government or the Chief Executive wants to appoint a serving Judge to do the job, I think this is a grave mistake. I only hope that the Government will find a former or retired Judge instead of one from the judicial system to serve as the Commissioner.

Just now, Mr LEE Cheuk-yan has said that if Members trust the Government, then they should support the Bill. I think this is actually not that simple. Even if you trust the Government, you still have to understand that if you support the Government on this occassion, judicial independence will be seriously undermined. This is a very serious problem. Why should we legislators do such a thing? Why can we not play our role as impartial legislators diligently under the system of the separation of powers? Why should we assist the Government in its wrongdoings? Why should we help the Government remove a Judge from the judicial system to perform the duties of the Government, then send the Judge back after completing the work? In fact, we do have some responsibilities in that.

Madam President, I take part in political affairs because actually I want to preserve the judicial system in Hong Kong. I hope that Judges can safeguard the freedoms of the public. In the 1980s, the British Foreign Secretary was HOWE; The Governor of Hong Kong was YOUDE and the Minister of State at the Foreign Office in charge of Hong Kong Affairs was LUCE, that is, Sir Richard LUCE. On one occasion, Governor YOUDE invited me to a dinner at the Governor House because Sir Richard EVANS was stopping by Hong Kong on his way to Beijing to assume the post of the British ambassador to China. I wrote a note to Sir Richard EVANS. I wrote that many people would tell him what they hoped he would do but I would only tell him one thing in this note and that was: "HOW(E) YOU(DE) LUCE(LOSE) Hong Kong, but keep our judiciary independent." Over the years, I always hope that I can continue to

work in this area, hoping that I can continue to make our judiciary independent and protect the freedoms of the public.

I still have a little time to tell a story. It is about the separation of powers. When I was drafting the Basic Law, on one occasion in Beijing, we were looking at the provisions together. It was in 1987, that is, at the early stage when the provisions were prepared, one of the provisions was about the separation of powers and this was written down very clearly. However, on the next day, DENG Xiaoping summoned us to see him. The venue was also inside the Great Hall of the People but it was on the other side and we could not just walk across it but had to go out and take a bus to get there. For no apparent reason, DENG Xiaoping suddenly said that the separation of powers would not do. He told us to take a look at the example of the United States, where the separation of powers was tantamount to the existence of three governments. All of us in the Drafting Committee did not understand this. However, DENG Xiaoping being DENG Xiaoping, and after he had said those words, on going back and when we continued with our meetings, we were told by the mainland members of the Drafting Committee that our sentence was not acceptable and the sentence referring to the separation of powers had to be struck out. However, the mainlanders are very clever. Although the four words did not exist any more, the provision was written clearly that it actually refers to the separation of powers. If Members are still in doubt, the case *Solicitor vs Law Society of Hong Kong and the Secretary for Justice*, which I cited earlier on, makes it clear that this is in fact about the separation of powers. The CFA considers that the Basic Law has already confirmed the separation of powers. Therefore, Madam President, I hope that when supporting the Government, Members can reflect on this. We will cause severe damage to the judicial system and judicial independence. I hope that when appointing the Commissioner, the Chief Executive must by no means appoint a serving Judge. In fact, there is also another reason, that is, there is a shortage of Judges in our system. When one of the Judges is transferred, there will be one Judge less.

The Democratic Party has proposed many amendments. To members of the Bills Committee — I myself am excluded because I was always absent — I am very grateful to those Members who have made contributions throughout. They have proposed such a lot of amendments. Unfortunately, I think the Government is totally unreasonable. What grounds does the Government have in not supporting the "sunset clause"? In fact, the Government itself also knows that even if the royalist camp supports the Government so that the Bill can be

passed today, the Government should still conduct a review immediately in two years' time because there are problems in many areas. How possibly can a piece of legislation that was drawn up hastily be a job well done? The Government chose not to adopt the legislation proposed by Mr James TO which had been passed. Now, since the Chief Executive's Executive Order was ruled by the Court to be unconstitutional, the Government is seeking to enact legislation quickly. A piece of legislation drawn up so speedily will surely be incomplete and even the Government knows that.

In fact, I cannot criticize the Secretary alone because he cannot be blamed for this problem, rather, the entire Government is to blame. If the Government can behave like this today, it can do the same in the future. In the future, all legislation will be dealt with hastily. Actually, I am very dissatisfied. Why should this meeting be convened when it is already August? We are now in recess and on holiday. Why do we have to come back? It is because of the Chief Executive. Had he not made the order, it would not have been necessary for us to go through all this hardship, however, the fact is that he has made the order. After losing for the first time, he was not humbled; after losing for a second time, he was not humbled either; it was only on losing for the third time that he hastily did something. He thinks that we Members are rubber stamps, asking us to hold meetings whenever he wants to. I am really very unhappy about this. Thank you.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

MR CHIM PUI-CHUNG (in Cantonese): President, concerning today's Bill, I have a great great deal of reservation. First, when the Government interprets the term "public security ", in whose hand does the power lie? This is in fact a very abstract matter and the power is all in the Government's hand. This is just like the term "public interest" in section 124 of the Government Lands Resumption Ordinance. As we know, There are three very clear stipulations in the Government Lands Resumption Ordinance. The first has to do with times of war; the second with the issue of hygiene and the third with the issue of redevelopment hindrance. If there is no problem in these three areas, then the fourth one will be public interest. Actually, the Government is exploiting this term so that it can get a judgement in its favour in every litigation. In the past, even if an appeal case was referred to the Privy Council, only the Government

would come out a winner. The Government is using the law to bully the public and seize land from the public. Now, the Government is making use of this term "public security" again, however, in whose hands does the power of interpretation rest? Therefore, the Government has a real responsibility and duty to interpret it again. I learnt from the newspaper that the Secretary would make it clear that he would not seek the passage of the Bill for political aims. Just now, I went through Article 30 again. Apart from these two grounds, all other grounds are unconstitutional and unlawful. What is the need for the Secretary to explain? Everyone knows about that already.

President, I seldom agree with the views of Mr Martin LEE because he is a traitor. He is called a traitor by people outside but he does not admit this. However, I share his comments he made today on the separation of powers. Why? This Bill tabled today has in fact eroded the foundation of the separation of powers. Why? Although it is claimed that power is divided between the executive, the legislature and the judiciary, we can see that the relevant decision made by the Court of Final Appeal (CFA) has in fact denied the judicial system of all credibility. Why? The CFA said that what had been done was unconstitutional and unlawful; since this is unconstitutional and unlawful, then the law should be repealed. How can one say that even though it is unconstitutional and unlawful, the power can still be conferred until 8 August? How can the public find this ground convincing? Many members of the public do not find doing so convincing, however, the layman only has a very vague idea and even barristers are like this.

Basically, the actions taken by the Government this time are that:

Firstly, the judicial system has been insulted. The Government has given the judicial system the boot, so what credibility does the judicial system still have? If members of the public want to seek redress through the judicial system, basically the judicial system can only cry and moan because the pressure from the Government has made it powerless and from now on, it has no more authority. What explanation can the Government give to this? Why is it that in order to survive under humiliating conditions, it allows an unconstitutional law to exist in Hong Kong? If the Court can make such a decision, how possibly can Judges have any authority? This is just suppressing the general public who is not wise. Of course, some members of the public are wise, but what then?

Secondly, we in the Legislative Council have been insulted. Why? It is obvious that we are in recess, so why must we come back for a meeting? This

is because of the deadline of 8 August. Therefore, we were forced to do so. This matter also exposes the fact that there is no separation of powers in Hong Kong but that Hong Kong is downright executive-led and even the President has to submit. In fact, the President has the right to say "no" and that the Legislative Council would not convene any meeting when in recess. However, even the President is forced to preside over the meeting. On this matter, you have to tell society the truth.

We have to tell the truth as well. As a Member returned by my sector, I have no duty to succumb to naked power. Of course, among Members of the Legislative Council, 18 Members must support the Government. Who are they? They are the Members who are also National People's Congress deputies, delegates to the Chinese People's Political Consultative Conference and members of the Executive Council. Of course, these three types of Members have no right to oppose any government decision. As regards other Members, they got to have conscience. Of course, they can make the decisions by themselves because their decisions are also founded on conscience but still, they will be flawed.

President, our Chief Executive says that he wants to achieve strong governance. In fact, he has to conduct a major review. Why? Does doing so mean strong governance? He is showing the outside world that Hong Kong is in fact in a mess. This matter could have been dealt with earlier. I have sympathy for the Secretary and the Permanent Secretary because they have been forced to do this. I also have sympathy for the judiciary and Members of the Legislative Council, however, the problem is, Mr TSANG must not think that he is at the very top. He should conduct a comprehensive review of this matter seriously and see who is at fault. He cannot say that no mistake has been made and that this is the fault of society. How can he say that this is the fault of the system? Concerning all the amendments, I do not have any particular view but as a Member of the Legislative Council, it is incumbent upon me to point out the mistakes of the Government because our duty is to look out for the mistakes of the Government. We can by no means allow the mistakes to get through. Of course, I do not know the results of the voting either because I also have some reservations. *(Laughter)* However, no matter what, I still have to say all the truth. *(Laughter)*

President, recently, an incident has occurred and it has aroused the concern of the legal sector. It involves wiretapping. We are in the position to

speak up because we have immunity, Members need not be afraid. Concerning this matter, the Independent Commission Against Corruption (ICAC) was one party to this affair and the Department of Justice was another. The ICAC reminded the Department of Justice that someone had divulged some information on protected witnesses, an action which was not appropriate. The Department of Justice simply did not let the ICAC continue to deal with this matter. Why? That was because the ICAC was one of the parties involved. Of course, certain members of the legal profession would remind their clients what they should do, as a result, they were sentenced to four years of imprisonment. Allow me to elucidate what I grasped. One of the defendants requested the former Chief Executive, Mr TUNG Chee-hwa, to write to the ICAC and ask it to retain the evidence gathered through wiretapping in the hope of producing it as evidence in Court. However, the ICAC immediately deleted all relevant evidence. If even members of the legal profession are confronted with such a situation, what should we members of the general public do? In these few days, a lot of things may still witness some changes.

President, I hope that if the relevant legislation involves criminal matters, then it has to be made clearer and the power cannot be vested in the Government. I have talked about the so-called "public security" and other matters just now. Since criminal matters are involved, if it is not drafted clearly, it will be absolutely, absolutely unfair to members of the public and the people involved. In particular, we understand that the common law in Hong Kong has no retrospective effect. However, what transpired and what took place will be set down in it, that is, the Government has the virtual power to act in retrospection and this can be very dangerous. Insofar as the Secretary is concerned, is the whole matter his responsibility? I believe the Chief Executive will also understand. However, often, on important issues, the Chief Executive in fact pays scant regard to Members. Even though we have begun to debate this Bill today, he still went on a long trip. Even as this is such an important matter, he still shows his contempt.

Therefore, I wish to remind everyone once again that as Members, be they Members returned by direct elections or through functional constituencies, as long as they assume their responsibilities courageously, monitor the Government and fulfil our duties, it is not necessary to submit to any power. Only in this way can a good example be set for the future Hong Kong society. I personally will do my utmost to fulfil my duties and pay no heed to the consequences. Thank you, President.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

MR LEUNG YIU-CHUNG (in Cantonese): President, the Interception of Communications and Surveillance Bill we are debating today is just like the firearm carried by a law-enforcement officer, who must use it only in certain desperate conditions, however, it is still lethal and dangerous. What is different is that firearms can kill. Although this Bill will not take lives, it can infringe on our human rights and freedom. Obviously, if these two things are abused, I think both of them can be dangerous, moreover, they will lead to irreversible outcomes. Therefore, when we debate on this Bill today, the issue should be how to achieve a balance between law enforcement and freedom. Where should the line be drawn in this balance? President, of course, it is necessary for us to observe subsequent discussions and in what way the Bill will be passed. No matter what, I think that at the same time as we enforce the law, we must also treasure and attach importance to how we safeguard human rights and freedom.

Since this Bill involves some important principles and the issue of a check and balance mechanism, a lot of time is actually required for discussions and consulting the public. It will only be appropriate to do so. I am even of the view that it will be better to publish a White Bill to seek a consensus in society. Unfortunately, events did not turn out as one has hoped. Today, the Legislative Council has to deal with this Bill very urgently, moreover, it has to deal with it in an unprecedented way and I find this highly regrettable. Why do I find this regrettable? Society and the public has been discussing this issue, unfortunately, the Government has all along paid no heed, in particular, the former Legislative Council passed a piece of legislation before the reunification, however, it is a shame that no signature was ever appended to confirm its commencement date, so it was like frozen in a freezer. The Government was told that there were problems, only that the Government did not face up to them, nor did it deal with them seriously. Now that the Court has promulgated a six-month period, so the Government has drawn up a piece of legislation hastily. This reveals that the Government is being irresponsible and does not respect the inherent rights of the public. However, President, we know that the Government will never learn any lesson and it will always make the same mistakes again. It is always like this and will never engage in any self-reflection.

Recently, an editorial of a newspaper says, "Pay no heed to the mistakes and oversights, speed is all that matters". This is a realistic statement of the present state of affairs in relation to this Bill. President, in fact I agree with such a description. Why do I say so? We can see that a number of Honourable colleagues and the Government itself have proposed amendments to this Bill concerning a lot of the definitions and its contents, however, what is happening now is that we have to enact legislation hastily. How can it be ensured that the entire piece of legislation will have no mistakes and oversights? This is where the problem lies. Now, it seems that no attention is given to whether there is any mistake or oversight and the sole concern is to have the Bill passed. Therefore, the headline of the editorial is a very vivid description and has pinpointed the problem, which is: "Pay no heed to the mistakes and oversights, speed is all that matters".

President, when it comes to the definitions of terms such as covert surveillance and public security, I believe that the more clearly they are defined, the better, particularly on matters such as listening to a conversation by an undercover agent and how to covertly handle some problems. I believe that the subject matter regulated by the Bill should be discussed in detail. Unfortunately, in view of the fact that we are dealing with the Bill hastily, this is indeed a cause for concern. Certain aspects in it arouse even greater concern in us and they are the issues pertaining to public security. The Bill provides that advocacy, protest or dissent likely to be carried on by violent means will be regarded as a threat to public security. In other words, take the examples of the anti-WTO actions organized by civilian groups, or industrial actions such as strikes initiated by us or the large-scale rally on 1 July, according to this definition, they can be monitored justifiably. I think it is problematic to do so, particularly with regard to us in trade unions. If we are subject to surveillance when organizing a strike, I believe the protection of our rights will indeed be jeopardized greatly.

Meanwhile, according to the Bill tabled today, if it belongs to Type 2 surveillance, that is, it does not involve entry onto any premises or interference with the interior of any conveyance or object, then law-enforcement officers at the rank of chief superintendent can issue the authorization to conduct surveillance. Put it simply, a chief superintendent can authorize bugging conversations over mobile phones on the streets without the authorization of a panel Judge. Such an arrangement on authorization is extremely lax. Why is not all covert surveillance authorized by a panel Judge, so that the Judiciary can act as the goal-keeper? Why are the law-enforcement officers given the chance to grant themselves authorizations?

Concerning these queries, the Government has so far failed to give us a satisfactory explanation. If the Secretary finds applying for a warrant from the Court is very troublesome and time-consuming, if he really has to do that, why does he not lower the level instead and discuss with the Judiciary to find out how to improve efficiency? Why does the Government seek to make us in the Legislative Council pass contents which I think have not been sorted out clearly?

Worse still, if we pass this Bill today, the legal professional privilege and the journalistic privilege will be seriously undermined, since law-enforcement officers will be given the opportunity to listen to conversations between a lawyer and his client at any place, including a lawyer's office; or they can listen to the conversation between a reporter and the interviewee in the office of the media organization, thus seriously hampering the gathering of journalistic materials by journalists. If we pass this Bill today, the foundations of the rule of law and freedom of the press will be sacrificed.

I have said just now that many amendments have been proposed to this Bill today, however, the problem is that be it the Government or Members, they have all proposed those amendments hastily. As I have said, mistakes and oversights will be inevitable. I have often asked what good will this do? In view of this, I express again my deep regret over such an approach. President, in order to uphold human rights, law enforcement and law and order, I hope very much that the "sunset clause" will be passed today, so that we can discuss this issue again, otherwise, if this piece of legislation continues to exist, it will affect our basic human rights continually and I believe it will create a lot of obstacles in social development.

I so submit. Thank you, President.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

MR LAU KONG-WAH (in Cantonese): President, Mr Ronny TONG asked right at the beginning of his speech why there were so few people in the Chamber. He found that it was deserted and felt a bit lonely. He also asked why he could not hear any voices of opposition. I thought at that time that he himself was voicing opposition, that is, to this Bill, but I think what he meant was that he

could not hear too many views opposing his, however, I will not let him feel lonely.

Mr Ronny TONG said that he could not hear many voices that support the Government and hardly anyone had spoken. I have to tell Mr Ronny TONG that in fact, this is not a matter of supporting the Government or not, the crux of the matter is public interest and it is a matter of public security. The privacy of the public, or personal privacy, is what matters most, rather than whether one is siding with the Government or not.

In the process of scrutiny, Mr Ronny TONG and I can be considered to be of the more diligent type. On many proposals, we agreed with one another on some of them but we also disagreed with each other on some other. This is something that we all understand. On matters which we agree with one another, I think basically, there are three points on which all members of the Bills Committee hold more or less the same views. First, all members believe that the interception of communications and covert surveillance are the necessary means when it comes to matters of law and order; second, on monitoring law-enforcement officers and private organizations (such as paparazzi), all members believe that it is necessary to deal with them separately, and although it was impossible to do so due to the time constraint, sooner or later, this matter has to be dealt with and the public will still be concerned about this aspect; and third, members all hope that appropriate monitoring can be carried out on law-enforcement officers who do their job in accordance with the legislation. As a result, the post of Commissioner on Interception of Communications and Surveillance (the Commissioner) was established.

However, there are also matters over which we disagree. We will talk about them individually when discussing the other clauses. One of the points raised by Mr LEE Wing-tat and Ms Emily LAU, although it is not covered by the provisions, was that in future, this type of panel Judges had to undergo integrity checks. Both the relevant Panel and the Bills Committee have discussed this point.

At present, if law-enforcement officers have the power to grant authorizations, for example, when officers of the ranks above Chief Superintendent of police are given such a power, they also have to undergo integrity checks. Why is it necessary for them to undergo integrity checks? The reason is to ascertain the degree of security. If authorizing officers in the executive authorities have to undergo integrity checks but Judges do not have to,

I think this is a double standard. Mr Ronny TONG said that Judges should be independent, selfless and autonomous. However, if Judges do not have to undergo checks but executive officers have to do so, are we being too distrustful and suspicious of law-enforcement officers?

Mr Martin LEE said right at the beginning that it is necessary to have judicial independence, so I was all ears listening to him talking about judicial independence — he is not in his seat now and I hope he will come back — he said that four to six panel Judges would not be sufficient and that all the Judges in the Court of First Instance should be allowed to undertake the vetting and processing of the applications. President, I have already pointed out in the course of the scrutiny by the Bills Committee that if we follow the suggestion of the Democratic Party, so that all the Judges in the Court of First Instance have to undertake this kind of vetting, and since another amendment proposed by Ms Margaret NG is that Judges who are to vet applications are not allowed to conduct trials, if these two are implemented together, then all the Judges in the Court of First Instance will not be able to conduct trials. Therefore, these are fundamentally contradictory amendments.

President, during the scrutiny of the entire Bill, even though the meetings were held in close succession of one another, in fact, we and the Government were fulfilling our responsibilities conscientiously. Not only did Members examine each word, but the authorities also responded to our suggestions promptly. For example, should the executive authorities make any mistake in the course of intercepting communications and conducting covert surveillance, we from the DAB requested that the Government should notify the persons concerned. The Government also accepted this view. Similarly, the Administration also accepted Members' suggestions, for example, to define "public security" as "the public security of Hong Kong" and made an undertaking to Members that public security will not be used as an excuse to achieve political ends, nor will it be used to suppress the freedom of expression or the right to peaceful assembly.

Concerning the amendments moved by some Members today, we do not find them acceptable. The main reason is that those amendments have gone beyond the balance. The decision made by the Judge concerned has posed a problem to society as a whole. To solve the problem pragmatically and actively, the only course of action is to enact legislation so that law-enforcement departments can have a law to follow. To dwell on the past will not do any good to the future. The decision made by the Judge this time paved the way for

the executive and the legislature to work hand in hand to enact legislation within a certain period of time, so that a legal vacuum can be avoided and rogues cannot have their way. This is a responsible course of action to take.

In the past, some people thought that Judges are far removed from worldly affairs, however, the decision made by the Judge on this occasion shows that not only did he take into account matters of justice but he also had a good grasp of public sentiment. In contrast, some of the amendments proposed by some Honourable colleagues in this Council will make it difficult for law-enforcement agencies to enforce the law and the public will not have any protection in law and order. Moreover, they will even cast opposing votes because they demand that some matters be bundled together. This is precisely what being far removed from reality is about. For example, Ms Margaret NG proposed that all intelligence derived from the outcomes of interception has to be destroyed. May I ask how a department can enforce the law effectively if it does not have any intelligence? Another example is that concerning the definition of serious crime, Mr James TO went so far as to include cases such as the counterfeiting of currency and possession of prohibited weapons in the domain in which law-enforcement officers cannot conduct any surveillance. One can say that this is being out of touch with public sentiment, unreasonable and far removed from reality.

President, I often heard people say that the Bill on this occasion had been drawn up too hastily and too little room had been allowed for discussion in society. I agree that over 50 meetings were convened intensively and there were over 100 hours of discussion. However, having a short timeframe cannot be equated with not being serious. As I have said, be it Members or the Government, they were all very conscientious in their examination and the Government also took on board the views of many Members and made amendments accordingly. If it is said that there was no public consultation, this in fact does not tally with the reality. The Law Reform Commission published a report as early as 10 years ago and released a White Bill in 1997, so the time for discussion has been as long as 10 years. Besides, after this Bill had entered the stage of scrutiny by the Bills Committee, the Government had meetings with 10 groups and individuals, including the Bar Association and The Law Society of Hong Kong, and the Privacy Commissioner for Personal Data also submitted a number of representations, so I do not agree that no consultation whatsoever was carried out on the entire Bill.

An outcry has appeared saying that this piece of legislation will encroach on human rights. However, I cannot help but ask if there is no limit to human rights. Can they be founded on jeopardizing public security? When we talk about human rights, we should not have a biased view of human rights. To detect, prevent and combat crimes is also a way of protecting the human rights of every individual. We insist that privacy must be protected, therefore, we demanded that a number of new provisions serving as safeguards be added to the Bill, however, at the same time, public security and law and order can by no means be neglected and the privacy and the right to security of all people must also be safeguarded.

In response to the decision made by the Judge, this Bill has to be scrutinized within a limited period of time. This is understandable. After over a hundred hours of meetings, it can be said that the views expressed are in fact quite comprehensive. Members who have taken part in the scrutiny all know that some views have been repeated again and again and what remains are items that we cannot agree on unanimously and this is also something very normal.

It is important to conduct a review comprehensively and seriously after the Bill has been passed and in operation for a period of time. Therefore, I agree very much with the point voiced by Ms Margaret NG on conducting a review seriously. Concerning the review, the Government initially told us that its plan was to conduct a comprehensive review after about four years, whereas Ms Margaret NG's amendment proposes that this piece of legislation will be abolished after two years. I believe that after a piece of legislation has come into effect, a more appropriate course of action is to give the general public, law-enforcement agencies and even the Commissioner the opportunity to conduct a review after the legislation has been in operation for a period of time. Four years' time is perhaps too long but two years may be too short. My proposal to conduct a comprehensive and effective review after three years is perhaps more appropriate. I hope the Secretary for Security can make such a statement later.

If we do not agree with enacting legislation in haste, we should not conduct reviews hastily either. This piece of legislation, which has been scrutinized in detail and conscientiously, has just risen like the sun, so why should we make the sun set so quickly? Quite the contrary, I believe that this piece of legislation should be a sun that never sets, so as to protect the belongings, lives and properties of members of the public. If we oppose this Bill because

other matters are bundled to it, so that in the end this Bill is negatived, such kind of behaviour is both irrational and irresponsible.

Thank you, President.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

MR ALBERT CHAN (in Cantonese): President, originally, I do not intend to speak, since many barristers and a lot of Members have already made a lot of analyses and expressed a lot of opinions that are penetrating and insightful on many aspects of the contents of the Bill.

However, after listening to Mr LAU Kong-wah's speech, I find that I will not be content unless I have aired my views, particularly on two points. The first point is that he believes that the pan-democratic camp, in bundling things together, is being disrespectful; the second point is that, President, he said we are too far removed from reality.

As far as public opinion and matters of public concern are concerned, I believe no other organization has shown more concern for society than the Hong Kong Journalists Association (HKJA) because the HKJA is not a political group, nor does it have any special economic interest, so it has a certain role to play and enjoys some status when dealing with public opinions and disseminating news and messages.

Several days ago, the chairperson of the HKJA stated publicly that the impact and destructiveness of this Bill was no less severe than Article 23. The chairperson of the HKJA commented a number of times that this Bill would deal a blow to human rights, the freedom of assembly and the freedom of the press, therefore, she was resolutely against it and she had also lobbied Members to oppose it. The position of the HKJA is basically the same as that of the pan-democratic camp.

If Members of the pan-democratic camp opposing this Bill are described as far removed from reality, Mr LAU Kong-wah's allegation is tantamount to accusing the HKJA of also being far removed from reality. Such an allegation is irresponsible and has disregarded the views of such a representative group.

Mr LAU Kong-wah has also been interviewed by quite a number of reporters, has he not? The mass media make certain contributions to Hong Kong society and play a certain role in it. These groups, including the HKJA, all pointed out that the Bill would deal blows to the core values of Hong Kong, including, of course, the freedoms of the press and assembly. However, Mr LAU Kong-wah seems to have turned a deaf ear to the views of these groups. I wonder if it is Members of the pan-democratic camp or if it is Mr LAU Kong-wah and the royalist camp who are collectively far removed from reality.

In addition, Mr LAU Kong-wah said that some of the amendments moved by Members of the pan-democratic camp had not been well-conceived and had been made in great haste. I hope he will recall the time when attempt was made to enact legislation to implement Article 23. I believe Mr LAU Kong-wah also supported legislating on Article 23 at that time. After stepping down, Mrs IP has recently finished her studies and returned to Hong Kong. She also admitted openly that the public resentment created by the legislation on Article 23 had been underestimated. Similarly, the same thing applies to this legislation on wiretapping: the work has to proceed hastily. The failure of TUNG Chee-hwa in performing his duties in the past eight years is of course the reason that this legislation has never been dealt with for so many years, so this is the mess left behind by the old and muddled TUNG. However, now, everybody has to bear the undesirable consequences. Indeed, even though the person concerned is gone, it seems that the disasters he has left behind seem to go on forever. Whenever TUNG Chee-hwa is mentioned, the same problems will also be mentioned. President, eight years have passed and it seems that this matter has been discussed in this Chamber for eight years, has it not? I came back in 2000 and this matter has been raised continually over the past six years. It seems all the problems have got something to do with him.

Concerning the Bill itself, even some Members of the pan-democratic camp have proposed that it should be dealt with by way of a "sunset clause". This is in fact a necessary approach that is very practical and conforms to reality, however, the Government has adopted the attitude of ignoring it completely. This is obviously because the Government has already got enough votes since the 34 votes of the royalist camp are securely in its hands. Some Members who have been out of town or planned to leave Hong Kong are forced to stay behind today and they have to stay for several days to cast their votes. Therefore, when it comes to being removed from reality, I hope Members, in particular, Members of the royalist camp will consider the views of some groups and also the views of those civilian groups without any political interests.

President, concerning wiretapping, when I was having a chat with some Members, what feel most deeply was that if a person is a devout Christian, in particular, a Catholic, he should not support wiretapping because since he faithfully believes in God and prays often, and since God is omnipotent, omniscient and omnipresent, if he prays sincerely, God will give him directions and messages and he does not have to resort to wiretapping to receive them. Therefore, Mr Donald TSANG should not support this piece of legislation on wiretapping. Although he prays every day, maybe his prayers are not sincere enough and that is why God has not given him any direction. Is it the case that he has to resort to wiretapping when the messages that God gives him are not clear? I believe such behaviour is an insult to his religion. Therefore, even if the Bill is passed, I still hope that he can refrain from putting his signature on this Bill. He should then pray very sincerely to God every day to ask Him for the right direction. If he really believes in God, God will definitely give him directions and he will not have to resort to wiretapping.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

MR JAMES TO (in Cantonese): President, It causes me to have a great deal of feelings talking about this Bill. Suddenly, we have to spend a lot of time to study this Bill day and night, just at the same time back in 1997 when we dealt with a related piece of legislation. It has been eight or nine years since 1997 that we have to deliberate on it again, one more time.

Mr LEE Wing-tat and Mr Albert HO have talked about the history of the subject. I will not repeat it. However, history records that the Government did the thing with intent and it was not a technical mistake. The intent should be reprimanded. The major responsibility should rest with the two former Secretaries for Security, for they had known the problem all the years and they had plenty of time to deal with it. As for the incumbent Secretary, he knew of the problem when he first took up the post and I have reminded him that failing to deal with the issue, he would have to step down, even though he does not have the pressure relevant to the legislation of Article 23. Has he done anything? Indeed he has, but not quickly enough. If I should say that the former Secretaries have done a lot of research on the subject, what he has to do is only to decide on policy directives on the basis of these findings.

As for the Chief Executive, it is indicative from his character and his proclamation, such as "strong governance" that he would decide that an Executive Order was good enough, rather than resorting to legislating at once. His decision has caused us a loss of nine months' precious time. We would otherwise have time for open consultation and to solicit collective wisdom. Let us not talk about working more studiously — but if we had some more time, we should at least be able to achieve a better balance.

Mr LAU Kong-wah just asked whether we indeed wish to be detached from the reality. This being one of the examples he quoted, if I may I shall debate with him on it more thoroughly later on. He argued that if we decided upon a threshold of serious crimes and an imprisonment of three years and above, we would not be able to track a person for cases related to counterfeit notes and prohibited arms. I have indeed answered this point he has raised before. Why can we not intercept communications in relation to cases like counterfeit notes and prohibited arms? An offence of communication interception is liable to an imprisonment of seven years and above. The answer is two-fold. Firstly, the crime in question is of a more serious nature, the imprisonment of which is more than seven years. Secondly, we and the Government both consider that there is a need for a balance. The point of balance is of great importance. There is something we may do but will not do. It is the crux of the problem.

I have been a member of the Fight Crime Committee for more then 10 years, and a member of the Action Committee Against Narcotics for six years. I have also served on the Legislative Council (but not the Provisional Legislative Council) for more than 10 years, and have been the chairman and vice-chairman of the Panel on Security. I have been in close, all-round and all-dimensional contact with the relevant information, some of which may even not be accessible through open channels to Members of this Council. I have also talked to prosecutors and intelligence people (I am referring to the police and ICAC) to get to know what threats and crimes we are facing with, and what are those people we are fighting against. I believe, and I dare say, that I know clearly, crystal clear, that we must have the power to deal with certain matters. However, I know well enough the way these law-enforcement personnel handle things, their bureaucratic structure, their mentality, and some of their co-called blind spots. They may sometimes overstep their bounds (of course, not everyone is doing this. And it is not that the overall culture is encouraging them to do this). It is the role of a Member to examine a Bill with a full perspective and in full dimensions, to analyse the technicalities involved, to understand technological advancement,

and to observe the way the front-line law-enforcement personnel would carry out their duties.

This couple of days, when we discussed the Code of Practice, I mentioned repeatedly to Mr YING, the Permanent Secretary, that he should understand that the same word or words with the same spelling, can have different meanings. If something is not written clear enough, there will be problems of application for people down below (and I am not talking about the thousand or so Superintendents, nor the one or two thousand Inspectors. Not these people, of course. I am referring to those people in the basic ranks, all of our so-called elite personnel, the organized crimes personnel in the Headquarters, those in the Anti-Narcotics Bureau and those in the Security Bureau). All front-line personnel must understand the spirit of the law, and its points of balance. When they provide the necessary information to applicants for applications to the Judge or to the Chief Superintendent, they must provide full and impartial information to the applicants to facilitate their applications. Only so would the authorizing authority be able to come to a decision strictly in accordance with the law and according to the appropriate points of balance.

In other words, I would not be unaware of the group of triad elements that we are dealing with, or which gang they belong to. Frankly speaking, even when I was in heated argument with the former Director of Bureau Mrs Regina IP about the legislation of Article 23, we were on the same front in the Fight Crime Committee, racking our brains for ways to deal with the problem. We would sometimes together put the law-enforcement agencies in aim, pushing them to do their job better.

I always remember, as a Legislative Council Member, particularly one who "leads the show" in security matters, I am a rather important man. I know we should fight crimes. The question is: what do we get from the prevailing law? This is the question I must put to myself.

Some reporters asked me these few days that if the "sunset clause" of the Bill is not passed, nor are the other important amendments, what will it become? That will be the worst scenario. Why should I describe this as the worst scenario? I am not saying that this will certainly happen, but I should tell the potential worst scenario to alert you all. In these few days, when more is reported about the situation, hopefully citizens may recall that a Member has pointed out what the worst possible scenario is. Similarly when the enactment of legislation to implement Article 23 was previously considered, we made the same analysis.

What is the worst possible scenario? By then we would not be judged by an independent court of law. By then the Chief Executive would summon three to six Judges and hold a meeting behind closed doors, saying that it was for security reasons (or any other reasons he might add). By then, in the way as I have said, would other people, for example the Privacy Commissioner for Personal Data, be allowed to be present in the meeting held in camera to provide an alternative analysis for the benefit of the Judges? However, the Government has objected to even this proposal. Even the Commissioner who is appointed by the Chief Executive, was "brushed aside". The Legislative Council has no right to talk about the job of the Commissioner who is appointed by the Chief Executive; and the Legislative Council cannot ask the Commissioner to do a monitoring work. Nonetheless, the law has not empowered the Commissioner to carry out a full investigation and monitoring, not to mention imposing penalty.

The purpose of this Bill is to put in place for the first time since 1997, a law to place the Chief Executive, the Secretaries of Departments and Directors of Bureaux above the law. Some may say that the Chief Executive will not be able to carry out any wiretapping, as he is a figurehead without executive support. The law provides that public officers are not permitted to carry out wiretapping, personally or through other people. In other words, not even through outsourcing. However the Chief Executive is not a public officer. Accordingly therefore, the Chief Executive may tap either through outsourcing or through other non-public personnel, including prosecution organizations in mainland China or their organizations in Hong Kong. The Chief Executive can do that, technically, because he is above the law. When we talked about the problems related to the bribery prevention legislation earlier on, we might say that it was a law passed on from the days of the British Hong Kong Government and that adaptation was not yet complete. Of course it has already been eight or nine years down the road, and it is now again the time for the election of the Chief Executive. We are still saying that adaptation has not completed. We may still excuse ourselves that it is a law inherited from the old times. Having said this, however, why should we create a new law that will place the Chief Executive above the law? Some have observed that, however detailed and all-embracing the law is, there are no penalty provisions. What a law it is, to have no provision on criminal or civil penalties, to penalize violations?

There embraces some concepts found in Article 23 in the term of public security that we are talking about The current Secretary for Security is privileged in that he does not have to deal with matters relating to Article 23 in

the first place. That will be the matter for the next term, by then he will have retired (this is what he has publicly stated). However, matters relating to Article 23 are included here. That the Chief Executive will have a few words to say a few moments later about this subject does not help relieve the worry. The former Secretary for Security had said many times in this Chamber that there would be a review of the legislation in eight years' time, which is well documented, but did anything materialize? To me, if it is not written into the law that there will be a review (in two, four or three years as Mr LAU Kong-wah has said, or in any reasonable period of time), it will only be empty words. Mr Albert HO has proposed an amendment which involves a compulsory review. It has nothing to do with the "sunset clause" and there is no mention when the law will cease to be effective. I shall see how Members all cast their votes. It is a "magic mirror". There is no use saying empty words. It will serve no purpose to be all mouth.

For us to believe that we are not under any political surveillance, we shall need to have some basic statistics. For example, if we can look at the matter from a time perspective, how many cases among the thousand or so applications are related to public security, and how many are for crime detection? It is not the first time that I raise questions regarding figures. I have been asking for them for at least eight or nine years. Many Members may remember that I used to raise the question about the allocated fund for "informer fees" during the Budget debate. That is a sum amounting to $70 million or $80 million but it has been all black-box operation. As a matter of fact, how much is spent on "informer fees"? How much is spent on bugging devices? And how much is spent on manpower? And, what are the other mysterious expenses? Why cannot a breakdown of figures about public security and crime detection be provided to us? However, even if we knew that the ratio was 1 200:400, how will our law-enforcement operations be affected? What we want to know is how many telephone lines are used in a year, how many faxlines, and how much petrol is used. Is it 5 000 telephone lines or 500 000 telephone calls? With answers to these questions, citizens will be able to judge for themselves whether or not they are under political surveillance.

The Government's reply is funny: If we know 5 000 telephone lines are intercepted, then people would know the Government's capacity for communication interception is 5 000 lines. The scale of surveillance should depend on the need; it is not that we will keep 10 000 telephone lines under surveillance as long as we have the capacity to monitor 10 000 telephone lines, unless the Government does have this mentality.

Currently we are spending at least $70 million to $80 million annually on this aspect of activities. We do not know, with the advances in technology, how many cases can be handled with the same amount of money of tens of million dollars and the same number of people, that is, a few hundred. It is a good thing if it is criminal elements that are under surveillance. If all surveillance operations are related to political surveillance, will Hong Kong people be subject to white terror that we should all live in fear?

Two years ago it would cost us almost $1,000 to buy a 1GB memory chip. It will now cost us only some $200. There is a difference of nine to ten folds in price. With the same technological advance, the Government will have much greater power with the same $70 million to $80 million. If we do not have a proper concept on surveillance, how can we say that the prevailing law has already achieved a proper balance?

The Government was forced to introduce this legislation. It is because of the Court's judgement that the Government is forced to propose amendments to the legislation. I would have thought, in a mean way, that the Government may think, should a Judge rule — in Cantonese this is pronounced "*Kin Kwun Choi*"* — the Executive Order is legitimate, the Government would probably again go for an Executive Order. It will not even resort to the appointment of Judges.

A piece of funny news is being circulated that some Members indicated that they were all hands up in their discussion with government officials. It was because directive from high above is that the legislature should have nothing to do with the subject. And even the Judiciary cannot entirely be trusted. I would think that the general view is hoping that the executive authorities should do what they ought to do. It is hoped that there is an independent mechanism monitoring surveillance activities. If Judges, who are like forwards in ball games, are subject to security scrutiny and the Commissioner, who acts like a defender, is hand-picked by the authorities, then there will be no place for the Legislative Council to question. When it comes to the Court, things will be quite different to the past. Remember, it is the Kwong Hing case and the CHAN Kau-tai case that have led to the need for legislation. Why? It is because extensive communication interception activities were involved in the interrogation process. Nothing like this would happen in the future and the Secretary for Security would no longer be troubled. Why? When clause 58 of the Bill is passed, no question can be asked about it; not even to mention it. If anyone should ask about it, he will be prosecuted under the official secrets law.

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* "*Kin Kwun Choi*" sounds in Cantonese like "seeing a coffin", this has connotation of bad luck.

Efforts of unveiling the dark side of the Government, and pushing for social reforms and law reforms will all disappear.

The Bill will not only legalize all the past practices. It will also shove up all possibilities of revealing the dark and ugly side of things. That is clause 58. And this is the outcome of putting this clause into force.

MR ALAN LEONG (in Cantonese): Madam President, it is not possible for any Member who really cares about public rights and privileges to be fully satisfied with the Interception of Communications and Surveillance Bill (the Bill) introduced by the Government today. We just cannot help wondering why the Government ventures to take no notice of the freedom of communication clearly specified in Article 30 of the Basic Law. What is more, a period of almost 10 years has been allowed to slip by without any meaningful consultation on the subjects of covert surveillance and public freedom. As a result, so far there is still no consensus on these subjects in the community. Meanwhile, this Council is compelled to deal with the Bill amid contending arguments.

Madam President, we have to bear in mind that Article 30 includes the contents now well known to us ever since the promulgation of the Basic Law in 1990. I find it necessary for me to take all the trouble to reiterate that striking a balance between the right to communicate in privacy and public security is not the starting point of Article 30. According to Article 30, no executive authorities may infringe upon the freedom and privacy of communication of residents unless authorization has been obtained through legal procedures. Such wording clearly acknowledges that residents' right to communicate in privacy is the starting point and that there can be legislation authorizing limited infringement only if there is absolute necessity as well as compelling circumstances. The implied meaning is that when such a situation arises, the executive authorities must exercise self-control in passing legislation to obtain just enough authority to meet the actual needs of the time so as to discharge the duties of governance, but it is not all right to use such opportunity to get more authority to make unwarranted and excessive infringement on residents' constitutional rights. It is my belief that the interpretation in this respect definitely leaves executive authorities no manoeuvring space to exercise discretion.

It is not difficult to understand the underlying reason why the Basic Law sets such strict and absolute protection for the freedom to communicate in

privacy. Of all the human rights protected by the Basic Law, the Bill of Rights and various international covenants, the freedom to communicate in privacy is the one most fundamental, or indispensable for the realization of the other rights and privileges. The word "communication" means both "dialogue" and "conveyance of ideas". In other words, the underlying meaning of freedom to communicate is that the people may freely convey ideas and have dialogues among themselves.

I wonder how the people can possibly speak without any inhibitions when communicating if they are always under the worry that a third party can access the details of the ideas conveyed by their communications. If there is not even the freedom to speak without any inhibitions, then does the so-called protection of freedom of speech just denote the protection for us to speak to a wall or tape recorder? I wonder how many people in a community not respecting the freedom to communicate in privacy can speak out freely with no worry about consequences. If words spoken at meetings of organizations can be wiretapped arbitrarily, then who else can still have faith in freedom of assembly and freedom of association?

Madam President, entangled with the survival or demise of the freedom to express are not just some other basic human rights, such as freedom of speech, freedom of religion, freedom of assembly and freedom of association. Also to be impacted is the people's daily life. Here I have to refer to the Big Brother in George ORWELL's novel *1984*, the figure who constantly monitors every move made by all citizens. An effective way to forestall the coming of Big Brother is to use the law to curb the exercise of public power by the Government so as to prevent the Government from arbitrarily keeping a watch on the citizens or monitoring or listening to their conversations on the pretext of public safety or law and order. This is to prevent any arbitrary intrusion into citizens' privacy or secrets by government officials in order that there can be real protection for the freedom to convey ideas.

The strict law-making requirement laid down by Article 30 of the Basic Law precisely reflects the aforesaid line of thinking on protecting the people's freedom to convey ideas. In the face of such safeguard, both available in the Basic Law as well as in the Bill of Rights, the executive authorities have been paying it scant notice ever since the time of colonial rule. So, Mr James TO was forced to present a Private Bill on the eve of the reunification. The Interception of Communications Ordinance (IOCO) was also passed by the former Legislative Council.

Following the reunification, the duty to deal with the legislation on interception of communications was passed from the Hong Kong British Government to the SAR Government. Adhering to the stand adopted by the former Government, the new Government refused to sign the IOCO into law, and for years applied "delaying tactics", failing to bring in new legal framework for the interception of communications. Twice last year, the District Court ruled the Government's covert surveillance to be unconstitutional for lack of legal justification. Notwithstanding that, the SAR Government still harboured the ambition of getting by with an "Executive Order" out of a wish to muddle through in the manner of a reigning monarch saying, "*La loi, c'est moi.*" Ultimately, the Court made the final verdict, affirming that the Executive Order definitely did not constitute a basis authorizing law-enforcement officers to carry out covert surveillance. Only then did the Government hurry to submit the Bill to this Council.

Madam President, the fact that the Court's verdict gave the Government six months' time to work on the legislation is no ground for the Government to claim justifiably that it is reasonable to give this Council five months' time to examine the Bill. If the Government really had respect for the protection given by the Basic Law to freedom of communication and did want law-enforcement officers to effectively crack down upon crimes in accordance with the law, then eight years should not have been allowed to slip by. A Bill already passed was left unsigned and there was no new Bill to follow up too.

For a Bill of such great significance to civil rights to come before the Legislative Council when only five months' time is left is in fact not acceptable. What is more, given the quality of the Bill, it has been easy for Honourable colleagues to point out a lot of outstanding issues over the last five months. However, to hammer out alternatives to such problematic clauses that are comprehensible and acceptable to members of the public is definitely not something that can be achieved in five months.

According to the Bill proposed by the Government, covert surveillance can only be authorized for the purpose of preventing or detecting serious crimes or for the protection of public security. Take the basic definitions alone, what is meant by public security? How long must the jail term be before a crime can be considered serious and should be dealt with by covert surveillance? The close examination of these basic issues alone already cost the Bills Committee a lot of time. Similarly, members of the public ought to have an opportunity to have

adequate participation in the discussions on these basic issues of immediate concern to them. We should not neglect this. However, these essential discussions have been omitted because the legislative schedule has been compressed so irrationally. Surely, members of the Bills Committee have indeed tried their very best. We, however, must acknowledge our limitations. For instance, it was not until a few days ago did the Hong Kong Journalists Association manage to make known to the public their position paper. But have many repercussions among the public been generated? It is there for everybody to see.

The so-called "two-tier mechanism," being the core of the entire authorizing set-up, not only reserves for the executive authorities a big margin for self-authorization, but also blurs the boundary between the executive and the judiciary. "Authorization by Judges" actually means that the Chief Executive is to specially appoint from a pool of Judges a few Judges to be responsible for examining applications for authorization. The Chief Executive is given the power to decide whether or not to renew such appointments, or even to revoke the appointments. A lot of covert surveillance activities can still be carried out under the authority granted by senior officials in the agencies. Given this, one inevitably gets the feeling that the role played by Judges under such "two-tier authorization" is a mere token camouflaging the dictatorship of the executive.

The Bill proposes that a Commissioner on Interception of Communications and Surveillance (the Commissioner) be created to oversee the compliance with the requirements of the Ordinance by the Government in carrying out covert surveillance activities. It is beyond doubt that the power to examine cases is the best curb on executive authorities. However, the Commissioner's power in this respect is very passive. Only upon receipt of an application from a person who believes himself to be the subject of interception or covert surveillance can the Commissioner conduct investigation to see if there is any breach of the law. If the Government is bent on deceiving the targets of surveillance, there is no way for these persons to find out that they are being put under surveillance. Naturally, there is no avenue for a Commissioner wishing to protect these people's rights and privileges to exercise his authority.

On top of these main contents, the Bill also contains quite a few points that are worrying. Here are some examples. Are the Chief Executive and the accountability officials subject to the control of the Ordinance? The Bill has not specified the punishments for law-enforcement agencies breaching the law.

There is only a code of practice which is designed for internal use. The provisions on the disclosure of surveillance information in legal proceedings as contained in clause 58 of the Bill are going to greatly undermine the defendant's right to know in a criminal case, even resulting in a threat to a fair trial. As the Bill is composed of a bunch of provisions which are unclear, ambiguous and even shocking, it is impossible for this Council to set it right in five months to become a Bill that is satisfactory and capable of safeguarding people's rights and privileges.

Of course, if in the end not even such an unsatisfactory Bill can manage to get approved, then from now on it is going to be impossible for the Government to apply covert surveillance in dealing with major criminals. We are well aware of such a threat, which, however, is not going to blindfold us and make us forget that the Government should be held mainly responsible for bringing about the present blunder. The introduction of a "sunset clause" is in fact the best way to deal with this embarrassing situation and meet the pressing need of the moment by temporarily delivering the Government from an unlawful and unconstitutional predicament.

Madam President, a "sunset clause" sets a deadline compelling the Government to evaluate the Bill's impact on human rights and the balance of powers so as to allow timely warranted revisions or delete provisions serving no great purposes but posing serious threat to human rights. If the Government takes no action, then there is a possibility for the Bill to lapse automatically. To a government having the habit of making no response until the last minute, a "sunset clause" is a controlling measure that is necessary and effective. Given that the Bill is still packed with outstanding issues and that the best way to identify the Bill's defects is to put it to practice, a "sunset clause" is the most important and indispensable among all the amendments.

The fact that there are some 400 amendments, a record-breaking figure, shows that a number of Honourable colleagues are earnestly looking forward to making every effort to bring the Bill to perfection in order that the Ordinance can both protect human rights and provide law-enforcement officers with effective authorization. Public security and civil rights are not necessarily rivals. On the contrary, a government's greatest responsibility is precisely to protect the people's freedoms and security with power vested by the people. People do not mind forgoing some rights and privileges in order to have public power forged for the maintenance of social order. But this does not mean that people are

prepared to forgo basic human rights to let public power have unlimited extension, or even go haywire and develop into a "Big Brother" interfering with people's living.

Benjamin FRANKLIN, a founding father of the United States, said in 1759: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." I think that this statement can well be used to remind us of the importance of the work of these few days.

Thank you, Madam President.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

MS MIRIAM LAU (in Cantonese): Madam President, first of all, I would like to ask you all to take a look at this cartoon printed in *South China Morning Post* last Saturday. In the cartoon, the four criminals in the house appear to have just made a hit. One of them is wiping the gun. One is counting money. One discovers that the phone is being bugged. Outside the window are two policemen trying to bug the place and monitor their activities, one holding binoculars and the other holding a listening device. What is the fourth criminal doing? With three joss sticks in his hand, he is facing the altar. I thought he is paying homage to the deity Kwan Kung. However, the figurine of Kwan Kung is placed on the floor. To whom is he paying homage? Let us take a close look. He in fact is paying homage to the Basic Law, praying to the Basic Law for protection against covert surveillance. The caption reads: Please protect us against covert surveillance.

This cartoon is very humorous. However, on giving it a deeper thought, we can see that the cartoon has a touch of black humour. The reason is that even though Article 30 of the Basic Law safeguards Hong Kong people's freedom and privacy of communication, it does not mean permission for criminals to use it as a shield protecting their privacy or freedom of communication in law-breaking. On the contrary, the Interception of Communications and Surveillance Bill (the Bill) today presented to us well shows that the privacy and freedom of communication are not absolute. Let me make correction as I just used the words "the Bill". Instead, I ought to say that Article 30 of the Basic Law shows very well that the privacy and freedom of

communication are not absolute. The reason is that public security, meaning the needs of public security or of investigation into criminal offences, constitutes exceptional circumstances under Article 30 of the Basic Law. It is a pity that so far we have yet to have a set of legal procedures dealing with issues in this respect as required by Article 30 of the Basic Law.

The purpose in resuming the Second Reading debate on this Bill today is to fill a gap in the law so as to avert a situation allowing criminals like those depicted in the cartoon to use the freedom and privacy of communication prescribed by the Basic Law as a "shield" for them to elude detection by law-enforcement agencies. The reason is that earlier on the Court of Final Appeal ruled section 33 of the Telecommunications Ordinance, provisions for covert surveillance on criminals, and the Law Enforcement (Covert Surveillance Procedures) Order made by the Chief Executive on 30 July last year to be in breach of the Basic Law. The order to stay the declaration of unconstitutionality is to remain valid only up to 8 August this year, after which should law-enforcement agencies wish to get on with the interception of communications or covert surveillance in connection with serious crimes or public security matters like kidnapping, armed robbery, drug trafficking, smuggling, computer hacking, and terrorism, there is going to be no law for them to rely on unless we have already enacted the relevant legislation. It is going to be unlawful for law-enforcement agencies to carry out such activities. I believe that we also do not want law-enforcement officers to carry out illegal activities. If it is illegal, it means that they cannot do so. In such event, it means that law-enforcement officers will be rendered powerless, and can no longer fight with criminals or offenders. For reason of public order, we will not be able to sleep peacefully, and there is going to be no peace of mind in us.

Surely, this does not mean that we, for the sake of law and order, can afford to totally disregard the protection of human rights as set out in the Basic Law. This does not mean that we are in favour of allowing the Government to commit all kinds of outrages. Nor does it mean that we have no objection to turning Hong Kong into a police state to let law-enforcement agencies feel free to tread on our human rights and intercept our communications. If the enactment of this Bill is likely to create big loopholes in our legislation on the protection of human rights, we will not go for it. What we seek to do is to set out in the law strict stipulations telling law-enforcement agencies the do's and don'ts. We have to strike a good balance.

According to the Bill, should the Government want to apply for authorization to carry out covert surveillance or to intercept communications, first of all it is necessary to prove two major points, namely, that the crime is serious and that there is an impact on public security. An application will not be approved automatically as there are a number of tests under clause 3, the part housing the spirit of the entire Bill. Included are the test of proportionality, the test of immediacy, the test of gravity and the test of necessity. A lot of restrictions will then be set out after all these. For instance, the Bill has the stipulation that even if it can be established that there is a crime, it is still necessary to first seek to strike a balance between such intrusive actions on privacy and the level of intrusion against the person under surveillance. It is also necessary to see if it is possible to resort to some other less intrusive means. Approval for such actions to be taken can only be granted when all such requirements are met.

Let a weight be compared to an attempt to strike a balance between the covert surveillance and intrusion into privacy. When a weight is put to a scale in balance, a tilt to any one side is bound to bring about unfavourable consequences. A tilt to the side favouring the protection of privacy is very likely to put excessive restrictions on law-enforcement officers, who will thus be very much hampered, and prevented from effectively enforcing the law and protecting the people's lives and properties. It is believed that the people do not want to witness this. A tilt favouring the protection of public security and affording law-enforcement officers a free hand to infringe on the people's privacy is likewise unacceptable to the people.

The reason why the Bill has to set out so many restrictions is that it is necessary to ensure the achieving of a balance between the protection of public security and the protection of privacy. It is necessary to stop law-enforcement agencies from going out of control while it is also necessary not to put too many restrictions on them when they are doing cases. It has got to be just right between the two.

Madam President, statistics prove that Hong Kong is one of the safest cities in the world, with an overall crime rate even lower than those of big cities like Tokyo and Toronto. Our crime detection rate is also higher than those of average big cities. Here, over 40% of the crimes are detected. With regard to our achievement as a safe city, it is likely for the people to take it for granted.

In reality, however, our law-enforcement agencies have done a lot of work in the back to prevent and crack down on crimes, and to protect public order in the community. For our law-enforcement officers to produce such remarkable results, it is necessary for them to have some indispensable powers and tools for their work of detection. If they are to be deprived of even these armories, then how can they deal with "big shots" like YIP Kai-foon and CHEUNG Chi-keung?

What is more, by taking a look at every country's law-enforcement authorities, one can see that they too resort to interception of communications or covert surveillance to track down criminals, especially those of serious crimes. So, the power bestowed upon law-enforcement officers by the Bill is not unique to Hong Kong. As a matter of fact, our requirements in this respect are, on the whole, more stringent than those of other countries. For instance, in the case of more intrusive or more sensitive surveillance, we require authorization from Judges. There is also an independent Commissioner on Interception of Communications and Surveillance (the Commissioner) who is to keep a watch on law-enforcement agencies, submit reports, investigate into complaints from members of the public, and, on uncovering unauthorized covert surveillance, notify the departments concerned and prepare reports. In the event that there have been mistaken or unauthorized covert surveillance activities, there is even a possibility for the people concerned to be notified. However, in Britain and Australia, all covert surveillance activities for reason of security can be carried out once there is executive authorization. In the United States, interception of communications and covert surveillance with consent from one party are not subject to the control of law. That is to say, there is no law regulating the so-called participant surveillance. However, under the Bill, even for such kind of surveillance to be carried out, it is still necessary to have executive authorization.

In my opinion, the Bill now presented does strike a suitable balance between effective law-enforcement and protection of personal privacy. In the course of our deliberation at the Bills Committee, we spent a lot of time going through, again and again, every clause, every subclause, every word and every sentence in a bid to keep the scale from tilting towards any one side. If the law places too much emphasis on protecting privacy, it may create room for criminals and make available to them loopholes for them to put people's personal safety and properties at risk. Do we really want to witness such an undesirable situation? It is believed that not even Ms Margaret NG and Mr James TO will agree to let criminals go their way and act wantonly.

Surely, I cannot say that the suggestions from Ms Margaret NG and Mr James TO are wrong. They act out of goodwill and they just want to provide human rights with an additional layer of protection. What is wrong with that? The problem is that if there is to be a higher threshold for law-enforcement agencies making applications so as to prescribe more curbs, more restrictions, more formalities, more disclosure, and more of this and more of that, to put stricter and stricter curbs on law-enforcement officers' actions by bringing in more and more restrictions, then there is the possibility of giving criminals more and more room for them to do evils and endanger people's personal safety and properties. We may of course ask law-enforcement officers to make an assessment and prepare a report on making each move, and tell them not to do this and that, and to apply for this and that, or how to do this and that, thus setting up all sorts of road blocks for them. Of course, they must act in the dark. However, those smiling furtively in the dark are no one else but the criminals themselves. It is believed that by then the people will not be able to bring themselves to smile.

If we narrow down the definition of public security or set a higher threshold for serious crimes, there will definitely be a sharp drop in the number of cases admissible for interception of communications or covert surveillance. For privacy, there will naturally be far more protection, but this also includes the protection for criminals. The point is that the room for law-enforcement authorities to fight criminals will also shrink considerably. The room for criminals to get out of surveillance will also expand considerably. How can this be a desirable balance?

As a matter of fact, the Government has responded positively to many views held by members of the Bills Committee, introducing many amendments to adequately address members' worries. For instance, some members had the worry that the "public security" of places outside Hong Kong would be included in the Ordinance. The authorities therefore have "public security" defined as "the public security of Hong Kong". Another example is some members had the worry that the Bill would impact the freedom of procession and assembly. The Government then put in additional provisions specifying that "For the purposes of this Ordinance, advocacy, protest or dissent, …… unless likely to be carried on by violent means, is not of itself regarded as a threat to public security." This already adequately protects assemblies and processions conducted in peace. The Security Bureau has promised to have this affirmed in the meeting of this Council today. It will also be spelled out in the Code of Practice that the Government will not intercept communications or carry out

covert surveillance for political ends. This well responds to Members' worry about possible abuse of power by the Government.

Madam President, the Liberal Party has just completed a survey. From last Sunday to this Tuesday, that is, yesterday, we conducted a survey by phone, randomly polling almost 700 people aged 18 and above. With regard to the question as to whether the Bill can strike a balance between the maintenance of law and order, that is, the protection of public security, and the protection of privacy, some 40% of the respondents said it was hard to say or that they did not know. However, it is worth noting that at the same time, almost 45% were very confident or confident. Those saying that they were not confident or extremely not confident only constituted a little more than 15%. This shows that, relatively speaking, the people do have confidence in the Bill. Also, about 60% of those polled even had the worry that there would be impact on our law and order if there was a legal vacuum depriving law-enforcement officers of the legal basis for their covert surveillance in the event that the Bill would not be passed by 8 August. About 60% of the people had such a worry. It is a grave worry. All in all, more than 60% of the people were in favour of passing the Bill. Those going against it only constituted a small minority, about 15%.

In order to strengthen the protection given to people's privacy and to forestall the abuse of power by the Government, we agree that there should be a review following the enactment of the Ordinance. The Government has also undertaken to comprehensively review the operation of the Ordinance in mid-2009. In addition, clause 54(1) of the Bill also has a stipulation requiring every departmental head to conduct review regularly. The Government has also made it clear that there is to be a general review at least every three months. Finding the arrangement basically acceptable, we from the Liberal Party do not think that there is any need for a "sunset clause".

In fact, we spent more than 130 hours deliberating the Bill in the Bills Committee. The deliberation was definitely not done perfunctorily and it was very different from the situation in some foreign countries, where similar laws would be hastily introduced and enacted. But such a situation definitely will not take place in Hong Kong.

Every government, no matter it is formed by general election or not, has to have appropriate authority for the protection of people's personal safety and properties. To put into the legislation all sorts of obstacles to make it

impossible for law-enforcement agencies to exercise their power to carry out surveillance even though they are already so authorized is tantamount to rendering them powerless. This is to let criminals get protection and do not have to be put under covert surveillance, as depicted in the cartoon. If they succeed in this, then I wonder if that is what we want to see. Our answer is very clear. It is "No". We have to place criminals under surveillance as the price for that is too heavy for Hong Kong to bear.

Madam President, I so submit.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

PRESIDENT (in Cantonese): If no other Member wishes to speak, I now call upon the Secretary for Security to speak in reply. This debate will come to a close after the Secretary for Security has replied.

SECRETARY FOR SECURITY (in Cantonese): Madam President, first of all, I would like to express my heart-felt gratitude to Ms Miriam LAU, Chairman of the Bills Committee, Mr LAU Kong-wah, Vice-Chairman of the Bills Committee and members of the Bills Committee, for their meticulous scrutiny of the Bill during the past five months or so and for the valuable opinions that they have put forward to perfect the Bill.

I would like to thank Ms Miriam LAU, Chairman of the Bills Committee, in particular, for her great leadership in the entire process. This has enabled the Bills Committee to discuss in such an orderly manner and in sufficient detail the policy behind the Bill, every fine detail of every provision, as well as the contents of the Bill as a whole. It is only natural that on some occasions the details concerned would lead to very technical discussions and on these pivotal issues, members have put forward different views and even polarizing perspectives. Even as these, under the leadership of Ms Miriam LAU, we could discuss all the views put forward in such a systematic and penetrating manner. Of course, we were also able to present our different opinions as well.

Madam President, on 8 March the Bill was read for the First time in this Council and its Second Reading also commenced. Then on 14 July this year, deliberations on the Bill completed. Altogether the Bills Committee had held 46 meetings which lasted a total of 120 hours. This demonstrates the adequate discussions made by this Council. As a matter of fact, discussions of the issues concerned were not limited to the formal meetings held by the Bills Committee.

Interception of communications and covert surveillance are no new issues. For many years they have been subjects of numerous discussions in our community. Before this Bill, the Law Reform Commission (LRC) issued a consultation paper in 1996 on these two related topics of interception of communications and covert surveillance. Views from the public were sought. In the same year, the LRC released a report on interception of communications. At the beginning of 1997, the Government published a White Bill on interception of communications and public consultations were conducted. Afterwards, the then Legislative Council passed the Interception of Communications Ordinance moved by an Honourable Member. In 2004 the LRC released a report entitled "Civil Liability for Invasion of Privacy". A lot of discussions were held in the community on related issues on these occasions. Such a large amount of discussions, consultations and studies carried out in the past serve to provide a very useful foundation for our legislative work. It is on this foundation that we held a number of exchange sessions last year with Members of the Legislative Council and other interested groups and individuals. From these we can be sure that the Bill we have formulated would be able to reflect views from all parties as much as possible.

After we had introduced our legislative proposals in February this year, the Legislative Council Panel on Security held five meetings to discuss these proposals. The Bill was introduced to this Council on 8 March this year. Our efforts in gathering views from the public continued. In the meetings of the Bills Committee we tried our best to answer questions raised by members of the Bills Committee and provided them with the information they needed. We also listened to their views very carefully while taking an active part in the discussions. We are very grateful to the Bills Committee for arranging members of the public to come to the meetings to express their views on the Bill. Among the deputations and individuals who presented submissions to the Bills Committee, quite a number of them were those deputations and individuals whom we had consulted and approached when the Bill was drafted. In addition, we continued with our efforts to collect opinions from all quarters as much as

possible. We maintained a close dialogue and frequent exchange of opinions with Members of the Council and other persons outside the context of formal meetings of the Bills Committee. In this respect, Members can see that the authorities have proposed as many as 189 amendments to the Bill after taking into account the recommendations from members of the Bills Committee and various sectors across the community. I will introduce these amendments to Members in the Committee stage.

Soon after we had put forward our legislative proposals, the Court handed down a judgement where a temporary validity order was made to specify that the existing interception of communications and covert surveillance system would be valid and of legal effect for a period of six months. This had indeed added to the urgency of the discussions held thereafter. However, with the solid foundation built on past consultations, studies and discussions, plus the great support lent by the Bills Committee and its co-operation, the time taken up for intensive deliberations during the five-month period in fact outnumbered that from other Bills Committees which may last more than one year. The discussions made were by comparison more meticulous in nature. An example is some member has made a special request to me that I should reiterate in the speech I am now giving that an authorization issued for postal interception does not include authorizing a change in the contents of the mail. From this it can be seen that discussions made by the Bills Committee had gone into such great depths. As for the 189 amendments which we have introduced, many of them are actually further elucidations of the original intent. Some of these are even what some Members have dubbed as drawing human figures with their internal organs visible. Such demands would never have been made had the discussions were not in such painstaking details and penetrating depths. Therefore, there have been sufficient preparations and discussions of the Bill and the policy recommendations behind it.

Madam President, as we all know, irrespective of whether it is in Hong Kong or overseas, interception of communications and covert surveillance are indispensable tools of investigation for law-enforcement agencies and they are crucial to the maintenance of law and order and the protection of public security. However, these activities will exert an inevitable intrusion on privacy. Hence we must strike a good balance between the protection of privacy and the maintenance of law and order. As emphasized by many Members earlier, these legislative proposals from the authorities and the Bill introduced are formulated with this primary object in mind. This I could not agree more.

The duty of the law-enforcement agencies is to maintain law and order in society and protect public security. This is something none of us would dispute. Many surveys have pointed out that Hong Kong people place much confidence in the law-enforcement agencies. They expect that these law-enforcement agencies can combat crime effectively and protect public security, making Hong Kong one of the safest cities of the world. It is perfectly in line with this expectation that necessary powers be given to the law-enforcement agencies to discharge their duties. On the contrary, any excessive restraint on the work of the law-enforcement agencies or any inappropriate disclosure of the details of their operations and their capabilities would be exploited by criminals in their efforts to evade sanctions. This is certainly not something that ordinary members of the public would like to see.

On the other hand, we agree completely that it is only when there are sufficient grounds and checks that the law-enforcement agencies should use intrusive tools of investigation like the interception of communications and covert surveillance. Our premise is built on a strict compliance with the protection given to privacy and other civil rights under the Basic Law. Article 30 of the Basic Law expressly provides: "The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences."

Article 30 of the Basic Law is not only applicable to government departments but also to everyone. Such is the case for Articles 29 and 39 as well. Even if the Bill as it is only regulates public officers, this does not mean that a different set of standards should be applied to other people. No matter who the doer may be, the same yardstick of compliance with the Basic Law should be used for the same acts. It follows when the relevant standards are set, they must be practical and sensible.

Some member raised the point in the Bills Committee that any activity carried out on private premises, regardless of whether there are any reasonable measures to protect privacy in place, should enjoy an absolute privacy. No surveillance can be conducted unless authorization for it is given. On the surface this seems to offer maximum protection to privacy, but apparently this runs counter to common knowledge of the issue and common law cases.

Unreasonable circumstances may arise given the crowded living conditions in Hong Kong when such a standard is used in any attempt in future to enact legislation to regulate other persons in the community, including the media. An example is when the window of someone's flat faces the window of his neighbour and if he does not draw down the blinds, he can say that his privacy is infringed upon when his neighbour sees what he is doing in front of his window. Likewise, when someone talks loudly in his home and causes a nuisance to his neighbours, can he say on the other hand that his privacy is being infringed upon when his neighbours overhear his conversation? Does our society think that everyone of us should be given this kind of privacy and should laws be enacted as required by the Basic Law to protect this kind of right of privacy? We consider that this is not the way to achieve a proper balance.

Before we have finalized the Bill, we have undertaken in-depth studies of the relevant laws and cases in other major common law jurisdictions. As compared to these places, proposals made in the Bill to protect privacy are sufficient. In the United Kingdom, Australia and the United States, there is no system of authorization by Judges together with the existence of a safeguard in the form of an independent and dedicated oversight authority. Some of the acts of covert surveillance which are subject to this Bill do not require any statutory authorization in Australia and in the United States, not to mention the requirement to be placed under independent monitoring.

During the deliberations made by the Bills Committee, we have accepted many views put forward by members of the Bills Committee as well as people from all sectors across the community on how to further strengthen or elucidate the safeguards found in the Bill. An example is that we have added in a notification system to notify targets of covert operations conducted without any proper authorization. We have raised in particular the point of adding more provisions to achieve a full protection of the legal professional privilege. Such safeguards have in fact surpassed similar arrangements found in other major common law jurisdictions. I will talk about these in greater detail when I move the relevant amendments later.

We have very good reasons to believe that this Bill together with the amendments I will introduce will strike a reasonable balance between a respect for people's privacy and other rights, and the protection of people's life and property.

The design of the Bill is aimed at achieving adequate protection in the various stages of interception of communications and covert surveillance.

First, such operations must be preceded by authorization. The authorizing authority for operations which are more intrusive in nature is the panel Judges. The authorizing authority for operations less intrusive in nature is the senior officers in the law-enforcement agencies. The purpose of the operations is only confined to the prevention or detection of serious crime or the protection of public security. The authorizing authority must be certain that the operation concerned meets the tests of proportionality and necessity. In response to suggestions made by the Bills Committee, we have proposed an amendment to state clearly that there should be a factor of reasonable doubt. I will propose an amendment to require the authorizing authority when considering applications for authorization to take into account other matters that are relevant in the circumstances in addition to meeting the proportionality and necessity tests. This proposed amendment is made in response to some members who asked that the authorizing authority may, for the avoidance of doubt, take into account the impact of the operation on human rights protected under the Basic Law.

When an authorization is being executed, the law-enforcement agency must ensure compliance with the conditions for the issue of the authorization. The law-enforcement agencies should keep the situation under constant review and if it is found that prerequisites for the continuance of the authorization are not met, the law-enforcement agency will discontinue such an operation.

Moreover, during the entire process, that is before and after the operation and while it is in progress, the compliance of the law-enforcement agency in question with the Ordinance, Code of Practice and conditions for issue is subject to independent monitoring and internal review of that law-enforcement agency. The Bill requires law-enforcement agencies to keep relevant records for review by the Commissioner on Interception of Communications and Covert Surveillance (the Commissioner) for non-compliance. The Commissioner may report to the Chief Executive, the Secretary for Justice and the panel Judges as when necessary. The Commissioner may make recommendations to the heads of departments on how to better put into practice the objects of the Ordinance or the provisions of the code of practice. The Commissioner may accept an application for examination to determine whether or not an operation has been carried out without proper authorization and if this is really the case, the

Commissioner may consider ordering the Government to pay compensation. As mentioned before, we have agreed to the suggestion made by the Bills Committee to set up a notification system to enable the Commissioner to notify and compensate a target of unauthorized operation in the absence of an application for examination. I will introduce an amendment to this effect.

All in all, the Bill together with the amendments I will move later will provide a sound system of checks and balances so that such powers may only be used by the law-enforcement agencies under necessary and specified circumstances and that the use of such powers is strictly monitored.

Madam President, now I would like to respond to issues raised by the Bills Committee and some of the arguments put forward by Members who have spoken earlier.

Some Members are worried that since the Bill does not have an all-embracing definition on public security, would the law-enforcement agencies make this a ground for political monitoring? Some other Members have asked about the relationship between the enactment of law this time and the enactment of the law to implement Article 23 of the Basic Law. As we have explained in detail in the meetings of the Bills Committee, it would be very difficult to formulate an all-inclusive definition on public security. There is no such definition in some other common law jurisdictions. But I can assure Members that law-enforcement agencies will never carry out surveillance operations under the Bill in the name of public security for political reasons. To allay possible suspicions, we have proposed amendments to state clearly that public security shall mean the public security of Hong Kong and the assessments concerned should be based on this understanding. We have also introduced exclusion provisions to provide that peaceful expression of opinions will not be regarded as a threat to public security. We notice that Mr James TO referred to the phrase "in the interest of the security of Hong Kong" in the Interception of Communications Ordinance of 1997. We consider the definition we have suggested as appropriate.

As for Article 23 of the Basic Law, we have the constitutional obligation to enact laws to implement Article 23 of the Basic Law at an appropriate time. However, as I have pointed out repeatedly, the Bill we are discussing now does not bear any relationship with enacting laws to implement Article 23. The powers of the Bill after its passage will not be used to investigate into offences yet to be created under Article 23. I do not agree with Mr James TO in the

exclusion provision about Article 23 in his suggested definition of public security since the enactment of laws to implement Article 23 has not completed. Such a move may impose restrictions on such work in future. Should this happen, this would really mean a coupling of this Bill with the enactment of laws to implement Article 23.

The Bill has set down different thresholds on the interception of communications and covert surveillance. Taking into account the more intrusive nature of interceptions, the maximum penalty punishable for serious crimes includes an imprisonment of not less than seven years. However, the intrusiveness of covert surveillance varies. It would be highly intrusive say, for someone to place a hidden tape-recorder in another person's home to pick up his conversations. But it would be less intrusive in comparison for someone to use a camera from outside someone's house to photograph images inside as seen from a window. Therefore, with respect to covert surveillance, the threshold of serious crime is comparable to that in other common law jurisdictions, that is, any offence punishable by a maximum of a term of imprisonment of not less than three years or a fine of not less than $1 million.

I must stress that the definition is only an initial screen and the authorizing authority can only give an authorization when the tests of proportionality and necessity of the case are met. So the law-enforcement agencies must never give any authorization for any offence punishable by a term of imprisonment of less than three years or a fine of less than $1 million. In fact, if the threshold for covert surveillance is set too high, it would bar law-enforcement agencies from carrying out surveillance for many kinds of serious or organized crimes such as those offences under the Dutiable Commodities Ordinance or the offence of the possession of counterfeit banknotes, hence criminals would be able to make use of the opportunity to engage in illicit activities.

Some members suggest changing the scope of the Bill in many respects. We have strong reservations for this.

(a) Definition of "communication" and "intercepting act"

Ms Margaret NG has suggested expanding the definition of "communication" and "intercepting act" to include communications transmitted by any means whatsoever and at any stage of such transmission. Although the President has decided not to approve the introduction of such an amendment, I would like to explain the position of the authorities on this.

The Bill is concerned about intercepting mail or electronic messages in the process of transmission. Generally speaking, legislations which regulate the interception of communications, such as those in the United Kingdom and Australia, are similar to ours in their scope of coverage. The proposal made by Ms Margaret NG to expand the definition would result in a drastic increase in the number of circumstances requiring authorization. We therefore think that the proposal is not necessary and it will not work.

On intercepting communications transmitted by courier service, our current practice is to apply for a search warrant from the Court. This move is more open and less intrusive. We fail to see why there is any need to resort to carrying out covert surveillance which is more intrusive when dealing with this kind of communications. In addition, we are not aware of an exact definition for communications transmitted by courier service, such as whether it would also include communications between friends.

Likewise, if the transmission of a communication is complete, such as when a letter is delivered to the addressee, our present practice is to apply for a search warrant from the Court. We do not think covert actions are required to obtain the communication.

In addition, Ms Margaret NG's proposal would include face-to-face conversation between any persons. However, Ms NG retains operations using surveillance devices in her definition of "covert surveillance". In the Bill, surveillance devices include listening devices. Then if listening devices are used to record face-to-face conversation, it would be considered an interception of communication under Ms NG's definition. If this is the case, why then should listening devices be retained in the definition of surveillance devices? This would make the Bill very unclear and difficult to enforce.

We understand that Ms NG hopes to expand the scope of the restrictions. But this would lead to practical difficulties. As the definition of "an intercepting act" does not necessarily require the use of any devices, when this is coupled with the other amendments proposed by Ms NG on the Bill, this would imply that when someone overhears other people talking loudly in a public place or sees various kinds of communications, such as when a referee in a football match takes out a red card or a yellow card, or when people exchange a glance, nod their heads or wave their hands, all these should require prior authorization from a Judge. This is not practicable at all.

Madam President, I have devoted a somewhat greater length to discuss two amendments which Ms NG have proposed because I hope Members would understand that we have considered the proposals from Members in a very detailed and careful manner and it is only based on practical grounds that we have decided not to accept them and include them in the amendments proposed by the authorities. It is definitely not the case that we are not willing to listen to views put forward by Members or because we have not given enough time to examine these amendments. This is also the same reason why other proposals are not accepted.

(b) Participant surveillance/Undercover operation

Ms Margaret NG and Mr James TO suggest expanding the definition of covert surveillance to include participant surveillance without the use of surveillance devices or what is commonly known as undercover operation.

We have taken reference of the practices and cases in other common law jurisdictions and we find that nothing is done from the perspective of protecting privacy by requiring the obtaining of a statutory authorization for participant surveillance not involving the use of surveillance devices. As a matter of fact, in the United States and Australia, no statutory authorization is required even for participant surveillance involving the use of surveillance devices, not to mention participant surveillance without the use of such devices. Such a legal point of view is confirmed by some cases in these countries. We notice in the Interception of Communications Ordinance proposed by Mr James TO and enacted in 1997, it is stipulated in particular that if the interception is made with the consent of the party to whom or by whom the communication is made, then the requirement of authorization can be waived. In this regard, the Bill imposes a more stringent requirement. With respect to the interception of communications, due to their being more intrusive, authorization by a Judge is still required for participant surveillance. With respect to covert surveillance, it is defined as Type 2 surveillance which means participant surveillance with the use of a surveillance device and it can only be carried out with the issue of authorization by a senior officer in the executive authorities. The other safeguards of the Bill are applicable under these two sets of circumstances.

When covert surveillance is carried out without the use of surveillance devices, the participant concerned can only use his eyes to observe and his ears to listen. At times such operations are carried out when the participant's own

safety is threatened, such as in the case of the family members of a kidnap victim. So in our opinion, such operations should not be subject to regulation by this Bill, otherwise, there would be a great adverse impact on the effectiveness of law-enforcement actions. When this is coupled with other amendments proposed by Ms NG on the definition of interception of communications, the result would be, if a law-enforcement officer is to observe any activity, irrespective of whether it is carried out on private or public premises, he must first get an authorization and he is required to specify the target of his observation when he applies for authorization. Suppose an undercover agent wishes to listen to the conversation between a leader of a triad society and other people, the agent has to point out who all these people are before he can apply for authorization. If any other person not specified in the authorization joins the conversation, then this undercover agent will have to stop his surveillance and find an excuse to leave the scene in order to comply with the requirements of the law. This will not work in practice. It will pose a great obstacle to the law-enforcement officers and a great threat to their own safety as well.

Even if the officers have got prophetic powers and are able to tell beforehand all the persons who will appear on the scene, and Ms NG and Mr TO also propose to change the definition of serious crime applicable to covert surveillance to that of offences punishable by a maximum term of imprisonment of not less than seven years, this would mean that our law-enforcement officers will not be able to apply for authorization for covert surveillance to deal with many offences. Hence our law-enforcement agencies will not be able to function effectively and the protection of the life and property of the people will be seriously undermined.

(c) Type 1 surveillance and Type 2 surveillance

Under the Bill, Type 2 surveillance is divided into two categories: first, participant surveillance which is carried out with the use of listening devices or optical surveillance devices; second, that which is carried out with the use of an optical surveillance device or a tracking device without entry onto any premises without permission or interference with the interior of any conveyance or object without permission. As Type 2 surveillance is less intrusive, it would suffice for law-enforcement officers to be the authorizing authority and this would maintain efficiency in operations. As I have just said, such an arrangement is more stringent than that in the United States or Australia.

As suggested by Ms NG, Type 2 surveillance in the Bill will become Type 1 surveillance and an authorization from a Judge is required. As proposed by Mr TO, Type 2 surveillance requires the authorization from a District Court Judge. Mr TO also proposes to change participant surveillance with the use of listening or optical surveillance devices from Type 2 surveillance to Type 1 surveillance and authorization from a Judge of the Court of First Instance is required. Apart from resources implications, this proposal does not comply with our principle and that is the appropriate authorizing authority is determined by the intrusive nature of the operation and the need to maintain efficiency in law enforcement.

As for Type 2 surveillance, put it simply, the proposal from Ms NG is only restricted to undercover operations in a public place without the use of surveillance devices. I have explained earlier why this does not work.

(d) Notification System

Some Members suggested that a general notification system should be in place to notify all those affected by interception of communications and covert surveillance after the operations have taken place and enable them to claim compensation. We have explained in the Bills Committee why there will be great difficulties to impose such a general notification requirement. We should know that the absence of any arrests resulting from such operations does not mean that there is no longer any threat to public security. The target concerned may continue to pose threats to the community. Notifying the target in such cases would likely serve to tip-off such person and his associates. The real target who is close to the person notified may become alerted. Such a general notification system might require the keeping of a lot of information involving privacy and this does not seem to be a very sound protection. Overseas cases also show that a general notification system is not essential. In the reports of the LRC released in 1996 and 2006, it is considered that such a system is not required. Therefore, we would in principle oppose the setting up of such a system.

(e) Regulation of public officers

Some Members have pointed out that Article 30 of the Basic Law does not only regulate public officers. This we agree completely. Actually, I have cited Article 30 of the Basic Law earlier. However, after discussing the issue

with the relevant parties, the general consensus reached is that laws should be enacted on the conduct of public officers in the first place. Though there is a divergence of opinions in the community and celebrities who have been under constant harassment from the media may want to see the law enacted soon to regulate this kind of conduct from people other than public officers, the general view is that laws should be enacted on the law-enforcement agencies and other public officers. This is also the basis of this Bill. The regulation of non-public officers will be followed up at a later stage.

Although people other than public officers are not subject to the Bill, the people concerned are to comply with Article 30 of the Basic Law and all other provisions of the Basic Law. The Bill does not apply to the Chief Executive, unofficial members of the Executive Council and Members of the Legislative Council and so on. This fact will not be changed. This is especially the case with the Chief Executive who has the constitutional obligation to implement the Basic Law. It would indeed be a very serious matter if he contravenes the Basic Law and he may be impeached. Moreover, the legal procedures found in the Bill are only applicable to the law-enforcement agencies specified in Schedule 1 of the Bill and the Chief Executive is like all other non-public officers and he is unable to carry out any interception of communications or covert surveillance operations within the framework of the Bill. Therefore, we do not agree with some members when they say that the Chief Executive would be made above the law.

I should like also to mention in passing that when added with the amendments proposed by Ms NG on covert surveillance, if the Chief Executive and Members of the Executive Council are included in the prohibition in clauses 4 and 5 of the Bill, as there is no application system, they will be like all public officers not listed in Schedule 1 of the Bill and would in effect be prohibited from observing other people or listening to other people talking in a public place. This is a further proof that the amendments concerned will not work.

Some Members have said that they do not agree to the idea that panel Judges should be appointed by the Chief Executive and they are also opposed the proposal that these Judges have to undergo extended checking. We have explained our position on this point in great detail in the meetings of the Panel on Security and the Bills Committee. I would like to reiterate here that under the Basic Law, all Judges in Hong Kong are appointed by the Chief Executive acting on recommendations made by the Judicial Officers Recommendation

Commission. For the Chief Executive to act on the recommendations of the Chief Justice of the Court of Final Appeal in appointing panel Judges will in no way prejudice their independence.

The setting up of the panel Judges system is the result of taking into account the confidentiality of the operations and also the fact that Judges should accumulate experience and subject themselves to the deployment of work by the Judiciary. The Chief Executive will not interfere with considerations made for an individual application. The recommendations made by the Bill in this regard will not affect judicial independence in Hong Kong in any way. Moreover, the Judiciary also finds the recommendations concerned acceptable. In the report entitled "Privacy: The Regulation of Covert Surveillance" released by the LRC this March, it is recommended that the Chief Executive should follow the suggestion made by the Chief Justice of the Court of Final Appeal and appoint a limited number of Judges of the Court of First Instance to be tasked with handling the applications for warrants during a prescribed term of office. The report also points out that limiting the number of Judges will help Judges develop their strengths in this respect and help maintain a roughly homogenous way of doing things.

Extensive checking is not part of the Bill but a well-established administrative practice with the aim of ensuring that people with extensive access to highly sensitive materials will not pose any risk to the entire system. Extensive checking is applicable to all people to be appointed to the most senior positions in the Government such as Principal Officials and heads of departments and those who have access to very sensitive information. I wish to emphasize again that the checking will never be a political vetting of any kind. Chances of any risk factor appearing in panel Judges are extremely slim. In any case, should such a risk factor be found, the Chief Executive will inform the Chief Justice of the Court of Final Appeal.

There have also been quite a lot of discussions on the Commissioner. We consider that just in the case with many other statutory supervisors in Hong Kong, the appointment of the Commissioner by the Chief Executive is appropriate and will not prejudice the independent nature of the Commissioner. The LRC in the abovementioned report called "Privacy: Regulation of Covert Surveillance" suggests appointing a Judge of the Court of First Instance as the supervisory authority to be tasked with applying the standards of a judicial review to examine whether or a warrant or internal authorization for covert

surveillance has been properly issued. After listening to views from the Bills Committee, we will introduce amendments to the effect that if in his efforts to prevent or detect crime or protect public security, the Chief Executive has deleted some contents from the annual report prepared by the Commissioner and which the Commissioner disagrees, this fact should be reflected in the annual report clearly. This proves that we are determined to ensure the independence of the Commissioner.

As I have pointed out earlier, we have accepted views from the Bills Committee and we will introduce amendments to expand the duties of the Commissioner so that he can notify targets of operations without any proper authorization and to order the Government to pay compensation. However, the main duties of the Commissioner should be supervisory instead of making decisions in the place of the authorizing authority. We do not agree that the Commissioner should be asked to reconsider whether approval should be given to the original application. The Commissioner should apply the principles of judicial review to determine whether the operation is conducted with proper authorization. To address the concern of the Bills Committee, I will introduce amendments to express this idea clearly. Under this principle, the Commissioner may determine an operation as not having been properly authorized, that is, no authorization has been issued or if anything has been done in excess of the original authorization issued. This will include operations which are what Members are most concerned about, that is, operations which have been mistakenly or wrongfully carried out.

The Bill has very stringent regulation of the products of interception of communications and covert surveillance. Any original, copy, extract or summary of the products should only be retained as when necessary. This is meant to protect privacy as unprocessed products would inevitably contain a lot of irrelevant information and thus are very intrusive to privacy. An example is when bugging the telephone conversation of a target, the law-enforcement agency will inevitably pick up the target's conversation with his family members as well as that with other people.

Some Members have proposed to extend the requirements for the protection of interception products to intelligence obtained from covert operations. As we have explained in the briefing session of the Bills Committee, for information gathered from a number of sources, after analyses

and selection it would become intelligence, the sources of which can no longer be identified. The intelligence will then be stored in a data bank. In such a process, all information unrelated to law enforcement will not be retained and all useful information will be used together with information obtained elsewhere for analysis, merging and conversion into intelligence. Intelligence can no longer be restored after undergoing such a process in much the same way as bread can no longer be broken down into its ingredients of flour, butter, eggs, water and raising powder and so on. Thus it will not work to separate the information obtained from interception of communications and covert surveillance. Not only will this cause great practical difficulties but it will also run counter to our principle of destroying the products as soon as possible because of privacy considerations.

There is a view that information obtained from interceptions and covert surveillance must never be turned into intelligence for use other than those prescribed by the authorization concerned. This will severely undermine our capability in protecting the people, hence it will not be in line with public interest. An example is when the Independent Commission Against Corruption (ICAC) in detecting a corruption case discovers that the suspect is also involved in kidnap, then should ICAC officers pay no attention or should they send the intelligence to the police so that the police can do their best to save the kidnap victim? I think most of us will pick the latter option. In fact, as confirmed by cases at common law, when a law-enforcement agency is to execute a search warrant, it is entitled to seize other evidence of crime not specified in the warrant on the spot. Other common law jurisdictions do not prohibit this turning of information obtained from interception of communications and covert surveillance into intelligence, for the reason that only the criminals will stand to benefit and the people will stand to suffer.

It remains of course that the intelligence must be kept in strict confidence and it should only be retained and used for law-enforcement purpose. Currently all law-enforcement agencies have their own stringent intelligence management system and we have accepted some suggestions made by the Bills Committee on enhancing regulation in this respect. We also plan to undertake a review of the intelligence management systems of the law-enforcement agencies with a view to further increasing transparency in management. However, as the issue does not bear any direct relationship with the Bill, I would suggest that it can be followed up in the subsequent meetings of the Panel on Security.

It has been an established policy that products of telecommunications interceptions will not be admissible as evidence in court proceedings. There are two major reasons for this policy. First, one of the features of telecommunications interceptions is that they are also highly intrusive to persons other than the target. When intercepting the telephone calls of a person, it is inevitable that all incoming and outgoing calls of that telephone number are tapped and these may not be related to the target at all. Therefore, all along our policy is to use telecommunications interceptions as a tool for gathering intelligence and to destroy the products concerned as soon as possible and they will not be used as evidence. This is meant to protect privacy. As compared to telecommunications interception, covert surveillance may often be more specific in terms of venue and target. This is why all along we have used products of covert surveillance as evidence.

The second reason why we do not use products of telecommunications interceptions as evidence in Court is to ensure that the capabilities of the law-enforcement agencies and their operation plans will not be revealed to the criminals easily. This is an important reason why the same policy is practised in the United Kingdom and Ireland. This is especially the case given the rapid advances in technology and we must guard against criminals who may use systematic interrogations and analyses to obtain details of operations conducted by law-enforcement agencies.

The Bill is completely in line with our long-standing and established policy.

Some Members queried why the Bill does not provide for criminal penalties for non-compliance with the provisions of the Bill. The safeguards of the Bill are sufficient in meeting the human rights requirements. We have stressed many times that contravention of the Ordinance, the code of practice or the terms and conditions of the authorizations may make the officers concerned liable to disciplinary action and provisions in all existing laws are applicable to these officers. An example is that under the Ordinance, application for authorization must be supported by an affidavit or written statement and it would be a criminal offence for someone knowingly making a false oath in an affidavit or a false statement. In addition, as all non-compliances are to be reported to the Commissioner and the Commissioner may in turn report to the Chief Executive, the Secretary for Justice and the panel Judges, the law-enforcement agencies will do their best to ensure strict compliance with all requirements in their officers.

As the Bill only regulates public officers, we consider that it is not appropriate to lay down penalties for criminal offences at the present stage. Otherwise, it will give rise to a situation where the same act will be punishable by criminal sanctions on the ground of the identity of some people as public officers, whereas for other people, they may not be liable to the same kind of sanctions. This will cause inconsistency and irrationality. The LRC has made recommendations on criminal offences in this area applicable to all persons and we can look into these at a later stage.

Madam President, the authorities are in complete agreement with the importance of this Bill and it is strongly in support of the idea that a close watch on the implementation of the Bill should be made and reviews should be conducted from time to time. However, such reviews must not be coupled with the necessity of the Bill. Therefore, we strongly object to the so-called "sunset clause" proposed by Ms NG and Mr TO as this will cause a law to expire. And this law is meant to regulate operations undertaken by law-enforcement officers which are essential to maintaining law and order and protecting public security.

Interception of communications and covert surveillance are indispensable tools of investigation for all law-enforcement agencies. It follows that the continuity of the Ordinance must not be put into doubt and there is no such "sunset clause" in comparable laws in other common law jurisdictions.

As for provisions in the Bill, when added with the amendments I am going to propose, the Bill should be able to offer sufficient protection in all stages of such operations. Not only are the provisions on safeguards in no way inferior to similar laws in other common law jurisdictions, the checks and balances on the law-enforcement agencies are also more effective. This is vastly different from examples of "sunset clause" in the laws of other countries. In the Australian Anti-Terrorism Act 2005, the "sunset clause" only targets the three types of mandatory orders in the Act, that is, control orders, preventive detention orders and prohibited contact orders. As these orders affect basic personal liberties, the thresholds set up are lower than the ordinary standard and so they are valid for 10 years. Our situation is exactly the opposite. The safeguards under the Bill are more detailed, specific and comprehensive than those found in other common law jurisdictions, and hence there is no such requirement for a "sunset clause".

As for the time taken for discussions, I have pointed out at the beginning of my speech that there is a great deal of discussions with respect to the Bill itself, the preparations and studies made beforehand. These are quite sufficient. This is unlike the "sunset clause" in the laws of other countries. The USA PATRIOT Act was introduced to the Congress 21 days after the September 11 attack and the Act which has a length of about 300 pages was passed about three weeks later. During the period, the Congress had to be closed for about one week because of the suspected anthrax incidents. This is why discussions of this Bill should never be compared to the exceptional circumstances in other countries.

I wish to reiterate that we are in complete agreement to the idea that the Bill should be reviewed at an appropriate time after its passage. But that does not mean that it would pose any doubts to the continuity of the Ordinance or that a question mark be put after it. The review we plan to carry out includes two parts. First, each year after the Commissioner has submitted an annual report, we would conduct a review of matters raised in the annual report and we would revert to the Panel on Security the findings. Second, after the Commissioner has submitted the second annual report, we would conduct a full-scale review of the implementation of the entire Ordinance. The review is not limited to observations made by the Commissioner on compliance with the Ordinance, the code of practice and the terms and conditions of the authorizations issued but also a review of the implementation of the Ordinance in other aspects. We would collect views from the Commissioner, the panel Judges, the Secretary for Justice and the law-enforcement agencies. We will discuss the issues with Members of the Council and other groups and individuals who are especially interested in these issues. In such a process, we will study into the developments in the laws and cases of foreign countries in this regard. Of course, we will see whether technological developments would have any impact on the Ordinance. We would expect that when the second annual report from the Commissioner will be submitted at the end of June 2009 or before, the review can be conducted. It will last for a few months. Our goal is to submit a report of the findings of the review to the Panel on Security of the Legislative Council by the end of 2009.

Some Members consider it imperative to provide in the Bill a mechanism for review when no "sunset clause" is in place. I do not agree to this proposal. The executive authorities pay great attention to all the undertakings we make, especially those we make to the Legislative Council. Earlier on some Members cited some isolated cases and tried to show that we might not keep our promise. However, in most other cases besides these examples, it can be seen that we have

indeed kept our promise. Besides, in these very exceptional cases, it is only when there are sufficient grounds that we have delayed work in this respect. After the September 11 attack, for example, we had to give priority to anti-terrorism laws. When we came across some unpredictable developments, such as some huge natural disasters like the tsunami in 2004 or some large-scale man-made destruction, there would really be a need for us to accord priorities to handling these events and the reviews have to be postponed for some time. This is nevertheless the most responsible thing the executive authorities or the legislature can do. On the contrary, if it is mandated that a review be conducted or completed no matter what has happened, this would be a most inflexible approach to take. I must reiterate that the Government has the greatest determination and sincerity in conducting a review of the Ordinance according to the timetable I have just talked about. I just want to explain again why some isolated examples exist and they have caused delays to our conducting a review in this respect.

Madam President, as I have stated earlier, we have accepted a great number of views from various members of the Bills Committee and we have introduced many amendments consequently. Even when it came to the final stages of the deliberations in the Bills Committee, when Ms NG and Mr TO proposed their amendments, we would also read these amendments seriously once again. We accepted seven of these items and we also introduced amendments as a result. However, there were a few Members who still wanted to propose some amendments which we could not accept owing to policy reasons. Later on in the Committee stage I would make an explanation when I am going to make a speech to respond to Members' amendments. However, let me point out here that the amendments proposed by Ms NG, Mr TO and friends in their parties are not only problematic in policy terms but at times also inconsistent in some cases when it comes to drafting. This applies, for example, to inconsistencies in the Chinese and English versions. In the references made to include "informant" in the new clauses 8(1B) and 11(1A) proposed by Ms NG, the Chinese version of the texts is the same while the English version is different. There are also examples of amendments made in the foregoing provisions but no consequential amendments are made in the subsequent relevant provisions. These will lead to inconsistencies in our law and add to the difficulties in interpretation and implementation. I think Members would agree that efforts should be made to ensure that laws passed in this Council are consistent to a certain extent and can be effectively put into practice. I therefore urge Members to vote against amendments proposed by Members.

Later on in the Committee stage I will explain again the position of the authorities on matters which are Members' concern. I think Members will hope that we can lay a new legal foundation so that our law-enforcement agencies can carry out interception of communication and covert surveillance operations in the protection of the people's life and property while these law-enforcement agencies are subjected to independent checks and monitoring. I also hope very much that Members will support the Bill and the amendments I will introduce in the Committee stage.

Thank you, Madam President.

PRESIDENT (in Cantonese): I now put the question to you and that is: That the Interception of Communications and Surveillance Bill be read the Second time. Will those in favour please raise their hands?

(Members raised their hands)

PRESIDENT (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Emily LAU rose to claim a division.

PRESIDENT (in Cantonese): Ms Emily LAU has claimed a division. The division bell will ring for three minutes, after which the division will begin.

PRESIDENT (in Cantonese): Will Member please proceed to vote.

PRESIDENT (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Mr James TIEN, Mr Albert HO, Dr Raymond HO, Mr Martin LEE, Dr David LI, Mr Fred LI, Dr LUI Ming-wah, Mr James TO, Mr CHEUNG Man-kwong, Miss CHAN Yuen-han, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr Andrew CHENG, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LEE Wing-tat, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU, Mr Albert CHENG and Mr KWONG Chi-kin voted for the motion.

Mr LEE Cheuk-yan, Ms Margaret NG, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG, Mr Ronny TONG and Miss TAM Heung-man voted against the motion.

THE PRESIDENT, Mrs Rita FAN, did not cast any vote.

THE PRESIDENT announced that there were 51 Members present, 38 were in favour of the motion and 12 against it. Since the question was agreed by a majority of the Members present, she therefore declared that the motion was carried.

CLERK (in Cantonese): Interception of Communications and Surveillance Bill.

Council went into Committee.

Committee Stage

CHAIRMAN (in Cantonese): Committee stage. Council is now in Committee.

INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE BILL

CHAIRMAN (in Cantonese): I now propose the question to you and that is: That the following clauses stand part of the Interception of Communications and Surveillance Bill.

(Mr James TO signalled by raising his hand)

CHAIRMAN (in Cantonese): Mr James TO, are you to raise a point of order, or to make a request?

MR JAMES TO (in Cantonese): No, I would like to speak on the clauses, the ones to stand part of the Bill, otherwise, I will not be able to speak on those clauses again.

CHAIRMAN (in Cantonese): You need not do so now. First let the Clerk finish calling the numbers of the clauses, then you may speak. *(Laughter)*

MR JAMES TO: Sorry.

CHAIRMAN (in Cantonese): Clerk, please stand up and call the numbers of the clauses.

CLERK (in Cantonese): Clauses 1, 16, 19, 53, 54, 61 and 64.

MR JAMES TO (in Cantonese): Chairman, this part has been disallowed because your ruling is that it is irrelevant and has impact on public spending. I have to explain now. With regard to some of the clauses that are to stand part of the Bill, I originally did propose amendments. I am now telling everybody that although my amendments have been disallowed, it does not mean that I agree to let the original clauses stand part of the Bill. As my amendments have been disallowed, I have no choice but to agree.

CHAIRMAN (in Cantonese): Mr James TO, you should explain why you disapprove of certain clauses and why you approve of certain clauses. That will do.

MR JAMES TO (in Cantonese): Exactly, that is what I mean.

CHAIRMAN (in Cantonese): You need not mention those amendments not included in the Agenda for reason of my disapproval.

MR JAMES TO (in Cantonese): All right, Chairman. Clause 1 is okay. Regarding executive authorization under clause 16 and clause 19, according to the Government, this kind of so-called executive authorization is of a less intrusive nature. I would like to take this opportunity to make a counter-argument. Suppose that the situation is one involving a so-called participant, and the participant is an undercover agent, and engages in long-term and systematic operation, and also another situation just mentioned by the Secretary, namely, a neighbour overhearing a loud quarrel, also to be considered one violating privacy, then this point is totally "senseless." Why? The reason is that a neighbour who overhears is utterly different from law-enforcement officers going to the flat next to someone to eavesdrop in terms of the level of reasonable expectation of privacy. In the Lam Hong Kwok case of 21 July, Justice CHEUNG of the Court of Appeal quoted a case in Canada, pointing out that as one might have spoken in a loud voice, or one might have informed one's friend, one might run a risk as that friend could let others know. However, it did not mean that one must run the risk. But it was possible for the friend to tape-record the conversation. Such a situation belongs to a different level of reasonable expectation. Similarly, one is perhaps speaking in a loud voice, making it possible for neighbours to overhear. However, that person will not expect law-enforcement officers to be tape-recording or listening in the vicinity.

CHAIRMAN (in Cantonese): Mr James TO, are you speaking with reference to clause 16?

MR JAMES TO (in Cantonese): It is about clause 16 and clause 19.

CHAIRMAN (in Cantonese): Is it about clause 16 and clause 19?

MR JAMES TO (in Cantonese): Yes. It is because this clause explains executive authorization, that is to say, the executive authorization for Type 2 surveillance operations.

CHAIRMAN (in Cantonese): This clause is about the duration of executive authorization, is it not?

MR JAMES TO (in Cantonese): It is on "duration". Chairman, in no other part of the entire discussion will there be amendment on executive authorization. If I do not speak out now, there is going to be no more opportunity. I spoke out for this reason. *(Laughter)* Sorry.

CHAIRMAN (in Cantonese): Then, please get on with what you want to say quickly.

MR JAMES TO (in Cantonese): OK. Let me speak quickly. For such a situation, there is a more clarifying example. For instance, there is a housing complex consisting of, say, five or six households. In the middle there may be common facilities such as car park or a fountain. A person may buy a unit in the housing complex. Provided that his neighbours are relatively reliable and the management of the management company is quite good, his expectation of privacy should be that when he is in the unit, he is only visible to people of the few households or other visitors within a reasonable scope even if he does not pull the curtains. It has never come to his mind that there are often law-enforcement officers looking into his unit from within the housing complex, a private place. Such a situation is far beyond a reasonable expectation of privacy.

So, Chairman, I think the clause on executive authorization should be deleted. I was unable to have it changed to authorization by District Judge, I am, therefore, unable to propose an amendment for Members' consideration.

I also would like to speak on the last clause, that is, clause 64. Why do I particularly bring up clause 64? The reason is that even though clause 64 is a consequential amendment, it in fact amends the Official Secrets Ordinance, a piece of relatively sensitive legislation. I know the Government will definitely argue that since all wiretapping and covert surveillance operations have to be kept secret, there has got to be a high regard for them. However, my view is precisely to the contrary. Try to picture this. In order to obtain or collect information for their reports, an individual like a reporter or emergency case reporter often has the opportunity to come across law-enforcement operations. For example, it is possible for the police to raid drug stores without informing them, like what happened over the past few days. If a journalist gets hold of such information while covering some events, he gets such information first-hand. If it is made known to another person, perhaps the "subject of news report", technically he is in breach of the Official Secrets Ordinance. If such a situation arises, then I think this is very …… Apparently, after the legislation pertinent to Article 23 of the Basic Law was withdrawn, the Government has not swiftly conducted any large-scale review of these relevant issues. However, regarding this Official Secrets Ordinance, just like the so-called Witness Protection Ordinance which reporters stumbled on recently, even Judge FUNG had to say when making his ruling that not until the last day of the trial did he remember that it could be very serious. That is to say, there is really such an offence. Of course, that is a piece of legislation passed by the Legislative Council a few years ago.

Similarly, to make consequential amendment to the Official Secrets Ordinance with this consequential amendment is highly problematic. When examining section 30 of the Prevention of Bribery Ordinance, we did give consideration to the question as to how to construe circumstances which constitute interfering with or obstruction the operations of ICAC officers. We thought of a few exception clauses, one of which was that it could be a defence for journalists or other people to uncover dereliction of duty or abuse of power on the part of ICAC officers or other government officers. Surely, according to the discussions in connection with the legislation to implement Article 23 of the Basic Law, public interest would constitute a defence.

However, for this amendment, never has the Government considered the impact on members of the press or other people arising from any of these consequential amendments, thus taking the responsibility of absolute confidentiality to a tip-top level. This is not an ideal balance.

CHAIRMAN (in Cantonese): Here, I must let everybody know that the compilation of this script was done with considerable effort. It was compiled on the basis of the fact that everybody on the Bills Committee had no objection to these clauses. It is, therefore, not possible for Mr James TO to predict whether or not I will approve or reject his amendment. My wish is for him to inform the Secretariat earlier in the future should he disagree with the original clauses. In such case, our script would not have been compiled as it is now. Otherwise, we will be very confused. The piece of legislation on this occasion is in fact very complicated. To smoothen the process of legislation, everybody must be co-operative as far as possible.

Very well, Mr James TO, I have given you permission to speak. Do you wish to speak further now?

MR JAMES TO (in Cantonese): Yes, Chairman. A point of order.

CHAIRMAN (in Cantonese): Please speak.

MR JAMES TO (in Cantonese): Chairman, why do I specifically bring up with you a question on point of order? It is because the fact that a Member moves no amendment has nothing to do with his view on whether or not the relevant clauses should stand part of the Bill.

CHAIRMAN (in Cantonese): Please sit down. Did you listen clearly to what I said? What I said is that I would like Members to be co-operative and let Secretariat staff be informed well in advance in order that they, when drafting the script, can keep clauses on which Members' views might differ be separated from the other clauses. Clauses placed here are all those which no debate is anticipated. Is that clear to you?

MR JAMES TO (in Cantonese): Chairman, I do not get it. Say, we disagree with clause 64 but have not moved any amendment. Then, the said clause will still be placed at the front part of the script, otherwise, there will be nowhere else to place the said clause.

CHAIRMAN (in Cantonese): You should not put it that way. If Members propose no amendment but do disagree, I will have them arranged separately. This Bill is very complicated. Now the Members know not how to get on the debate with you because they do not know there is a need to debate. I do so for the sake of the Members. Though the Rules do not specify this point, this has been our usual practice. I hope all of you would co-operate.

MR JAMES TO (in Cantonese): Chairman, ……

CHAIRMAN (in Cantonese): Well, you may speak again.

MR JAMES TO (in Cantonese): Chairman, you have never issued any explicit instruction to let Members know. Must notification be given with regard to clauses to which no amendment has been moved but for which there is demand for their exclusion from a Bill for reason of disagreement about them? So far I have not seen a notice to that effect. I will co-operate with you. However, my point is that we probably have some misunderstanding on this.

CHAIRMAN (in Cantonese): On many matters we issue no notice. However, we do have usual practices. Now we have different views on many usual practices. Thus I have to make a clarification here.

Ms Emily LAU, are you also raising a point of order?

MS EMILY LAU (in Cantonese): Chairman, it is a point of order. The question of whether or not there can be a debate when dealing with clauses going to stand part of a Bill in fact also appeared last time. Mr Albert HO earlier on also mentioned it. It was because an amendment did not get passed, the clause was then included in the Bill. At that time, you gave your permission. That was very appropriate.

So, I think we had better return to the Committee on Rules of Procedure to discuss the matter, namely, not to disallow speeches when clauses with no amendment are to stand part of a Bill, and also not to require a Member to

indicate in advance a wish to speak on the clauses that are to stand part of a Bill. Can one be allowed to speak freely? Chairman, I wonder if it can be handled in this way.

CHAIRMAN (in Cantonese): I do not think I will handle it in that way. Last time, with the case of Mr Albert HO, it was because we did not specify that it was a joint debate. This time, our handling is very clear. It has been specified as a joint debate. During the joint debate, Members already spoke on the original clauses as well as clauses intended for amendment. In saying these words today, I want to let all Members know in advance that upcoming are some clauses on which there is no disagreement among Members. We will place them in one group. There are some clauses on which there is probably disagreement among you, but for which no amendments have been moved. We are going to place them in another group. Then we can understand. My purpose is to let you all understand. I made it very clear last time and I have no wish to limit your freedom of speech. I am trying my best to protect your freedom of speech. However, the Council must also need to run smoothly. When we adopt this practice, other Members are likely to think that there is no need for debate and therefore may not be prepared for the debate.

Well, does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): I now put the question to you as stated. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

CLERK (in Cantonese): Clause 2.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move amendments to clause 2(1) regarding "communication transmitted by a postal service", "copy", "data surveillance device", "device retrieval warrant", "emergency authorization", "examination", "executive authorization", "head", "interception", "listening device", "maintain", "postal service", and "public place"; to delete from the subclause the definition of "transmitted"; and to add to the subclause the definition of "postal article". The amendments have been set out in the paper circularized to Members.

Perhaps let me briefly explain each amendment. With regard to the definition of the term "copy" in the Bill, the draft version was one based on relevant provisions in the United Kingdom Regulation of Investigatory Power Act 2000. In view of the advice from certain Members, especially that from Mr Ronny TONG, we had the relevant definition simplified to mean "such copy, extract or summary of such contents". Based on the definition for the term "copy" in subclause b(i), as far as the definition of " postal article" is concerned, the addition of the said definition is made on the advice of the Legal Adviser to the Legislative Council in respect of the relevant provisions for the purpose of further clarifying the scope covered by the term "postal interception" in the Bill.

The other amendments are amendments made to the Chinese version of clause 2. They are made on the advice of the Legal Adviser to the Legislative Council with regard to the relevant Chinese version. Thank you, Madam Chairman.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MS MARGARET NG (in Cantonese): Madam Chairman, I would like to comment on the amendments just brought up by the Secretary for Security.

Madam Chairman, on the face of it, the Administration is very willing to make amendments. However, we notice that many of the amendments are very superficial, and of little help to the major issues. All in all, in many cases they are just some insignificant touchups. So, in no way can the number of amendments be indicative of the acceptance of our views by the Administration. Soon we will see that on key issues, the Administration does not accept our views.

Madam Chairman, by the way, I would like to say that, as I pointed out in my speech given during the Second Reading debate, with regard to some clauses such as on one definition, this Bill is, to put it in a nice way, very "tricky". This can be noticed by reading the text. What sorts of activities does wiretapping monitor? Under what circumstances can there be wiretapping? Instead of spelling them out in the provision, the Bill uses some definitions to define them, that is, by referring to the relevant definitions. Take "wiretapping" as example, Madam Chairman. We will come to that in due course. We noticed that not all "communications" are considered "communications", and that not every "wiretapping" is "wiretapping". However, by then, it was already not possible to bring up Committee stage amendments (CSAs).

Ms Miriam LAU said during the Second Reading debate held earlier on that we had had in-depth thorough discussions because a lot of CSAs were proposed, and that there would not have been so many amendments had the discussions been not that thorough. I would like to take this opportunity to say that if we take a closer look, it can be noticed that all the amendments are on minor issues. Our actual amendments, however, have been restrained by the Rules of Procedure.

First, what does the scope of the Bill refer to? Madam Chairman, you did bring this up to Members in your ruling. Madam Chairman, I believe that both Mr James TO and I are very co-operative. This is especially so because we do recognize that the workload of the Secretariat is very heavy. So we have tried our best to be co-operative. However, Madam Chairman, our resources are limited so are our capability and manpower. Our time is also limited. It was under very pressing circumstances that we proposed our amendments. It was, therefore, inevitable for errors and omissions to crop up from time to time. Also, when there was objection, one slight move was sufficient to affect the whole thing. We then had to do it all over again. If something is indeed left to be desired, Madam Chairman, I offer my apology to members of the Secretariat.

However, Madam Chairman, as I have pointed out just now, there has been restraint on our amendments. For instance, the target of the whole Bill is to meet the requirement of Article 30 of the Basic Law so as to give effect to Article 30 of the Basic Law. Why was the Government found to be unconstitutional by the Court? The reason was that it failed to satisfy the requirement of Article 30. We proposed amendments, and expressed the view that it was advisable to have certain areas broadened so as to be more in keeping with Article 30. However, Madam Chairman, you stated in your ruling that whether or not Article 30 was satisfied was the responsibility of the people concerned.

So, with regard to many issues, the first point to notice is this: Given the fact that only very few amendments can be brought up during the Committee stage, it cannot be certain that the clauses amended today can indeed make it possible to give effect to Article 30 of the Basic Law. We told the Secretary for Security that, as legislation has to proceed by stage, we should therefore first focus on law-enforcement officers. That what concerns the general public is to be dealt with later, the reason being that the former can be more devastating. However, even with respect to law-enforcement officers, the remedies proposed by the Government still leave much to be desired.

Another restraint on us is that the incurrence of additional public spending is not allowed. When talking about what sorts of situations were likely to incur additional public spending, the Government raised objection to matters like slightly increasing the workload or requiring the Commissioner to do a little more work. Madam Chairman, we earlier on opined that it was a big problem not to have public consultation. It is precisely for this reason. Once a Blue Bill is out, and as there is no White Bill for consultation, it is impossible for many ideas to be brought up.

We put forward many ideas particularly for clause 2 because many definitions therein are at variance with what the ordinary people would understand. The language of the whole Bill makes it impossible for us to understand what it is about. There are many points that we are unable to bring up. Madam Chairman, we will point them out later when it comes to the relevant amendments.

In his speech just delivered, the Secretary for Security said that, because of many technical problems on our part, he was unable to accept a number of our CSAs. In some cases, the Chinese wording was poor. In some cases, the

English was not all right. There were problems here and there. In length though he spoke, he only gave us a few examples. Indeed, Madam Chairman, I feel very well pleased. Try to picture this. The whole government is so big. Today, the Secretary for Justice is present. His department is so big. So is the Security Bureau. I wonder how many lawyers are working for them. We only have a few small potatoes. None of them have any legal training. All they have got is zeal, which drives them to discharge their duties in putting forward these amendments. If there are just a few errors, we are indeed very pleased.

At this stage, Madam Chairman, I am not going to object to the amendments proposed by the Secretary for Security on clause 2. However, it does not mean that we are satisfied. On the contrary, we think many are minor issues, things for window-dressing and of little importance. Thank you, Madam Chairman.

MR JAMES TO (in Cantonese): I am only going to speak on the definition of "public place".

The Government adopts the definition of "public place" given in the Summary Offences Ordinance. What is applicable in the Summary Offences Ordinance is not necessarily applicable here. Of course, it is all right for the Government to pick it up and use it if applicable. However, here, the meaning of "public place" has something to do with reasonable expectation of privacy. If "public place" in general really denotes a street, then we will not expect to have any so-called "privacy" there because one is walking on a street.

As a matter of fact, "public place" under the Summary Offences Ordinance tends to exceed what people in general expect of "public place". Take as example some lanes in certain private housing estates. So long as they are normally accessible to some people, they can become "public places". In reality, this considerably enlarges what cannot be expected of a person's so-called reasonable privacy.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MS AUDREY EU (in Cantonese): Chairman, I would like to respond to what the Secretary for Security just said in connection with the definitions in clause 2. The Secretary said that though some amendments were disallowed by the

Chairman for being outside the scope of the Bill, he still wished to explain why the Government was unable to accept them. He brought up one point in particular, which I consider to be simply ridiculous. So I have to make a response.

The Secretary made mention of the definition of "communication" under clause 2. According to him, "communication" only denotes the interception of postal items and parcels. He said that it was not possible to embrace all the other kinds of communications. He asked us to picture this. How much additional work will have to be done if other kinds of communications are included? On hearing that, I found it pathetically ridiculous. I gave it a thought. In the past I wrote a lot of letters when I knew not how to use e-mail. But nowadays when do I write letters? Everyday I receive more than 100 e-mail messages.

So, when the Government explains to the people that the Bill is for the protection of the right prescribed in Article 30 of the Basic Law, that is, protecting the people's freedom of communication, the reference is to freedom in the area of postal items and parcels but not the freedom for one to send and receive e-mail daily. Why does the Government not cover the freedom in such areas? It is out of a wish not to do so much work. If every e-mail message is to be broken into and read, then application will have to be made for every act. It is too troublesome. To avoid trouble and to stay away from so much restriction and the need for authorization, the Government keeps the definitions set in the Bill very narrow. Freedom of communication is applicable only to some means of communication that are now seldom used. Chairman, in my opinion, response has to be made to this point in particular.

Thank you, Chairman.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR LEUNG KWOK-HUNG (in Cantonese): I just went out for some business. So I do not know what you all are talking about. However, having listened for a while after coming back, I would like to present my views.

I would like to say something about the rejection of the amendments proposed by our Honourable colleagues, such as Ms Margaret NG. In my

opinion, it is not quite right to apply Article 74 of the Basic Law to make the ruling that their amendments are not admissible.

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, are you commenting on my ruling or are you speaking on the amendment moved by the Secretary for Security in respect of the definitions of the terms set out in clause 2(1)?

MR LEUNG KWOK-HUNG (in Cantonese): There is a connection between the two.

CHAIRMAN (in Cantonese): What is the connection between the two?

MR LEUNG KWOK-HUNG (in Cantonese): It is a legal concept.

CHAIRMAN (in Cantonese): Perhaps you are still a newcomer to this Council. Generally speaking, once the Chairman has made the ruling, there is no further comment on the issue concerned.

MR LEUNG KWOK-HUNG (in Cantonese): Is that so?

CHAIRMAN (in Cantonese): Yes. If you are not satisfied, you may talk to me outside the meeting. Alternatively, as you have stated in public, you have other channels, and you are considering using them. You are free to do so.

MR LEUNG KWOK-HUNG (in Cantonese): I am not quite aware of such rules. I think I am a person who calls a spade a spade. You may ……

CHAIRMAN (in Cantonese): I am telling you the rules now. Please observe the rules. All right?

MR LEUNG KWOK-HUNG (in Cantonese): You may refute what I have said right away and save me the trouble of taking the matter to the mass media ……

If a person says — of course, not the Chairman — a person says …… I ran into a person on the street today. He told me that the amendments moved by the democrats in fact went too far and, therefore, their amendments were denied by others. That fellow told me that Article 74 explicitly stipulates that it is not permissible to make the Government spend extra money. If our amendments go too far, then it is very unfair. The reason is that while other people want to enact a law in order to do a certain thing, yet we have the legislation amended to such an extent that it is completely out of shape.

In fact he said to me ……

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, sorry, I would like to tell you a fact. I made my ruling on the basis of Rule 57 of the Rules of Procedure.

MR LEUNG KWOK-HUNG (in Cantonese): I understand. However, I am not talking about you. I said I ran into ……

CHAIRMAN (in Cantonese): Just now you were talking about the mechanism……

MR LEUNG KWOK-HUNG (in Cantonese): I was repeating what the person whom I met on the street said.

CHAIRMAN (in Cantonese): My wish is for you to return to this amendment. All right? If you are to mention other persons' views on the amendment in the course of your speech on this amendment, please feel free to speak out. It is because many amendments are coming up. You may say what you have just said, but you must do that at the right time.

MR LEUNG KWOK-HUNG (in Cantonese): Understood, understood.

With regard to this amendment, I have never amended other people's matters because I do not like amending other people's matters. However, this is indeed a serious matter. Whenever there is an amendment on other people's matters, the fact is that the amendment is proposed out of a wish to keep the legislation in line with certain requirement. The Secretary for Security has heard a lot of our opinions about amending this and that. To prove his sincerity, he now puts forward 200 amendments. How many? Secretary, please say louder — it is over 180.....

CHAIRMAN (in Cantonese): Excuse me, Secretary. You should not speak when a Member is speaking.

MR LEUNG KWOK-HUNG (in Cantonese): Thank you, Chairman.

Why in fact does he propose so many amendments? I still think that he is doing that under pressure. I have talked with the Secretary for Security, telling him that it would be all right for there to be no amendment if he got enough votes. The reason is that in this world only votes count, right? Anyway, they have proposed amendments. What is the essence of their amendments? It is not what the opposition party said. It is not what the dissidents said. The point is whether or not it can satisfy the requirement of Article 30 because it is where the trouble begins. Why is there a need for legislation? It is because Mr TSANG is not in compliance with the requirement of Article 30. The Government is reprimanded because according to the Court, the Government's acts did not meet the requirement of Article 30. That is not right, so the Government goes for legislation. So, for all the amendments, both those from the Administration and those from other people, there is in fact only one goal, namely, to legislate for the protection of Hong Kong residents' freedom and privacy of communication in accordance with the requirement of Article 30. This is a prerequisite.

Well, if we say that there is more spending, or that there is more work for the Government, or that the Government's attempt to legislate is not in compliance with the requirement of Article 30, that is to say that there is no effective legal protection for Hong Kong residents' freedom and privacy of communication. It is in fact valid to say so. The reason is that there is a basis for us to sit here to legislate. That is the requirement of Article 30.

In fact, it is well stated in Article 30. The last part of the provision reads: "no department or individual may, on any grounds," — please pay attention, it says "on any grounds". That is to say, no matter what the justification is ……

CHAIRMAN (in Cantonese): Sorry, Mr LEUNG Kwok-hung. I have to interrupt you again. What you are saying now ought to be said in the resumption of the Second Reading debate. You should now speak on the amendment moved by the Secretary for Security. Just now, several members also spoke on the amendment concerned. So, please also do that.

MR LEUNG KWOK-HUNG (in Cantonese): I understand. I understand.

So, the question of whether the amendment moved by the Secretary for Security is good or bad has got to be considered from this perspective.

In my opinion, it seems that the amendment moved by the Secretary for Security has taken in many ideas. It broadens the scope. That is to say, many things will have to be destroyed. Things collected not meeting the requirement will have to be destroyed. However, we already had the problem pointed out in the course of our discussion. The reason is that the crucial point is on how to use those so-called products obtained after opening a door. To someone bent on invading others' privacy, whether or not the originals have been obtained is something immaterial. It is material only to the prosecution. For instance, it is going to be useless if nothing can be said about the source. Perhaps it is something illegally obtained. However, if it is to be used for other purposes, for example, to target a person, then it is very material.

So, as far as this point is concerned, if our Government does not seek legislation to make it possible to get information or data — whatever it is called — they may use another way to change it into another thing for them to keep it. When it is put to use, there is no more protection as Article 30 of the Basic Law no longer provides any protection against further abuse of the information obtained by law-enforcement agencies both legally or illegally. This is the key issue.

In the course of the present legislating process, we have had repeated discussions. In my opinion, so long as the Government is ready to retreat a

little and make it clear that those things will not be made use of, then there will be a broad horizon opened up before us. The Government perhaps may also insert a provision stating that in the event that those things will have to be used, the Judges will first be approached. That is to say, permission will have to be sought for those things to be used. For instance, information on this and that about "Long-hair", it becomes intelligence. We surely cannot stop that. However, when it is time to use the intelligence, a fresh application will have to be made to unseal the things. It is because the information is already on record. Is that not correct? It is more fair if there is an unsealing order.

But the Government has not done so. I wonder what the problems are in applying for an unsealing order. We think both panel Judges and Judges are trustworthy. Of course, we understand that a panel Judge and a Judge are not the same. A panel Judge is basically not a Judge. A panel Judge is not required to perform duties which a Judge performs while in Court. They are one-sided, that is, dealing with an application to wiretap a certain person. There is no way to find out the timing of the wiretapping. There is no way to defend or make claims……

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, I have been listening for a long time, but still cannot see the connection between what you said and the amendment now being moved by the Secretary for Security. With regard to what you have said, there will be relevant amendments for you to debate in due course. Please read carefully to see what the current amendment is about.

MR LEUNG KWOK-HUNG (in Cantonese): All right, let me go on. My speech is about to end.

CHAIRMAN (in Cantonese): You cannot do that because a Member's speech must keep to the topic. All Members are doing that. You should try to learn. All right?

MR LEUNG KWOK-HUNG (in Cantonese): Which part of my speech has strayed from the point?

CHAIRMAN (in Cantonese): The current amendment is to amend a number of definitions in clause 2(1). What you have said has nothing to do with that. Could you point out to me the connection between what you have said and this amendment?

MR LEUNG KWOK-HUNG (in Cantonese): What I refer to is the attitude adopted by the Government in introducing this amendment……

CHAIRMAN (in Cantonese): You are talking about another amendment. Do you understand? For every amendment proposed at the Committee stage, all Members are required to speak on the subject matter of each amendment. Surely, when speaking, a Member cannot possibly keep entirely to the subject matter of the amendment. Occasionally, they will touch on some other issues. I let Members do that. You have talked for so long, but still have not spoken on the proposed amendment.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, thank you very much for your direction. One day in the past when I was not yet a Member, I met Secretary Michael SUEN — he was not yet a Secretary then — Michael SUEN was then making a rambling speech. Even he himself was laughing, admitting that he was rambling. I do not have such an aim today. Perhaps I am ignorant, just like what you have said. Is it right? However, is it guilty for one to be ignorant? In the first place, it is certainly not so. In the second place, what a Member says may in fact be judged by the people. If you keep telling me what to say, how can I go on?

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, first of all, I have never said that you are ignorant. Second, I am not telling you what to say. I am just enforcing the Rules of Procedure.

MR LEUNG KWOK-HUNG (in Cantonese): Understood.

CHAIRMAN (in Cantonese): The Rules of Procedure clearly state that when an amendment is being discussed during the Committee stage, we should speak on

the amendment concerned. When speaking on an amendment, one might occasionally touch on some other issues. This is no problem. But now you have said nothing about the amendment under debate, instead, you have only talked about some amendments scheduled to be introduced in due course or sometime tomorrow. I cannot allow you to do this because it is unfair for me to allow you but disallow another Member to do so.

MR LEUNG KWOK-HUNG (in Cantonese): Understood.

CHAIRMAN (in Cantonese): Hence, please think it over and see what the connection is between the words you are going to say and this amendment.

MR LEUNG KWOK-HUNG (in Cantonese): No, I am not going to argue with you over this. In my opinion, in a parliamentary assembly, once a member has finished talking, that is it, right? It is very difficult for you …… Of course, I wonder if I had voted for you. Probably I did. So, I all along do follow your advice. However, my understanding is different. I think a parliamentary assembly is a place for members to present their views, right? That is to say, you may speak ……

CHAIRMAN (in Cantonese): A parliamentary assembly has rules of procedures. Mr LEUNG Kwok-hung, you have been here for almost two years. I think during the two years you should have seen how the Honourable colleagues conduct debates.

MR LEUNG KWOK-HUNG (in Cantonese): I understand.

CHAIRMAN (in Cantonese): In a parliamentary assembly, every member enjoys freedom of speech. However, it is necessary for them to speak on the contents of a motion. So, I hope you will co-operate, and speak on the amendment. If you insist on straying from the topic, then I can only remind you, and ask you not to stray from the topic. If you keep on straying from the topic, then I will have to take action. I do not want to do that. However, if you still stray from the topic, then the only option open to me is not to let you get on with your speech.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I do not want to waste your time; nor do I want to waste my time. My view is very simple. First, regardless of what a Member says here, the Chairman had better refrain from interfering as far as possible. Second, in this Council, some people also ramble. They are the officials. The officials often do not keep to the topics. However, you are unable to rule on them. I find this very unfair. If officials accept ruling, I surely will also accept ruling. Right? Many of those officials also ramble……

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, all that I do is in accordance with the Rules of Procedure. If you find fault with our Rules of Procedure, you may ask the Committee on Rules of Procedure to consider and study the matter to see if it is necessary to amend the Rules of Procedure.

MR LEUNG KWOK-HUNG (in Cantonese): Understood.

CHAIRMAN (in Cantonese): However, you cannot speak as you wish not in accordance with the Rules of Procedure before there is any amendment to the Rules of Procedure. If you keep on doing this, I will have to interrupt your speech, restrain you, or even ask you not to speak any further.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I am about to finish my speech. Here, I just want to state something. First, the Rules of Procedure are archaic, and utterly not in keeping with the needs of Hong Kong. Second, in this Council, the officials — I am just making a statement, no matter how you are going to punish me later on — have strayed from the topic again and again. However, the Chairman has not got the power to correct them. Regarding ……

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, I cannot let you go on like this. Please sit down.

MR LEUNG KWOK-HUNG (in Cantonese): This is a statement, a statement……

CHAIRMAN (in Cantonese): Please sit down.

MR LEUNG KWOK-HUNG (in Cantonese): OK, I cannot even make a statement, why should I stay here.....

CHAIRMAN (in Cantonese): Please sit down. Otherwise, I will have to ask you to leave the Chamber. Please sit down.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I really want to ask you a question. I am making a statement.....

CHAIRMAN (in Cantonese): The meeting is now suspended. I have to invite Mr LEUNG Kwok-hung to come to my office for him to calm down. I will talk with him later. I cannot conduct the meeting in this way.

5.21 pm

Meeting suspended.

5.33 pm

Committee then resumed.

MS MARGARET NG (in Cantonese): Chairman, I only want to refer to the definition of "communication" just mentioned by Ms Audrey EU.

Chairman, earlier on I said in my speech that for many matters, there have got to be definitions before it is possible to see what are really expected to be excluded. Chairman, there are many examples of this type. To make it clear to all, I would like to quote one example. Here is the example. All of us use e-mail, like what Audrey EU just said about e-mail. If someone clandestinely reads your e-mail, does that mean interception of communication? Chairman,

the answer is in the negative. Why? If that person reads your e-mail from your server, then there is no interception of your e-mail. The reason is obvious just by reading the definition of "interception".

In the first place, the interception has got to be for communication. The definition of "communication" does not cover e-mail. The definition specifies that it has got to be communication using postal service or telecommunications system. As for intercepting acts, it is defined as interception in the course of transmission. It can be noted from clause 2(4)(b) — we will come to that later — if the communication has already been received by the system under your control, then it is not regarded as being in the course of transmission. One can access your e-mail information from your server by turning on the computer. So, information on the server is no longer in the course of transmission. In the event that someone is bugging your server, all the definitions, when considered together, will lead to such a conclusion.

According to clause 2(4) of the Bill, "a communication transmitted……is not regarded as being in the course of the transmission …… whether or not he has actually read or listened to the contents of the communication". So, Chairman, after reading these provisions, you will then understand why we are still "in the clouds" or "in the mist" after deliberating for 130 hours. Chairman, given that everyone can draw the conclusion only by placing various definitions together, then they will have the impression that e-mail also comes under interception of communications. In reality, this is wrong. This is very crucial. To intercept communications, applications have to be made to panel judges. If there is no interception of communications, then the next question to ask is whether or not there is any covert surveillance. If there is not even any covert surveillance, then it is a completely easy situation, one that is totally at the mercy of the Government.

So, if we want to protect our e-mail or that of the general public, the outcome is going to be a proposal for amendment. This has something to do with the definition of covert surveillance. The inference is that one definition leads to another definition. Why is it so important not to be treated as interception of communications? When we eventually come to Type 1 and Type 2 surveillance activities, we will be able to see that it is for reason of greater independence of panel Judges that cases are required to be submitted to panel Judges. The hope is for them to be more objective.

Chairman, I just want to add this point to show to Members that even though I earlier on said that the Bill is "tricky," in fact, in view of the definition, it is not "tricky" but is cunning. I myself have to make the correction. Thank you, Chairman.

MR RONNY TONG (in Cantonese): Chairman, I also would like to elucidate on the same subject.

In the first place, I would like to give an explanation to clarify our stand on this Bill and to account for the adoption of the said stand. In the second place, I also have to point out that we did propose a number of amendments, which, however, were turned down by you, Chairman. At present, I am not calling into question your rejection of the amendments. However, I would like to explain the reason why we put forward those amendments. If these amendments are not allowed or if they are not incorporated into the Bill because they are rejected, there is no justification for us to give our support. Why? Chairman, the fundamental requirement in respect of the interception of communications or covert surveillance is in fact in the area of definition.

The definition of "communication" covers two areas. The first one is postal delivery. The second one is electronic communications. On postal delivery, we have just heard that the definition is limited to the Government's postal service, that is, the definition of postal service. As I have stated just now, it is confined to the Government's postal service. The reason is that their reference is to the postal service under the Post Office Ordinance. In other words, all other communications are not covered. For instance, if we "pass notes" in the Legislative Council, the note that I pass to LEE Wing-tat is not covered.

Chairman, not only is "passing notes" in the Legislative Council not included, most of the companies in the Central District, especially law firms, I am sure, usually do not make use of the Government's postal service, they all use messenger service instead. But sorry, messenger service is not included in this Ordinance. The reason is that it is not communication; nor is "passing notes"; nor is messenger service; nor is courier service. That is to say, nor is DHL because it is not government postal service. Therefore, under this Ordinance, all communications are not regarded as communications. What is the result then? It would be sheer "jungle law" to intercept those communications.

Application has to be made to Court only for interception of postal communications, that is, the kind which people put a stamp on and go through the Government's postal service. Sorry, nowadays, to be honest, very few people use stamps to mail things because there are many other forms of communications available.

As these communications are not covered, then I wonder if they constitute acts of covert surveillance. This Ordinance does not define "surveillance". There is definition only for "covert surveillance". However, the definition of "covert surveillance", irrespective of the way in which it is construed, does not seem to be able to cover interception of communications. It is because they are two things. "Covert surveillance" is covert surveillance. "Interception of communications" is interception of communications. Under such circumstances, does it mean that it is just anarchic "jungle law", without any legal regulation for law-enforcement officers to intercept notes passed, or communications delivered by couriers or messengers? How can it happen? Let us again refer to the worthless Basic Law. There is no stipulation saying that for communications, there is only protection for postal communications. Its Article 30 does not say so. Its reference is to all communications. How come that the other communications are not under protection? This is a very big loophole.

In the second place, as stated earlier on by Ms Audrey EU and Ms Margaret NG, how about electronic communications? Regarding electronic communications, Margaret NG has just explained. According to clause 2(4)(b), a communication already received by the server is regarded as having completed the process of transmission, whether or not it has actually been read or listened to. In the case of a person communicating by e-mail, when such an e-mail message reaches the server, that is, your account, the process of transmission is completed. If I can access the account by just hitting a button during that 0.1 second, then it is necessary to apply to the Judge in order to be able to carry out the interception during such a short interval. Following their transmission to the account, it is possible that the e-mail messages are read only a day or two later. That period of time is also not considered to be part of the process of transmission. Someone might use a device to carry out interception during that period of time. In the Ordinance, for the time being, I can see no reason why there is an absolute absence of regulating provisions. As I have stated just now, "interception" and "surveillance" are two different things. Yet, there is no definition for "surveillance". Only "covert surveillance" has a definition. In

written language, "covert surveillance" should not cover interception of communications. Under such circumstances, it is very likely for law-enforcement officers intercepting telecommunications to find themselves in a state of "jungle law".

The question that I want to raise is this: why is there such a great contradiction? Is the loophole intentional or unintentional? If it is unintentional, I wonder why the Government insists on making no amendments, and the Members are thus being forced to propose amendments themselves even though so much time or a period of so many months has gone by since we made the request when examining the Bill? Amendments proposed by the Members are subject to ruling by the President. The President's ruling is based on the President's interpretation of the purpose of the Bill. If the President's ruling is that we cannot propose such an amendment, we cannot appeal against it. For the Government to propose an amendment is the sole approach that is reasonable and respectful of human rights. However, the Government refuses to do so. What should we do then?

Is this Bill as worthless as our Basic Law? Where is the protection that it offers? Chairman, with other clauses yet to be examined, we have already found the mistakes and omissions in the Ordinance flabbergasting.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR JAMES TO (in Cantonese): Chairman, in brief, we are talking about interception. Interception involves intercepting acts. However, I am going to speak mainly on interception. In fact, every piece of legislation ought to be in keeping with common sense. According to common sense, an e-mail message intercepted within the 0.1 second or 1 second prior to its opening cannot be regarded as an interception of communication. Once the e-mail message has reached the server, any interception effected before it is opened by the intended recipient constitutes covert surveillance. The gadget used is a data surveillance device. Why is it known as a data surveillance device? In fact, it is something storing some data, which can be some viruses or commands. Ultimately, it may enable the computer to access that piece of e-mail for transmission to the police. This amounts to an interception of e-mail. The device is known as a data surveillance device.

Although these are different things taking place in one single second, no one will object if the same yardstick is applied. Now it is not like that. Interception of communications can only be conducted on serious crimes punishable by a maximum imprisonment of seven years. In the case of covert surveillance, whether it be Type 1 or Type 2, the offences involved are punishable by not more than three years' imprisonment. Moreover, the considerations pertinent to each of the concepts as a whole are different. If the matter has an element of exigency, it is hard to effect any differentiation. Differentiation can only be made from a technical standpoint. A lower threshold is then set for one of the types. In my opinion, it is unfair for the Government to deal with an amendment, that is, a piece of legislation, in this way.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If no other Member wishes to speak, Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the amendments proposed by us have already adequately taken into consideration the deliberation of the Bills Committee. With regard to the issues just raised by several Members, I would like to respond briefly.

Regarding the definition of "public place" raised by Mr James TO, we have already made the stipulation that the places concerned do not include premises like lavatories or changing rooms. As for the so-called e-mail issue raised by Ms Audrey EU, as I pointed out in my speech delivered earlier on, our Bill targets the interception of e-mail or telecommunication in the course of transmission. This definition is one made with reference to the definitions in relevant legislation in the United Kingdom and Australia. If we broaden the scope in the manner proposed by Ms Margaret NG, we will run into considerable difficulty. However, it does not mean that there is no protection for telecommunications or postal items already delivered.

As I pointed out in my earlier speech, if the transmission of the communication concerned is already completed, for example, the recipient has already received the letter, or the e-mail has already reached the server, that does not mean that we may hack into another person's computer to intercept communications. This is not permissible. How is our current practice? We have to apply to the Court for a search warrant. That is to say, it is not without any protection. If the communication has already reached the recipient's home or the server, it does not mean that the law-enforcement officers may hack into his computer to intercept the communication. This is not permissible. It is necessary to apply to the Court for a search warrant. In our opinion, it is not necessary to resort to so-called covert surveillance or covert interception to access the communications concerned. We will openly apply to the Court. So, there is protection. It is not without protection.

Madam Chairman, I have finished speaking.

MR RONNY TONG (in Cantonese): Chairman, I do not understand what the Secretary for Security is talking about. As a matter of fact, the Secretary already said these words while we were examining the Bill. However, never has he made any response to our worries. According to what the Secretary has just said, it is necessary to apply to the Court for a warrant. Which part of any ordinance has such a provision?

CHAIRMAN (in Cantonese): That comes under another ordinance.

MR RONNY TONG (in Cantonese): There is, however, no such stipulation in this Ordinance. That is to say, it is not necessarily possible for this Ordinance to link up with other legislation. I wonder what the Judge is to say when there is a problem. The Judge will say that this Ordinance is to regulate the interception of communications, and that to search someone's residence is a search to be conducted on a residence, not an interception of communications. So, an interception of communications ought to be regulated by this Ordinance. The point is that whilst there is no such stipulation in this Ordinance, but another piece of legislation may not be applicable. This is the first point. Secondly, with regard to electronic communications, I have never learned that the Government will apply to the Court in order to hack into someone's account.

Just now the Secretary mentioned applying to the Court for a warrant, but that is for entering a house to conduct a search. However, we are now talking about the interception of electronic communications. Moreover, as mentioned by me earlier on, what about communications other than those carried by postal service, such as "passing notes" and by courier service? Five months have gone by, why is the Secretary still not prepared to make an appropriate clarification for these issues after hearing so much from us?

MR JAMES TO (in Cantonese): Chairman, I find the Secretary for Security's reply very shaky.

Chairman, the main reason is that communication by telephone is finished at the split of a second. That is to say, once I finish talking, there is silence. There is no sound, for example, no more sound when the remark is finished. However, e-mail can be kept permanently in a certain mode — for example it can be stored in the electronic mode of 1010. However, since the time when EDISON invented gramophone and telephone to the present time, development has led to new forms of technology. On the basis of such a concept, there is no justification to regard surveillance on communications in the course of transmission as interception of communications whilst communications already delivered to the accounts, with which data surveillance device — in fact the Chinese name of data surveillance device is very misleading because it in reality denotes a device or programme even though it is known as data surveillance device. That's to say, it includes hacking. Even at the briefing session, the Government also admitted that the stealing of information by hackers is included too.

In other words, all subsequent thresholds will likewise be lowered. In future, what can bring law-enforcement agencies to the foolish act of intercepting e-mail? What will they merely do? That is going to be covert surveillance by data surveillance device — it is indeed very complicated — because the minimum punishment for such an act is low. If this is to be applied to reporters, then there is going to be an even bigger issue. Why?

Try to picture this. If the Government is to conduct a search on newspaper offices in great fanfare, it will turn out to be a big issue. Criticism will be aroused, and it will make newspaper headlines too. If the Government resorts to covert surveillance, and if it is able to identify the e-mail addresses

specifically feeding reporters with information, then it is possible to hack into them with a data surveillance device. What is more, these are not going to be offences punishable by more than seven years' imprisonment. Is this right? Hence, the entire provision is totally unable to be in keeping with the point of lower or higher intrusiveness as the Secretary for Security said. There is lower intrusiveness in some cases, but higher intrusiveness in other cases. On this issue, given that the difference in punishment is between seven years and three years, the line between interception of communications and covert surveillance will become incredibly thin. Yet basically, their intrusiveness is very high.

I wonder what the difference is between interception in the course of transmission and the Government making intrusion into someone's e-mail to access the contents or giving commands for the contents to be delivered to its own account. There is absolutely no difference. I do not understand why the Government must make such an artificial classification on this issue. In truth, the Government's ultimate goal is to intercept e-mail — no, not to intercept e-mail, I should say just to access the contents of other people's e-mail on a lower threshold.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR LEUNG KWOK-HUNG (in Cantonese): I also remember that discussion — not till now do I remember — the point is that if the definition of communication is like this, then there is no need to apply for permission to send a mole to the office of DHL. The reason is that it is neither communication nor covert surveillance. If the entire section of DHL in the Central District were "taken over", then did it mean that even the Chief Executive was put under surveillance? This is an obvious loophole. The query I raised at that time was left unsettled. So far there is still no amendment, and I have been unaware of this.

Secondly, regarding postal service, this is a piece of legislation set in the past. Even the Postmaster General has got to be co-operative. So, it is basically superfluous. Therefore, the Ordinance in fact cannot protect Hong Kong residents' freedom and privacy of communication in accordance with Article 30 of the Basic Law. For a piece of legislation not in keeping with the requirement of Article 30, there can only be two considerations. The first is to

make revisions until it can do it. A responsible government certainly ought to do so. If the Government makes no amendment, and yet amendments proposed by others are not allowed, then it simply forces people to reject the Bill introduced by the Government. Is this correct? It is because this is the only way.

Therefore, I, wonder why the Government cannot be on good terms with the people. Right up to this moment, I still do not understand. In fact I am also a victim. My computer is often hacked. For some time my computer was manipulated. Some of the information stored was gone. I made a report to the police, but the police said that nothing could be traced. I do not even know whether it was the police who did that. The fact is, as Mr James TO has stated, if the threshold is so low, it is possible to conduct daily surveillance on me. Here is the problem. In the past, it was a big issue to seize from newspaper offices information on somebody or so-called products or information already transmitted. Once there was a mention of applying for a search warrant to get into a newspaper office, the community would be alarmed.

On one occasion, after my confrontation with the police on 29 September 1989, the police immediately applied for a search warrant to seize from others all the videos and photographs they had taken. The impact was very great at that time. However, there is now no need to do so. All that is required is to tamper with reporters' e-mail accounts. This is in fact very obvious. Because of the legislation this time, the Government can take advantage of the opportunity offered by the process of legislation to put in some "C stuff" that we do not want, that is, something that Hong Kong people do not want to see. On this, I think the Government has not discharged its duty in drawing up legislation in accordance with Article 30 as directed by the Court.

Therefore, I am of the view that the Government should make some amendments to the Bill. If it refuses to make any amendments whereas those amendments proposed by others are not allowed, then the ultimate outcome is that according to the entire piece of legislation — it is because once it is enacted, Hong Kong residents' freedom of communication and privacy of communication are, paradoxically, going to be lawfully infringed upon by the Government. This is indeed tragic.

As one who has initiated a lawsuit to get the Government to draw up legislation, I really have no alternative but to express my views here. Originally I asked the Government to admit its fault but the Government refused

to do so. There is in fact a reason for that. The Government thinks that, by bringing in this piece of legislation, it can continue with the unconstitutional activities it has been doing all the time — though not all activities are so, most of them are — without observing the spirit of Article 30. I find it lamentable. My wish is for other people to understand that the present state of affairs is an outcome attributable to the fact that the Government still makes no amendment even though we have been discussing the matter for many hours — I did not spend much time discussing it, but I think others did.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I would like to reiterate one point. It is against the law to hack into someone's computer to peep at the data from someone's server. No one, not even members of the disciplined services, may do that. So a law-enforcement officer wishing to examine e-mail messages on someone's server has got to apply to the Court for a search warrant in order to seize officially the person's server for inspection. That is to say, unlike what Mr James TO said, it is not possible to take a peep by means of some electronic device.

MR JAMES TO (in Cantonese): Chairman, what Secretary Ambrose LEE just said was under discussion for two or three hours during the 100-odd hours we spent on the Bill. However, it has never been brought up by the Permanent Secretary for Security. Nor has it ever been refuted. I wonder how the matter all of a sudden came to the notice of the Secretary. The reason is that at the meetings, on several occasions I cited data surveillance device as an example, covering the scenario of breaking into a certain computer to give commands for the transmission of some information to certain specified destinations. He never said a word in refutation.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MS EMILY LAU (in Cantonese): Chairman, if the Secretary for Security says so, we have got to believe him. The reason is that even though Members have the worry that such thing might happen, the Secretary is still not prepared to amend the Bill.

Just now I browsed through the Code of Practice, which makes no mention of this. As Members are so worried — the Secretary has made it very clear that no attempt whatsoever will be made to steal and read the people's e-mail — the Secretary should at least undertake to specify this in the Code of Practice so as to let all law-enforcement officers know that it is not permissible to do that. Communications in the course of transmission are, of course, subject to this Ordinance. But it is not permissible to seize e-mail already transmitted and yet still left on the server, unless an application has been made to the Court for a search warrant. It is my belief that if the Secretary agrees to make it clear and have this specified in the Code of Practice, we are going to feel somewhat assured.

Thank you, Chairman.

MR JAMES TO (in Cantonese) Secretary, you probably do not have enough time to propose a CSA today. I hope he can review carefully in the forthcoming review. Why? It is because according to a legal analysis of what the Secretary has just said, it is absolutely wrong. The reason is that "covert surveillance" mentioned here denotes obtaining certain information by using certain device. Not specified here is the question of which provision is to prevail in the event that this Bill is in conflict with other legislation. Or, in the language we use, which provision will be given consideration first? Never has this been discussed. Even when I had discussions with members of your Bureau in the past, they also expressed reservation. The point is that at present there is probably no such device or even such practice available. But is it possible to have that in the future? This remains unsettled. So, as Emily LAU has stated, if there is not enough time to propose an amendment, it is still hoped that there can be an arrangement made soon for it to be specified in the Code of Practice as the Secretary's instruction. It is hoped that the Secretary can tell them that this is something strictly prohibited.

MR RONNY TONG (in Cantonese): I do not quite agree with Ms Emily LAU's suggestion because we have not discussed this issue at the Bills Committee which examines the Bill. I can think of a lot of contradictions involved.

Firstly, the Code of Practice is not a piece of subsidiary legislation. If there is no mention in the principal ordinance, I wonder if it is possible for the Code of Practice to make such a request. This is the first point. Secondly, although the Secretary has already stood up twice, he has yet to respond to the point I just raised with regard to another loophole, that is, the one concerning transmission by means of courier service, passing notes or a messenger. There is still no reply from him, Chairman. I wonder how he is to handle under those circumstances. Does he also admit that before it is permissible to intercept those communications, it is necessary to go to Court to apply to a Judge for the issue of a warrant? If the answer is in the affirmative, then I wonder why it is necessary to give those communications stricter treatment while in the case of these communications, it is good enough to entrust them to Judges appointed by the Chief Executive. Why is it necessary to use different methods in dealing with communications? Why is it stricter for some and more lenient for others? What are the reasons?

What we are talking now are only about communications. According to logic, there is no need to have communications "chopped up" into so many pieces, and treat this type of communications in this way and that type of communications in another way; or to apply to a Judge in the case of this type of communications, but to apply to a panel Judge or obtain authorization from the supervisor of the law-enforcement officer in the case of other types of communications. Why take such an approach? Does Article 30 of the Basic Law say that communications can be treated in dozens of different ways? To stand up to discuss these contradictions just at the Third Reading of the Bill simply cannot work. This is something impossible. Over the last five months, we have been working hard day and night to address this problem. Why was this issue not brought up for discussion sooner? How come that only at the last moment did the Secretary stand up and say that application had to be made to the Court? This is totally not acceptable.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I have said all I want to say.

MR LEUNG KWOK-HUNG (in Cantonese): Given that the Secretary twice stated that in order to do so, it is necessary to make an application to the Court, I wonder if the Secretary can tell us how many applications there were in the past. Secretary, please let us know how many applications of this type had been made in the past. Has it ever been done? I do not quite believe the Secretary. So it is better for him to talk about this.

MR LEE WING-TAT (in Cantonese): Chairman, I am not a member of the Bills Committee. Having heard the replies just given by the Secretary, I really find them not very satisfactory. It does not matter whether or not the Secretary agrees with the analysis made by the Bills Committee, he must still answer the queries raised.

What Mr Ronny TONG brought up is a legitimate question. The Secretary may disagree with the analysis made by Mr Ronny TONG. However, in a parliamentary assembly, the Secretary is required to respect not just Mr Ronny TONG, Mr LEE Wing-tat, the Democratic Party and the Civic Party, but the whole parliamentary assembly. The Secretary must give a reply so long as the question is legitimate, even though he may disagree.

The question raised by Mr Ronny TONG is very simple. I have already heard it twice. It is whether or not "communications" would include communications between persons, and those delivered by private companies such as courier services like DHL, as well as those communications between parties other than companies. The Secretary has got to let this Council have his reply. He cannot say that he has already replied to every thing. Surely, enough votes have already been acquired for the Bill to go through. However, if the Secretary does not even answer legitimate questions, the Government's image will look very bad indeed.

Chairman, though I am not a member of the Bills Committee, I still feel very disturbed on hearing that. The Secretary may disagree with the analysis

made, but he cannot refuse to answer questions. What is more, Mr Ronny TONG has stated the question three times.

Thank you, Chairman.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR MARTIN LEE (in Cantonese): In fact, this is very easy. If the Government does not know how to reply, then it can just say so.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you still have anything to add?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, regarding the matter raised by Mr Ronny TONG, in fact I have already touched on that in the main speech I delivered earlier. I have also stated that if the scope of the definition of the term "communication" is to be widened in the manner recommended by Ms Margaret NG, it is going to result in a lot of practical difficulties. Earlier on I also cited a few examples. If "passing notes" was to be regarded as communication, then how about gestures and glances? Or how about a referee showing a red card? I have said earlier that there will be practical difficulties. Madam Chairman, I have nothing to add.

MS MARGARET NG (in Cantonese): Chairman, today's debate in fact serves a very important function because of its ability to convey the message, telling those working and living here that there is no protection for communications entrusted to courier service companies for express deliveries. These communications may be intercepted by the authorities. They are totally beyond the scope covered by this Bill. So, "If you are at ease, then just do it." If you are prepared to let your business secrets be intercepted by the Government at any

time, then please hire those services. I wonder how these courier service companies are to account for that to their clients. In addition, how are we to ensure that it is safe in the case of e-mail? Then we probably have to think it over. People may think that e-mail is also one type of communications, and that they have every reason to feel safe because it is, as understood, necessary to apply to a Judge in order to intercept communications. In reality, it is not so.

Chairman, now the Secretary has been rendered speechless. Everybody can see that. It is hoped that this Council, in having today's debate, is at least doing one thing, namely, making it possible for our residents and businessmen to know clearly how far their rights and privileges can go. Thank you.

MR RONNY TONG (in Cantonese): When I spoke earlier on, I did not respond to the examples cited by the Secretary in the main speech just delivered by him because I respected his intelligence. Regrettably, he does not respect our intelligence. At present, the Basic Law is talking about covert communications, not open communications. Never have I learned of a way to intercept glances of the eyes *(laughter)* or a way to intercept the waving of hands *(laughter)*. Sorry, I can think of nothing for the time being. Earlier on I did not respond because I respected the Secretary's intelligence. It is my hope that he also respects Members' intelligence and does not reply to my query by citing such examples.

MR JAMES TO (in Cantonese): Chairman, as a matter of fact, it is the Government's duty to get a piece of legislation properly prepared. It is, of course, so much the better if the Members can do their very best and have the legislation properly amended. The amendments now proposed by Members have previously been brought up at the Bills Committee. If the Government finds that a certain idea is not entirely workable, or that not the whole idea ought to be subject to control but only part of it ought to be subject to control, then it is the Government's responsibility to incorporate into its amendments the part that ought to be put under control. What the Secretary just said is, in plain words, somewhat like someone stamping his foot, only pointing out the possible inadequacies in Members' amendments. However, the attacks and criticisms made by him in such a manner contribute nothing to the matter. Secretary, the Government has a lot of talent and resources, and, therefore, a greater responsibility to also care for the forms of transmission not covered by postal service which are referred to by some Members.

In the Bills Committee, I quoted the example of carrier pigeons. Are you intercepting communication if you intercept my pigeon when the bird is flying around? The pigeon itself is a form of communication, right? Examples like that are in fact numerous. With regard to some methods which we believe people usually use — relatively speaking, ordinary people do not use carrier pigeons — people in the Central District, however, all use express service like DX, this is quite common. If the issues that we bring up are precisely those that the Government has got to deal with, then the Government must deal with them in that part.

By the way, Mr LEUNG Kwok-hung is indeed very smart. The reason is that the anti-drug trafficking office of Miami did set up a telephone company for about 10 years, pretending to be offering cheap services. In this way, quite a few grass-roots drug traffickers were attracted to use its services. As a result, the said office did not even have to intercept communications as it could see through the whole company.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR MARTIN LEE (in Cantonese): Madam Chairman, in view of the reference to "red card" and "yellow card", I really find the Government very cheap because we are now talking about something very serious. If the Government finds it necessary to protect e-mail, then just go ahead. The Government should not say that it is going to be very troublesome because of the need to do additional work. It is because the Government, on the other hand, does not find it troublesome to do wiretapping. There is wiretapping for all sorts of things. In fact, that is also very troublesome. Why are the authorities doing that? When we ask the Government to provide protection, the Government simply says it is not going to provide protection because it is troublesome. How can it be so irresponsible? In my opinion, the Government is indeed very cheap, not knowing how to debate but still pressing on unconvincingly, and hastily too.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I would like to clarify a few points. Ms Margaret NG just now mentioned one point, saying that all businessmen in Hong Kong had to be careful because of the lack of protection for courier services.

If Members recall, when delivering my main speech more than an hour ago, I said these words: On intercepting communications transmitted by courier service, our current practice is to apply for a search warrant from the Court. This move is more open and less intrusive. We fail to see why there is any need to resort to carrying out covert surveillance which is more intrusive when dealing with this kind of communications. In addition, we are not aware of an exact definition for communications transmitted by courier service, such as whether it would also include communications between friends.

We are not saying that there is no protection for such communications. There is protection, Madam Chairman. As I have stated earlier on, there is protection even for communications on servers.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, even if what Secretary LEE has said is right, he is just swapping ideas. Why is it now necessary for him to apply to the Court? I do not know. I do not know why he has to apply. However, what we are discussing now is that if the Bill proposed by the Secretary is passed, he will have a threshold to get in.

In the future, when I am having a lawsuit against him, he will show me this provision, and say, are these circumstances included? The logic is so simple, still do not get it? In other words, if he caught me in the past, when legislation had yet to be drawn up, I was still able to wage a lawsuit. Once the legislation is enacted, when I take him to Court in the future, seeking to know why the Security Bureau is able to make an interception when a T-shirt is delivered to me by DHL, he may say that the law is like that, that there is no need for him to apply to the Court, and that he has the power to do so. Then the Judge will rule in his favour.

This is an important issue. If we pass the legislation, I wonder if he considers it to be insignificant. Is he doing that now? I do not know. In a bid to find out whether the practice is already like that now, I have again and again put the question to him, asking for data right away. There has been no reply from him. However, from now on he can do that.

He must understand that he has to persuade all Members to give him support and vote in his favour so as to give him such authority. Does he know that? To say it bluntly, in future, as I said earlier on, when things are being delivered by DHL, it is likely for someone to punch the courier, knock him unconscious and take away the things. It is also likely to casually steal things which belong to others. It is, however, not right to do so.

May I ask the Secretary again, if the scenarios we have just described really take place, will he still apply to the Court for a search warrant? Will he be that stupid? I do not think he will. In the course of this debate, we have time and again heard from law-enforcement departments the view that it is necessary to strike a balance in the legislation because procedures that are too complicated tend to obstruct the crackdown on crimes. It is now balanced. According to the legislation, there is no need to apply to the Court in certain situations. The Secretary is now telling me that he will not apply even if there are going to be such situations in the future. This is tantamount to telling me that as there is already e-mail, it is ridiculous to use carrier pigeon again. This does not make any sense.

Therefore, in my opinion, he is trying to deceive us with his words. I put the question to the Secretary again. Say, if DHL is providing courier service or if I am passing a note to others, under the legislation now amended by you, is he required to apply for a search warrant before making interception? Is it necessary for him to apply to the Court? Is it necessary? He just has to answer this question.

MR JAMES TO (in Cantonese): The examples cited by Mr LEUNG Kwok-hung are not appropriate because it is a criminal offence to knock a person unconscious or to steal information. If there is not even authorization, it is just against the law. However, ways are open to the authorities. If the setting is

an office, then it is possible for you to picture him doing this and that. However, we have to remember this, front-line officers wishing to get a search warrant cannot use the search warrant for gathering intelligence. It is only for the collection of evidence. Rules governing the application for search warrants are very clear. That is an advanced stage. That is to say, only in a more mature or later phase can a warrant be used to target a certain offence so as to take away the letters concerned. Otherwise, it is theft.

What should be done if law-enforcement officers think that there is some information of intelligence value? It is very simple. Just "putting up a show" or by carrying out a so-called "infiltration operation". Get a few colleagues to pose as couriers. However, they are not to steal or take away things. Instead, they are to read the contents whenever there is a chance. The reason is that it is not against the law to take a look. It is okay to do everything so long as it is not against the law. Then why should he apply? What is more, it is not possible to make an application at a certain stage of the investigation, is it not? The question now is that we have to prevent this sort of things from happening.

MS MARGARET NG (in Cantonese): Chairman, it is not my wish to protract the debate. However, I must point out that to apply to the Court for a search warrant is no secret. For instance, when I want to intercept a private courier service company's postal items or articles, I will apply to the Court for a search warrant. Then, holding a search warrant, I will proceed to conduct the search in the manner of one searching a house. The process is open. The authorities will do so when looking for a certain document for use as evidence. However, for one wishing to put the information back after secretly reading the information without allowing the other party to be aware of the interception of information, it is absolutely useless to apply for a search warrant. Therfore, Chairman, the Secretary has been talking nonsense. I think it is necessary to point this out.

CHAIRMAN (in Cantonese): Secretary, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I think we have been repeating ourselves. I am not going to speak further.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the amendment passed.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move an amendment to amend the definition of "covert surveillance" in clause 2(1) as set out in the paper circularized to Members.

In the Bills Committee, Members made detailed discussion on the definition of "covert surveillance" and put forward many views, particularly on the scope of covert surveillance. Members especially made in-depth discussion on the reference to the term "systematic" in the original definition. The authorities explained at the meeting that the inclusion of the term was to exclude immediate response to operational circumstances, and it was considered that the term reflected correctly the relevant intention. Nevertheless, to address Members' concern, we have agreed to delete the term "systematic" in the relevant definition and, at the same time, amend the said clause to the effect that "covert surveillance" does not include any reaction to unforeseen events or circumstances, and any such surveillance to the extent that it constitutes interception under the Bill.

Thank you, Madam Chairman.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MS MARGARET NG (in Cantonese): Chairman, I have proposed an amendment in respect of the definition of "covert surveillance", but my amendment has been vetoed by the Chairman pursuant to the Rules of Procedure. We do not oppose the deletion of the term "systematic" as proposed by the department as we feel that there is a need for doing so. However, this is far from being enough.

We have made detailed discussions in the Bills Committee. Covert surveillance requires devices, that is to say, if an undercover agent is not using any special device — "special device" has a definition too. Chairman, perhaps you think that you know what special device is, but actually you might not. Serious effort and careful scrutiny have to be made and it is necessary to read all these documents as well as some other documents. In any case, we are of the opinion that if the term "undercover agents" is not included in the provisions, it will be like employing a private secretary who makes a note of all documents and telephone numbers of his employer that he comes across when he should actually work with confidentiality. Everybody will consider this to be covert surveillance but this is not included in the Bill.

The reason that we propose that covert surveillance must have a definition is mainly because of its intrusiveness as this sort of operation infringes upon people's privacy. I am not saying that you are just being tracked on the streets. You are not simply tracked by a policeman, rather, an undercover agent is sent to the place where you live, or, all information of your company comes under my eyes. I can send out secret reports every day. This is not regarded as covert surveillance. This is not regarded as something highly intrusive. It has even been said that this is of low intrusiveness. It would not be regarded as covert surveillance if no device is used. I feel that in any case, this is unacceptable to the public. Therefore, the Bill basically does not provide any protection in many aspects.

Chairman, I would like to make some response. We also request that paragraph (a)(i) of "covert surveillance" be deleted. The question is what is considered as covert surveillance. The Bill stipulates, "..... where any person who is the subject of the surveillance is entitled to a reasonable expectation of privacy". Therefore, it is undoubtedly not covert surveillance if there is no device and it does not fall within the scope of the Bill at all. However, it is not covert surveillance either if it is considered that you do not have any reasonable expectation — Chairman, when we come to subclause (2) in a while later, we are

going to have a detailed discussion on this issue — this will make members of the public feel that there is no guarantee, although the Secretary said firmly earlier that this was what the whole world relied on for making a judgement. However, when a member of the public wishes to know whether he is protected under the Ordinance, he has to seek legal advice in order to ensure that the legal advice that the law-enforcement officers have got on "whether there is entitlement to a reasonable expectation" is the same as his. Otherwise, there is again no protection.

Chairman, I do not want to give a detailed account here. I just want to reply briefly to the Secretary. The Secretary has indicated that if our residences are close to one another — we are not living in houses at the Peak, in Stanley or in a resort area, where houses are so distantly spaced that we cannot see one another at all. For the ordinary buildings in Hong Kong, the residences of members of the public are very closely packed — is it covert surveillance if a neighbour looks at us? Of course it is not. Let us look again at the definition of covert surveillance. Paragraph (a)(ii) states, "…… the surveillance is carried out in a manner calculated to ensure that the person is unaware that the surveillance is or may be taking place" — this is truly topnotch Chinese — in brief, it is a deliberate look at the neighbour, made not for the reason that the rice the old lady over there has cooked smells good, but made to find out what she is eating. It is not made just once or twice accidentally but made deliberately and stealthily, so that the other person does not know that you are keeping a stealthy watch on him. It is only thus that it is regarded as covert surveillance. Why does the Secretary insist on the inclusion of "reasonable expectation"? What is the purpose of making such duplication and complication? The reason for making such duplication and complication is to allow law-enforcement officers to explain that this is not covert surveillance. Therefore, application for authorization ought to be made for these "non" cases. Chairman, this is the reason why we say that the Bill basically does not protect the privacy and freedom of communication of the public.

Thank you.

MR JAMES TO (in Cantonese): Chairman, I am not going to repeat what Ms Margaret NG has just said. I agree to what she has said. The only thing I wish to speak a little more about is especially for the Secretary for Justice, who happens to be here, because Article 30 of the Basic Law is about the protection of the freedom and privacy of communication of Hong Kong residents by law.

We have learned just now, and as we keep learning we are getting more aware that actually the "covert surveillance" that we are now talking about refers to covert surveillance carried out with the use of devices, which means the infringement upon the freedom of communication of other people with the use of devices. However, Article 30 of the Basic Law does not stipulate the use of devices. Therefore, if it is only under the conditions that Ms Margaret NG has just mentioned — or perhaps there are more examples — that it is regarded as an infringement upon the freedom of communication of a target, no regulation is provided by the existing laws of Hong Kong. Nor is there any legal framework. If we refer to the several authoritative cases cited by the Court of Final Appeal, basically there is a vacuum at the present moment. In other words, it is as indicated by the Kwong Hing case or the CHAN Kau-tai case — in the CHAN Kau-tai case, photographs were taken from over the head of the person concerned. This is a proven fact. I am not going to dwell on it because this is a fact and I will not bother about it even if there is a retrial.

What we are talking about here is the use of devices. For the same case, if a device is installed over the head of somebody, the surroundings or the person who disguises as his secretary or a cleaning maid or chap can be seen through a hole. I see Emily LAU — it scares me. There must be a balance — the freedom of the person concerned is still infringed upon under such condition. As the Secretary has said, we may have to tell what we have been infringed upon when it is necessary to present something in Court in future. Is a legal framework still there if the situation is such that no device is used? For the undercover agents that we normally talk about, if he has to violate the law, that is, to disguise as a triad member, can the Secretary grant him an exemption that only allows him to fight other people but not to break their heads? If his "Big Brother" asks him to kill somebody, he must not do so but must retreat. These rules are a must, but can these rules be truly proportional, have the necessary authorization and objectivity and be handled with discipline? Is this protection sufficient? We have a vacuum for this.

Therefore, if the relevant provisions are passed and there are similar cases which do not involve the use of devices, those challenges will still be there. What is being said today is heard not only by the Secretary for Justice but the Secretary for Security as well. If unfortunately, what I am saying is right, and such a case suddenly comes up several months later and it is not until then that it is found that the Ordinance does not work, both of you will have to bear the political consequences.

We might not be aware of such circumstances earlier. I did not mention the point of undercover agents even in 1997. But today, I want to make this point for record. If in future our front-line officers put on all sorts of disguise — actually it is a lot of hard work and danger to be undercover agents — they go to the most dangerous places to obtain information, but it is eventually found that the information is not admissible in Court. They are even condemned by the Judge for having done something unconstitutional, simply because our Secretary does not enact legislation in this area after listening to our debate today. Not only does he not do so, but he also does not allow us to make improvement in this area. If you say that the improvement we are making is simply the addition of the term "undercover agent", and that this may affect the family members of the kidnapped person (they have actually quoted this as an example), do you think this should require an application too?

If I am able to cite an example to show that the law is imperfect, it is your responsibility to make amendments. If you are able to cite another example to point out that our amendments are imperfect, it is your responsibility to make amendments to perfect it. There is a difference between the two. You cannot say that there is no need to address it because you have cited an example. You are only deceiving yourself if you do so.

In addition, you are not treating our frontline partners fairly. They are wearing all sorts of disguise and braving the elements. They have been doing so for more than a year. Why? We have already talked to you today. If you still do not do it, what responsibility do you have to bear? I hope that the more senior officials seated in the front row are able to hear this.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, regarding the definition of "covert surveillance", I have made very detailed responses during the resumption of Second Reading debate, pointing out why we cannot

accept the proposals of Ms Margaret NG and Mr James TO. Madam Chairman, I have nothing to add here.

MS MARGARET NG (in Cantonese): Excuse me, Chairman. I should have waited for the Chairman to call my name to speak. Chairman, I think that the Secretary's saying that he has no response is very remarkable. He has no response at all to the rationale that we have put forth. In other words, he is only relying on power now.

Thank you.

MR JAMES TO (in Cantonese): Chairman, to show the basic manner to specific arguments put forward by Members, would the Secretary go back to study whether there is legal vacuum in this area? If you put particular emphasis on devices but are unable to address other incidents which may be in breach of the law, do you not at least owe Members a polite response? In other words, would you go back and take a look into it and be serious about the matter?

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, as I said in my main speech, we would review from time to time the implementation of this piece of legislation.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Emily LAU rose to claim a division.

CHAIRMAN (in Cantonese): Ms Emily LAU has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Miss CHAN Yuen-han, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU, Mr Albert CHENG and Mr KWONG Chi-kin voted for the amendment.

Mr LEE Cheuk-yan, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Albert CHAN and Mr LEUNG Kwok-hung voted against the amendment.

Mr Albert HO, Mr Martin LEE, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Dr Joseph LEE, Mr Alan LEONG, Dr Fernando CHEUNG, Mr Ronny TONG and Miss TAM Heung-man abstained.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that there were 51 Members present, 30 were in favour of the amendment, five against it and 15 abstained. Since the question was agreed by a majority of the Members present, she therefore declared that the amendment was carried.

MS MIRIAM LAU (in Cantonese): Chairman, I move that in the event of further division being claimed in respect of the provisions of the Interception of Communications and Surveillance Bill, its Schedules or any other amendment thereto, this Council do proceed to each of such divisions immediately after the division bell has been rung for one minute.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That Ms Miriam LAU's motion be passed.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MS MARGARET NG (in Cantonese): Chairman, I would normally support shortening the division time, but I consider this Bill exceptional because we are going to keep on discussing in this manner, at times Honourable colleagues may feel confused due to the large number of amendments. Chairman, if we cast our votes wrongly, that is, if Members unknowingly cast their votes wrongly, no matter on the amendments proposed by us or on those proposed by the Government, so that a result obtained may be inconsistent with a former one, it would be a great pity. This debate is different from motion debates we have on other occasions. Therefore, as a great exception I oppose that the ringing time of the division bell be changed from one minute to three minutes — from three minutes to one minute. *(Laughter)* Pardon me. Pardon me. You see, I am already getting confused.

DR RAYMOND HO (in Cantonese): Chairman, actually before Ms Margaret NG spoke, we, that is, the five Members from The Alliance were discussing

about who was to speak about this. We are also of the opinion that the division time should remain to be three minutes because a division time of one minute is too short. A while ago, I was waiting for the lift at the lower floor of the Legislative Council Building, but the lift stopped at the first floor and did not move. I did not know at that time whether I should walk up here from the lower floor or continue to wait for the lift. I was very nervous. Therefore, I propose that the division time should remain to be three minutes. Thank you, Chairman.

MISS CHAN YUEN-HAN (in Cantonese): Chairman, the three of us also support Ms Margaret NG's proposal because there are 400-odd amendments. If the time for each division is one minute, I trust that we are going to get rather confused. Because of this, I think that we should adopt a time limit of three minutes. Thank you, Chairman.

MR LAU KONG-WAH (in Cantonese): Chairman, normally I will take a different direction from that of Ms Margaret NG at the voting, but I support this proposal of hers. As a matter of fact, the division time of one minute has been adopted earlier. I do not know if it is because we have become advanced in years that I feel that I am moving rather slowly when I walk down here from the upper floors. At times I just barely make it. It appears that this is not too good.

MR MARTIN LEE (in Cantonese): Chairman, I move quickly. To me, slow mobility is not a reason, but I agree to Ms Margaret NG's proposal that a division time of three minutes should be adopted. Actually, I can reach the Chamber in time on foot even if there is just one minute. I will surely make it.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If not, I would like to see whether Ms Miriam LAU wishes to speak in reply.

MS MIRIAM LAU (in Cantonese): Chairman, this is basically a motion about the procedure. Of course, if Members feel that the division time should remain to be three minutes, they can make their own choice. But I only wish to point out that the present Bill is in fact very complicated and the time we spend in deliberation will be very long. If the bell rings three minutes for each division, the time taken to conduct the meeting will also be very long. I hope that Members will take this point into consideration before making their decision. I will respect Members' decision.

CHAIRMAN (in Cantonese): As we are now conducting a debate, Members may not speak after she has replied on my request. The division will now begin.

CHAIRMAN (in Cantonese): I now put the question to you as stated. Will those in favour please raise their hands?

(No hands raised)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr Albert CHENG rose to claim a division.

CHAIRMAN (in Cantonese): Mr Albert CHENG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Mr LAU Wong-fat, Ms Miriam LAU, Ms LI Fung-ying, Mr Vincent FANG and Dr Joseph LEE voted for the motion.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Ms Margaret NG, Mr CHEUNG Man-kwong, Mr Bernard CHAN, Dr Philip WONG, Mr WONG Yung-kan, Mr Abraham SHEK, Mr WONG Kwok-hing, Dr Fernando CHEUNG, Mr WONG Ting-kwong, Mr Patrick LAU, Mr KWONG Chi-kin and Miss TAM Heung-man voted against the motion.

Mrs Sophie LEUNG, Mr Howard YOUNG, Mr Tommy CHEUNG, Mr Daniel LAM, Mr Jeffrey LAM and Mr Andrew LEUNG abstained.

Geographical Constituencies:

Ms Emily LAU voted for the motion.

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Mr James TO, Miss CHAN Yuen-han, Mr Jasper TSANG, Mr LAU Kong-wah, Mr Andrew CHENG, Mr TAM Yiu-chung, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr LI Kwok-ying, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr CHEUNG Hok-ming, Mr Ronny TONG and Mr Albert CHENG voted against the motion.

Mr LEUNG Yiu-chung abstained.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 26 were present, five were in favour of the motion, 15 against it and six abstained; while among the Members returned by geographical

constituencies through direct elections, 23 were present, one was in favour of the motion, 20 against it and one abstained. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the motion was negatived.

CHAIRMAN (in Cantonese): I order that in the event of further division being claimed in respect of the provisions of the Interception of Communications and Surveillance Bill, its Schedules or any other amendment thereto, this Council do proceed to each of such divisions immediately after the division bell has been rung for three minutes.

CHAIRMAN (in Cantonese): Mr James TO and Ms Margaret NG have respectively given notice to move amendments to the definition of "interception product" in clause 2(1).

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Mr James TO to move his amendment.

MR JAMES TO (in Cantonese): Chairman, I move to amend the definition of "interception product".

Chairman, my amendment is like this. "Interception product" means any content that has been obtained or seen through interception, and such content is the "interception product". In the view of the Government, only those intercepted pursuant to an authorization fall within the definition of interception product. Therefore, I propose to delete this and replace it with one to the effect that whatever obtained through interception, whether pursuant to an authorization or not, falls within the definition of interception product.

In that case, what is the difference between the two? Suppose the authorities have once intercepted communications without authorization — of course, whether the relevant act involves a criminal or civil offence will be discussed later — but according to the present Bill, there should at least be provisions on the destruction, careful retention and restriction on duplication and circulation of such products. If the relevant definition only covers communications obtained pursuant to authorizations and does not cover

communications illegally or unlawfully obtained, there will arise a very strange situation, and that is, those communications that have been illegally obtained need not be destroyed because they do not fall within the scope of mandatory destruction. This is purely a technical amendment.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG to speak on the amendment moved by Mr James TO as well as her own amendment. However, Ms Margaret NG may not move her amendment at this stage.

MS MARGARET NG (in Cantonese): Madam Chairman, actually my amendment is almost identical to Mr James TO's amendment. There is little difference between the two. Therefore, I will be very happy if Mr James TO's amendment is passed.

I urge Members to support Mr James TO's amendment, and both of us share the same reason as it is not justified that, contrary to expectation, that for which authorization is required but is not obtained is to be subject to double jeopardy but no protection. I feel that this is very unreasonable.

Therefore, Madam Chairman, we support Mr James TO's amendment.

CHAIRMAN (in Cantonese): This Council will now have a joint debate on the original definition and the amendments thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, Ms NG and Mr TO propose to delete the reference to "pursuant to a prescribed authorization for interception" from the definition of "interception product" and substituting it with "an". The relevant proposal has the effect of expanding the coverage of products protected by the Bill to information obtained not pursuant to prescribed authorizations. This will cause enormous difficulties in practice. For example, there will be "interception product" no matter if the interception is conducted pursuant to an authorization obtained through the mechanism provided for by the Bill or not. We are of the opinion that the protection provided by the Bill should be confined to products obtained pursuant to authorizations provided for by the Bill. Therefore, the authorities oppose the relevant amendments.

Thank you, Madam Chairman.

MS MARGARET NG (in Cantonese): Chairman, what the Secretary has said is really astonishing. Chairman, what we are discussing here is all about definitions. No one knows why there are products for an interception. Is an orange plucked off secretly from another person's backyard or a peach plucked off secretly from a tree in another person's backyard a product of interception?

The original meaning is that information intercepted or telephone conversation of other persons tapped pursuant to prescribed authorizations, that is, formal and legitimate authorizations, must be protected. Chairman, this is very important. Generally speaking, as we have said earlier at the Second Reading debate, everyone is entitled to privacy of communication. No other person shall infringe upon their privacy or intercept their communications. It is only under the most compelling conditions that this may be done for the purpose of safeguarding the security of Hong Kong or for detecting truly serious crime. These products are not to be used recklessly and must be protected in certain ways. This is already provided for by the Bill. In that case, when is there no prescribed authorization? For example, when it is very clear that authorization should be obtained, action is taken of one's own accord with no application for authorization being made. Why is information obtained under such conditions unprotected and may be circulated or exchanged for use? This is the first point.

Chairman, as to the second point, we will understand it if we read the other parts of the Bill as well. A duty officer or a law-enforcement officer applies for the relevant authorization as required, but in the course of it something goes wrong or there is some problem with the authorization. According to the department's explanation, such authorization is tantamount to no authorization given. That is to say, the relevant procedures have been gone through, but because someone has done something improper, such as telling lies, what has been obtained is regarded as being obtained without any authorization. However, other people's communication has already been intercepted anyway, and there are products. In that case, why are they not subject to protection? Therefore, we feel that it is very important that "prescribed authorization" be deleted. I do not understand what the Secretary has said at all. Could the Secretary please enlighten me by explaining it once again?

MR JAMES TO (in Cantonese): Chairman, I almost jumped when I heard it, because I never thought the Government would provide such an answer. Perhaps the Secretary did not answer in detail and perhaps he did not understand the explanation given to him by his subordinates or the law-enforcement departments. The Secretary could ask that the meeting be adjourned for a few minutes and make a phone call to seek a clarification. If not, we would not understand why it is so, because in this Bill, "interception products" are the final items that have to be protected, that is, they are not to be copied or circulated at will and they should be kept in confidence.

If "interception products" covers contraventions — it will be marvellous, because the Government has added the words "without authority", that is, provisions on interceptions conducted without authorization, and has it introduced a mechanism of notification or compensation, and so on. However, why is it that, contrary to expectation, there is weaker protection if the final product does not include information obtained without authorization or information completely irrelevant to the authorization, such as information obtained in contravention of the law, the rules or discipline? I hope especially that these last few words that I say are heard by Ms Margaret NG — no, it should be Ms Miriam LAU. We are actually doing something good by proposing the amendments. Not to mention anything else, if in future a second year student of the faculty of law writes a thesis or article in the Hong Kong Law Journal, I think the several hundred counsels under the Secretary for Justice WONG Yan-lung would not be able to find any place to hide for shame.

I hope the Secretary will really think it over thoroughly. If there is anything that he does not understand, he may convene an internal meeting outside the Chamber, it will be alright if it is just a five-minute discussion. Do not remain adamant because of considerations of face. Otherwise, we will feel very ashamed, while the Government would also be tied with us and will feel more ashamed than convicts being paraded through the streets.

MS MARGARET NG (in Cantonese): Chairman, perhaps allow me to explain more clearly. We may have to a look at the definition of another term.

Chairman, if we take a closer look, we will see that it is stated that these so-called "protected products" means "interception products" and "surveillance products". If you ask why this definition has been made, it is because these two types of products are both protected. If we go through clause 56 of the Bill, we will see that it says that these protected products shall be subject to the protection stated in the text that follows. Therefore, if interception products do not include unlawfully obtained interception products, it would be doubtful as to whether the latter is subject to protection.

MR RONNY TONG (in Cantonese): Chairman, I feel that this is a very basic and very common issue in logic, of which we have mentioned when deliberating on the Bill. The logic is very simple. Contrary to expectation, information obtained unlawfully is not subject to protection. This is impossible. Therefore, I would like very much to ask those Honourable colleagues who are prepared to vote against our amendment why they would support amendments which are not in line with basic logic and support the stance of the Government but oppose our amendment.

I hope Honourable colleagues will think carefully whether our amendment should be supported.

MR ALBERT HO (in Cantonese): Chairman, I hope that the Secretary will respond clearly to this question. Is it because there will not be any product obtained not in accordance with the procedures or without authorization that he opposes the amendments proposed by these two Honourable colleagues? Are these products non-existent? The answer is absolutely not. There will certainly be products obtained not in accordance with the authorization

procedures or the law under certain circumstances. In that case, what is the government policy for handling these products? The Secretary must let us know.

The Secretary may say in reply that these products should also be subject to protection and he may tell us the circumstances under which these products should be destroyed or would be destroyed as quickly as possible. If that is the case, the amendments that we have proposed are in line with the legislative policy of the Government. I cannot not think of any reason why they are not. If they are the same, why does the Secretary not agree to our amendments, so that the Bill can be better? Now that they have been proposed by Members (the Secretary might have not made circumspect consideration due to certain reasons and he has expressed opposition in the Bills Committee), why is it felt that the amendments we propose cannot be accepted to help refine the original legislative policy of the Secretary?

MR MARTIN LEE (in Cantonese): Chairman, actually, sometimes, for instance, when the Administration or the police consider that there is some very good information that must be obtained, but when an application is made to the Court, authorization is not granted. However, someone may act very boldly and considers it imperative to obtain it, because it is very important information. Eventually, it is forcibly obtained. This is information unlawfully obtained. What will happen then? Actually, should lawfully obtained products and unlawfully obtained products be regarded as the same? It may not be. If it has been unlawfully obtained, it should be immediately returned. If the information has been obtained by a "Mad John" and the Secretary knows it, basically it should be immediately returned, otherwise, it will have to be dealt with as well. This is very obvious. If even this would not be done — actually our debate at this meeting is broadcast live — I trust that members of the public who are watching the television would be so scared that they fall unconscious when they hear what the Secretary is saying again and again. If the people have the opportunity of going to the streets again, I trust that many of them are going to do so, because they should have understood by now, even though they did not understand earlier. If the Secretary does not understand, he can seek advice from the Secretary for Justice, the incumbent Acting Chief Executive sitting in front of him and study the matter together.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MS EMILY LAU (in Cantonese): Chairman, what we are saying now is that products of communication interception obtained not in accordance with the procedures should be destroyed. However, the Secretary says that they should not and that they can be made use of. But according to clause 23 of the Bill, some of them, that is, those involving an application for emergency authorization, that is, Type 1 information, will be destroyed. An emergency authorization has to be confirmed by a panel Judge within 48 hours. If not, the information obtained may not be retained. I brought up this point in the Bills Committee and we discussed it, and the authorities also accepted it, but the principle was so narrow that only information obtained not in accordance with the procedures and for which confirmation of authorization was not made within 48 hours had to be completely destroyed. However, under other circumstances, if the procedures are not followed and a mistake is made, the information obtained will continue to be used or be turned into intelligence. This is very unconvincing to me. It is perhaps logical if such information is not retained because of procedural mistakes as stipulated in clause 23. However, this is not allowed while that is now allowed. I do not think that the public will understand it. Thank you, Chairman.

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CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, about this topic, we have convened meetings of a total of some 130 hours and have discussed it over and over again in the Bills Committee. Perhaps let me reiterate our stance. Policy-wise, we definitely do not wish to see any law-enforcement officer carry out any operation without authorization. Our policy is that they must carry out such operations under lawful conditions. Therefore, we do not wish to see any information obtained through unlawful channels or by unauthorized operations. Secondly, we are accountable to the Commissioner for any operation in contravention of the provisions of the Bill.

An independent Commissioner will be put in place. The Commissioner may submit reports to the Chief Executive, the Secretary for Justice, heads of departments and panel Judges. Thirdly, if any information has really been obtained through unlawful channels, such information will also be protected by law, that is, it is governed by the Personal Data (Privacy) Ordinance. We feel that there is already adequate regulation. Therefore, the present Bill mainly authorizes our colleagues to obtain such information lawfully.

MR RONNY TONG (in Cantonese): I am sorry that what the Secretary has said is not the answer to the question at all because the Personal Data (Privacy) Ordinance provides much less protection than the present Bill. The Bill presently proposed is going to provide strict protection by requiring that the relevant information must be destroyed and shall not be disposed of. And when we eventually take a look at the functions of the Commissioner, we will find that the Commissioner has the power of holding that an authorization by a Judge is an unlawful one. For such circumstances, I will not say that it is definite that the law-enforcement officer has the deliberate intention of breaching the law but that there may have been a procedural mistake. In that case, why are the products so obtained not subject to protection?

I wish to ask the Government a very simple question: why are such products not protected by this piece of legislation? I would also like to ask those Honourable colleagues who are prepared to vote in favour of the Government and against this amendment of ours why they think that products obtained not in accordance with the law and procedures should not be protected. Why?

MR LEUNG KWOK-HUNG (in Cantonese): I remember that I said at the discussion session that officials would not encourage their subordinates to do anything unconstitutional or unlawful. Of course, there would not be any oral instructions to tell them to do anything unconstitutional or unlawful. However, it is absolutely unacceptable that products obtained inadvertently or deliberately through unlawful channels can be retained or submitted. This is the same as the case of a football coach who does not teach the players to resort to foul play but tells them that they have to win by hook or by crook. Thus, all players will resort to foul play. That is what we saw in the World Cup matches. Therefore, this should not be allowed.

What is the educational significance of this to the entire community? The answer is that a prize will be given to someone who commits a mistake inadvertently and a greater prize will be given to someone who commits a mistake deliberately. This is not right. I feel that the Secretary is really good at swapping ideas. When this matter is being talked about, he will immediately talk about another matter, saying that protection will be provided somewhere else. If this is so, the Secretary had better improve this clause, otherwise this clause would form the basis of possible future litigations. If in future I find you have mistakenly or inadvertently taken my information and used it as intelligence, I would not be able to win even if I take legal action. Therefore, I think this is very important. We are now protecting the interest of future potential victims of this loophole. Therefore, would the Secretary please reply to this again?

The Secretary indicated just now that he would not encourage his subordinates to obtain information through unlawful channels and considered that protection was already provided elsewhere, that is, protection was provided by the Personal Data (Privacy) Ordinance. What does the Secretary mean? Does it mean that we will be provided protection by the Personal Data (Privacy) Ordinance if in future we initiate litigation? Is it so? Or can we rely on this Ordinance? My shallow understanding is that if this Ordinance is explicitly written while the Personal Data (Privacy) Ordinance is ambiguously written, I will definitely lose the litigation if I bring it up under the Personal Data (Privacy) Ordinance, because this Ordinance states explicitly that the authorities can do so.

The other problem is that no one will be given the punishment they deserve. This is the saddest thing. They can continue to use the information that they have obtained and do not have to bear any responsibility. I feel that this is very inappropriate. It is now dinner time, and many citizens and children are watching television. What does such an Ordinance teach our children? It is good to make mistakes and play dirty tricks.

Let me ask the Secretary again. If such a situation arises in future, are members of the public encouraged to initiate litigation and make claims under the Personal Data (Privacy) Ordinance?

MR JAMES TO (in Cantonese): Chairman, I really feel very puzzled. The Secretary is getting into increasingly big trouble with his answers. He has said that in view of the protection provided by the Personal Data (Privacy) Ordinance,

if information is obtained in accordance with the law, there will be safeguards for the protected products, including products of communication interceptions, as stipulated in clause 56 of the Bill. The head of every department must put in place a system to ensure the secrecy of all of this type of information and have the information destroyed as soon as its retention is not necessary. This is very important. It should be done so in the entire mechanism and concept.

The Secretary mentioned earlier about what was going to happen to those that went beyond this mechanism, that is, the type obtained in contravention of the law and procedures. Firstly, the department heads do not have the responsibility of destroying them at once; secondly, the situation would be even sadder. Let me imagine how I would answer if I were holding the post of the Secretary. I have thought of an answer — I do not know if the Secretary would use it, but I do not know if this is what the Secretary was originally thinking of — if it is unlawful, the product can be kept for the sake of prosecuting the person concerned for contravening the law.

It seems that it makes some sense to say so, but is this what the Secretary was originally thinking? What was he thinking about? Why was it pointed out contrary to the expectation that the unlawful ones did not have to be dealt with in accordance with the mechanism of this piece of legislation? What was the Secretary thinking about? I hope the Secretary can at least think about whether it is possible to pull back at the last moment and save the Government from a ugly image of being so stubborn by just making a little change. Perhaps the Secretary is beginning to understand that actually he has been manipulated and fooled by his subordinates. They are of low calibre and have written something wrong, and he could only read out the draft speeches exactly as they are written. That is the calibre of people who will only read the draft as they are written and do not know how to make a judgement. There sits in front of him a brilliant member of the legal profession, but he will not spend a few minutes' time to seek advice from him. What for? Is it for the sake of saving face? If that is the case, our Government is really very ugly.

MR MARTIN LEE (in Cantonese): Chairman, there is one point that I appreciate the Secretary of. He still tells us the reason. In fact, it would be better if this reason is not told. Frankly speaking, the Government already has sufficient votes. Therefore, I appreciate the Secretary for his attitude of being willing to make explanations to us. But the problem is that more problems arise

after the explanations are given. He said that he did not wish to see his men obtain information by inappropriate means. However, sometimes when a policeman faces a suspect but there is insufficient evidence, what can be done? The policeman will beat him up in order to obtain a confession statement. If the statement is not accepted by the Court at the trial, it will not be used.

However, this clause does not state explicitly that such information will not be used. Secondly, the Secretary said that the Commissioner would submit a report — it is true that the Commissioner does submit reports. He will report to the Chief Executive and various parties — about the Personal Data (Privacy) Ordinance (the Ordinance), what Mr James TO has said is right. I do not wish to repeat it. However, I can think of a scenario. For example, Mr LEUNG Kwok-hung complains that someone has obtained his documents, that is, the so-called products, by unlawful means. Having investigated into the matter, the Commissioner would send him a letter saying, "The Honourable Mr LEUNG, I have conducted an investigation and found that this unfortunate incident has really occurred. This is the last thing we wish to see." This is the first point in the letter, that is, the indication that it is the last thing they wish to see. The second point in the letter is, "We have submitted a report to the Chief Executive. The Chief Executive has directed me to tell you that you may uphold your interest by action under the said Ordinance." Let us imagine what Mr LEUNG will do when he receives this letter. Will he be happy or will he get very upset? How can this solve the problem?

Furthermore, if unlawfully obtained information is to be dealt with in accordance with the said Ordinance, then lawfully obtained information need not be protected and it just can be dealt with in accordance with the said Ordinance. I would like to ask what the logic is. I appreciate the Secretary for his explaining the reason to us, but I hope that Secretary will command our respect. I would like to ask him to think over it again. Such a clause really will not work.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MS MARGARET NG (in Cantonese): I will speak very briefly. The Secretary indicated earlier that he did not wish to see law-enforcement officers do so without authorization, but we have already discussed this issue in the Bills Committee. Sometimes, someone makes a mistake. A certain person is

mistaken for another. A certain CHAN Tai-man is mistaken for another CHAN Tai-man. The wrong person is tracked or the wrong information intercepted. What should be done then? Is it necessary to state clearly that this is a mistake? The department has repeatedly explained to us in detail that such an incident is same as an unauthorized one. However, even the sages do make mistakes. If a law-enforcement officer inadvertently does anything wrong or breaches any regulation and does so without authorization, he has got something wrong only. Is this not allowed? Are there certain areas that we have not been able to understand? Does the Secretary have something else in his mind? Would the Secretary care to explain it to us?

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If not, Secretary, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, as I said earlier, many hours were spent in arguing on this topic in the Bills Committee. The stances of both sides are very clear. All along, from point of view of our policy, we will definitely not allow our law-enforcement forces to obtain any product by unauthorized means. That is why we have written explicitly in the Bill that any such incident shall be reported to the Commissioner who will conduct an investigation. If there has indeed been such an incident, the person who has been investigated will be notified and the Government will be ordered to make a compensation.

Looking from another angle, there is another Ordinance that provides safeguards. Therefore, we feel that there is no need to write explicitly in the Bill about such material under the so-called unauthorized conditions. This does not mean that we will abuse such material. About the entire matter, as Mr LEE Cheuk-yan said clearly when speaking on the principal Ordinance, it is mainly because some Members do not trust in the Government, our policemen and law-enforcement departments and they query whether these departments will frequently infringe upon the privacy of Members by these unlawful means. I can tell everybody that in the past before this Bill was introduced and when the

old legislation was still in force, our law-enforcement departments, irrespective of whether the Police Force or the Independent Commission Against Corruption (ICAC), they were very careful in exercising their own power. They exercised their power with respect to human rights and privacy. Now, the present Bill basically makes a large number of improvements on the foundation of our past practice. Members said just now that the public seemed to be rather indifferent to the entire topic. I think that some Members do not have sufficient trust in the law-enforcement departments, but in general, the citizens of Hong Kong have a high degree of trust in officers of our Police Force and the ICAC. Some Members have said that our law-enforcement forces often abuse their powers and tap the telephone conversations of other people. They seem to suggest that Hong Kong is a police state. This is not true. As citizens trust our police so much, I hope Members will also support our Police Force and law-enforcement officers.

MR RONNY TONG (in Cantonese): Chairman, I do not understand why the Secretary is getting farther and farther away from the point. We are not talking about whether law-enforcement officers are trusted but whether products of communication interception or covert surveillance obtained without authorization should be given the same protection. I think this is not a problem of trust. I may trust the Government and law-enforcement officers, but why products obtained by such means are not given the same protection? I really want to hear it clearly because the Secretary has said that the stance of both sides are very clear. It is true that they are very clear, but I do not understand why those products obtained in contravention of the law or regulations should not be protected. I want to know why.

I have repeatedly requested those Honourable colleagues who are prepared to vote against our amendments to tell us — perhaps they know what we do not know — is this a "bundling" tactic, under which opposition is made for the sake of opposition? And is it because these are amendments proposed by the pan-democratic group that the Government has to oppose them? If it were the Liberal Party that has discovered this point and proposed the amendments, they would be passed. Is that so? Is that the reason? If it is, then please tell me, so that I may know it too. However, up till now, I have not been able to understand why this stance, which contradicts basic logic, has become the Government's stance. I do not understand at all.

MR MARTIN LEE (in Cantonese): Chairman, we are of course not saying that policemen frequently steal documents deliberately, although some of them do such things. But even if something wrong is done, it is unintentional or just due to improper procedure and the mistake is discovered only after the document has been obtained. The problem is: these incidents should not have occurred if the Police Force are trusted. If the Police Force are trusted, the policemen should not beat the suspects to obtain statements. But these things do frequently happen.

Basically, citizens may have originally trusted the Government and the policemen, but when they have heard the explanation given by the Secretary, they would lose much of their faith. They originally trusted the Government, but they found that even such a reasonable amendment was opposed by the Government. If information obtained through lawful channels can be protected by the Government, information obtained through unlawful channels should be protected even more, because the Government has done something wrong. But on the contrary, the Government will not protect it. In that case, how can citizens trust the Government? After hearing the Secretary saying this again and again, their confidence in the police and the Government will keep on falling. But the Secretary need not worry, because he already has sufficient votes. I believe for those Members who support him, their confidence in him has also fallen. They have an increasingly strong feeling that they have done something wrong. It is surprising that the Secretary is so stubbornly against such an obvious principle. The Secretary for Justice is also sitting there and listening and he is also the Acting Chief Executive. Is this still correct?

MR JAMES TO (in Cantonese): Chairman, my speech will not be repetitive.

The answer that the Secretary has just made is even more obvious. Where does the even more obviously absurd part lie? Information obtained in accordance with the rules will be destroyed in accordance with clause 56 of the Bill, while information obtained not in accordance with the rules or the law, in the event of a complaint being made by someone — if someone makes a complaint — the Commissioner will carry out an investigation in accordance with clause 43 and if it is found that there has truly been no authorization, what will he do? He will tell you that he has done some work and suggest that compensation be made. What will happen next? The person involved can launch a complaint to the Privacy Commissioner under the Personal Data (Privacy) Ordinance. The Privacy Commissioner will issue an investigation

order. Upon completion of the investigation, if it is found that the Government has indeed done something wrong — but the prerequisite is that an investigation can really be made, because if the information was within the original scope of law enforcement, there is exemption for it. I doubt very much whether the Privacy Commissioner is able to conduct the investigation. Even if he can conduct the investigation and indicates upon completion of it that the Government has acted against the law and that the information should be destroyed — but does the Government want to have such procedures? In the event that the information has been obtained through unlawful channels, what will the Government do? It will make cash compensation first and take follow-up action shortly afterwards. But if the person concerned considers it too troublesome and does not want to further pursue the complaint, the authorities need not destroy the information. Does this amount to buying unlawful intelligence with money? I am really puzzled. I do not understand what the Secretary has said at all.

Do not forget the consequential amendment that we have mentioned earlier. Schedule 5 talks about amending the Personal Data (Privacy) Ordinance. Clause 58A concerns protected products — that is, it is a newly added clause. Just now, the Chairman asked me not to talk about that point, but since it is consequential, I must say it — it happens that the data system is already exempted from the provisions of the Personal Data (Privacy) Ordinance. That is awful. It turns out that there are no checks at all. The Government itself protects itself. On applying the conspiracy theory, unlawfully obtained information can be exempted as a particular system and then stored. In order that the information need not be destroyed, it is preferable to make cash compensation to settle the matter in the hope that the person concerned will not complain to the Privacy Commissioner. How can this be? The logic is totally absurd. If an encyclopedia of jokes is to be compiled, and if these things can be put down in simple words, I think it will be very funny and it should be published.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR ALBERT HO (in Cantonese): Chairman, I do not want to be repetitive. I just hope that the Secretary will not make use of his theory of trust in future debates. If there is mistrust of him, there is mistrust of him for the entire

legislative process. It is right, all laws are meant to restrict powers or regulate the use of powers. Therefore, he may also say that it is because of mistrust that the reason for enacting legislation is queried. Perhaps it is because of this mentality of his that the Government has refused to enact legislation for so many years.

Chairman, in fact I have made myself very clear. Our entire system has envisaged that there will be abuse and erroneous use of power under certain situations. It is just because of this that we have put in place a Commissioner for the reviews. Sometimes there is a need to conduct reviews. Sometimes there is a need to conduct investigations. Sometimes there is even a need to make compensation. Such situations do occur in real life. Therefore, we must face these situations and deal with them. Actually, our request is very simple. All information, whether lawfully or unlawfully obtained, should be dealt with in the same manner. And the Government's stance is that it also considers that such information should be appropriately dealt with. "Protection" means there should be prompt destruction and no leakage, so that the privacy of the third party will not be infringed upon. Therefore, the logic is very simple. I think if your argument is not valid, please do not say that we do not trust the Government.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If not, Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): I would like to bring out two points to respond to Mr James TO. The first point is about the Commissioner. He does not only conduct investigations upon receipt of complaints. Actually, investigators of the forces are internally regulated and the regulatory requirements are quite strict. If we do find that certain colleagues in the forces have taken action unlawfully or without authorization, we should also report this to the Commissioner.

Secondly, Mr James TO mentioned just now about the lack of protection under the Personal Data (Privacy) Ordinance. About this point, the relevant clause says that products obtained with authorization are exempted from the provisions of the Ordinance but information obtained without authorization is protected by the Ordinance.

MR JAMES TO (in Cantonese): Chairman, I wish to speak in retort because information obtained without authorization is protected by the Ordinance, but it matters when the nature of obtaining unauthorized information is also to enforce the law. Then, according to the Ordinance, law enforcement and criminal investigations are exempted from the provisions of the Ordinance. In other words, if there is a breach of the legislation that we are presently discussing but the person is investigating into a certain case, the information cannot be dealt with under such a situation. Would the Secretary please make a check of this?

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR MARTIN LEE (in Cantonese): Chairman, the Secretary has only replied to Mr James TO's speech but has not responded to our speech.

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, this topic has been debated in the Bills Committee for many hours and the stances of both sides are very clear. I do not have anything to add.

MS MARGARET NG (in Cantonese): Chairman, the Secretary has just solved a problem. Ms Miriam LAU pointed out earlier in her report that we spent 130 hours in debating and deliberating on this Bill but we were unable to deal with these issues successfully. The reason is that we spent many hours trying to convince the authorities to make these very reasonable amendments but the authorities were unwilling to do so. Therefore, we all know that the actual effect of these 130 hours was not great.

Chairman, I wish to say something very simple. Firstly, even sages do make mistakes. If law-enforcement officers have made a mistake, the person whose communications have been listened to or intercepted should not be affected and should not suffer any loss or have no channel to air his grievance because of the mistakes of law-enforcement officers. Therefore, I really do not understand why the Secretary subjects products obtained by people who have inadvertently made mistakes to proper protection. Secondly, the Secretary indicated that he did not wish to see law-enforcement officers do anything unlawful. However, why do I have to suffer if law-enforcement officers breach the law? Chairman, this is also logically invalid.

Sometimes, the authorities cannot just give the persons affected a small "consolation prize" through another piece of legislation. If the authorities have really made a mistake, we must give the persons affected compensation and make remedies. Therefore, I reiterate it for the last time here, so that I need not say it again when I speak later.

MR MARTIN LEE (in Cantonese): Chairman, the Secretary said that we had argued for many hours. It is undeniable that we have indeed attended many hours of meeting. However, for what has been argued today, I can tell the Secretary that at least there has been no argument on what I say today as I was not present when those meetings were held. What I say is of course something new. If the Secretary was right, it would be easy for the rest of today's meeting to proceed. He just has to tell the Chairman that every amendment has been talked about and then sit down or say that he has nothing to add. What point does this make? Now, the Secretary has to convince Members attending this meeting to vote in favour of the Government. The authorities of course need not convince those Members who are in support of them. However, people watching TV now are listening to the speech of the Secretary. He has to convince the public. How can he take such an attitude? The Secretary cannot convince me or other Members at all and may not be able to convince other members of the public. However, the Secretary already has enough votes, because it requires no convincing talks to secure them. But still, he should not adopt such an attitude.

MR JAMES TO (in Cantonese): Chairman, I say this very clearly. It is clearly written here that the Personal Data (Privacy) Ordinance stipulates that the

detection and prevention of crime is exempted from the provision of the Ordinance. Therefore, I do not understand what the Secretary meant by saying earlier that regulation was given by the Ordinance. Regulation is introduced on one hand, but exemption is given on the other hand. How can it be said that there is regulation? It will become absolutely lawless. I would have nothing to say if it is said that regulation is given by the laws in general. How can the Secretary say that regulation is given by the Ordinance when in fact it is not? An unlawful detection is still a detection unless the Secretary says that an unlawful detection is not a detection. If that is the case, the entire principle would be different. My understanding is that the Privacy Commissioner has never made any detection within this area. If the Secretary says that unlawful detections are not detections, and so they are not exempted from the provision of the Ordinance, that would be very serious. After this meeting, the Privacy Commissioner would not even have time to go to the toilet. Why? Because we have talked about so many unlawful investigation operations or operations in which private information has been unlawfully obtained, and the persons concerned are going to queue up to see the Privacy Commissioner. And then the same would also happen to cases related to the police. I guess that it would not be as many as 50%, but maybe 10% to 20% of Complaints Against Police Office (CAPO) cases would be handed over to the Privacy Commissioner for handling and the CAPO need not deal with them. I do not know if such a situation is good or bad because I always thought that an independent investigation mechanism should be established. If this floodgate is suddenly opened, it may have the effect of enabling the Privacy Commissioner to investigate into incidents involving the abuse of power and dereliction of duty of the police. Is this what the authorities mean? If not, the Ordinance basically does not provide any coverage but an exemption. Why does the Secretary want to mislead us?

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, why does the Secretary not reply to Mr James TO's question? He asked whether the Secretary was misleading us. The Secretary did not answer. Therefore, I can only resort to a harsher tone in the hope that the Secretary will answer whether he is misleading us. If not, may I ask why he said just now that protection was

given by the Personal Data (Privacy) Ordinance? If there is no protection, I am of the opinion that he should take back these words, although in actual fact they cannot be taken back. Once the words went out of his mouth, they were out in the streets. The Secretary is really unfair. Is Mr TO right or the Secretary right? I hope that the Secretary is right, but please let me know your rationale.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I reiterate again that the viewpoints of everybody have been discussed many times in the Bills Committee. I have nothing more to add.

CHAIRMAN (in Cantonese): Before I put to you the question on Mr James TO's amendment to the definition of "interception product", I wish to remind Members that, as Ms Margaret NG has actually said earlier, if Mr James TO's amendment is agreed, Ms Margaret NG may not move her amendment.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr James TO rose to claim a division.

CHAIRMAN (in Cantonese): Mr James TO has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

MISS CHOY SO-YUK (in Cantonese): Chairman, I have pressed the wrong button.

CHAIRMAN (in Cantonese): The voting light is still flashing, you may make a correction.

MISS CHOY SO-YUK (in Cantonese): It is alright now. I have pressed the button again.

CHAIRMAN (in Cantonese): You may still make corrections before I announce the voting result. The voting light is still flashing. You may still make a correction. If you want to be "safer", you may tell me how you have voted. I will check the voting result shown by the computer later on. If the voting result indicated by the computer differs from your voting intention, I will take what you tell me as correct. Do you wish to tell me how you have voted? Or do you have confidence in the computer?

MISS CHOY SO-YUK (in Cantonese): It is alright now.

CHAIRMAN (in Cantonese): Does any other Member have any query? If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Mr James TO, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 26 were present, five were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 25 were present, 16 were in favour of the amendment and eight against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Ms Margaret NG, you may move your amendment.

MS MARGARET NG (in Cantonese): Chairman, I move that the definition of "interception product" be amended.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Mr James TO, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 26 were present, five were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 25 were present, 16 were in favour of the amendment and eight against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): The Secretary for Security, Ms Margaret NG and Mr James TO have separately given notice to move the addition of the definition of "public security" to clause 2(1).

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon the Secretary for Security to move his amendment.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move the addition of the definition of "public security" as set out in the paper circularized to Members.

The Bills Committee has conducted very extensive discussions on whether a detailed and comprehensive definition of "public security" should be drawn up and we have also explained to Members that it would be very difficult to do so. However, having taken into consideration some Members' concern about whether law-enforcement agencies would conduct communication interception and covert surveillance in respect of extraterritorial matters unrelated to Hong Kong on "public safety" ground, our amendment stipulates that "public security" means the public security of Hong Kong, thereby confining explicitly "public security" to matters related to the public security of Hong Kong.

Consequentially, upon applying for action to be taken on public security ground, the applicant has to provide a comprehensive assessment of the impact, both direct and indirect, of the threat on the security of Hong Kong, the residents of Hong Kong or other persons in Hong Kong. The relevant provision is reflected in the authorities' amendment to Schedule 3.

I trust that the above provisions, coupled with the exclusion clause 2(5A) to the effect that advocacy, protest or dissent, unless to be carried on by violent means are excluded from the definition of "public security", the addition of which I will move later, will adequately address the concern of various parties.

The amendment concerned has been proposed with due consideration to the deliberations of the Bills Committee and has achieved an adequate balance between various factors. Therefore, I urge Members to pass this amendment.

Thank you, Madam Chairman.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG and Ms James TO to speak on the amendment moved by the Secretary for Security as well as their own amendments. However, they may not move their respective amendments at this stage. If the Committee has agreed to the Secretary for Security's amendment, Ms Margaret NG and Mr James TO may not move their respective amendments.

MS MARGARET NG (in Cantonese): Chairman. I urge Members to oppose the amendment moved by the Security for Security, not only because I want everyone to have the opportunity to pass Mr James TO's amendment as well as my amendment, but also because the amendment proposed by the Secretary is meaningless.

I mentioned earlier at the Second Reading debate that the Secretary had proposed a host of amendments, but these amendments were of little practical significance and only serve to do some window-dressing. What has he added to public security? He said that it meant the public security of Hong Kong only and not the public security of other parts of the world. But does this have any meaning in itself? No, it does not. We just have to go through paragraph 37 of the Code of Practice — I do not expect everyone to carry this Code along — but it can be seen from paragraph 37 of the Code that the public security of Hong Kong means the direct and indirect public security of Hong Kong. In other words, a matter which is apparently unrelated to Hong Kong may have the indirect effect of bringing harm. For example, if the United States attacks Iran or any other country, the public security of Hong Kong could be indirectly affected and this also falls within the definition of impact of public security of Hong Kong. What is it that we actually worry about? What is to be worried about is that the so-called public security in actual fact means the public security of the Mainland, which may be used as an excuse for wiretapping in Hong Kong as well.

Just think about this. We should have heard about the saying that Hong Kong and the Mainland are as closely related to each other as lips and teeth. What affects the Mainland will of course affect Hong Kong. And so, there can be no protection too. Therefore, the Secretary's amendment is meaningless, especially at this time of globalization now. The most important point is what public security is. What is public security to any place?

The Secretary thought he had a very hard time in the Bills Committee. I also know why he has proposed a meaningless amendment. What he means is this: I will introduce an amendment since Members want amendments. An amendment is made, but nothing is amended. However, Members cannot say that he has not made any amendment and they can only say that his amendment is meaningless. The basic principle of the Secretary is that public security cannot be defined, as he has indicated, it is not defined in many places. However, we will say that it is defined in many places. Why does the Secretary not draw

reference from the practice of these places where it is not defined but not from the practice of those places where it is defined? He actually has nothing to say in reply. As a result, he has indicated in the last paragraph of his speech that he does not want any regulation on their law enforcement officers.

(THE CHAIRMAN'S DEPUTY, MS MIRIAM LAU, took the Chair)

Therefore, the amendment that I propose in respect of public security states very explicitly that "'public security' means the public security of Hong Kong from terrorist acts and similar acts endangering public safety". Please do not forget the essential meaning of this — that is, what is the most important meaning? Under what circumstances can law-enforcement officers apply for authorization to conduct lawful wiretapping? It must be on public security ground or for the purpose of combating serious crimes. If the scope of public security is very extensive and he makes no definition of it, it can have a very broad meaning and this barrier will serve no purpose. Anything, including the smallest thing, can be done for political purposes. It may also be done for the Public Order Ordinance. Therefore, we request that terrorist acts or similar acts be explicitly stated.

However, some people may ask why the definition is confined to such a narrow scope. Because it can be imagined that besides these terrorist acts, all acts or threats that can affect the public security of Hong Kong are very serious crimes, and terrorist acts are not a kind of criminal offence in Hong Kong. In fact, we just have to take a look at the anti-terrorism laws of the United Nations and we can see in the definition a series of acts — that is, terrorist acts are not casually imagined but well defined. Therefore, if a limitation is provided for, everyone will know that if these things are not done, the departments or law-enforcement officers have no reason to conduct wiretapping or communication interception on you. Therefore, at least one more layer of protection can be added. However, if the things which that person does really affect the public security of Hong Kong and these are really serious crimes, law-enforcement officers of the departments concerned will also have adequate justification to apply for authorization to conduct communication interception or wiretapping.

We can see that the departments cited the United Kingdom as one of the places where no definition is made. However, this is just a deceptive trick.

Why is no definition made in the United Kingdom? It is because the practice in the United Kingdom is that the responsibility is borne by national security officers. And before there was statutes in this respect, that is, at the time of 1956 or 1950, they took a very serious approach in defining national security, which covered acts of subversion against the entire government or spying or acts that might sabotage the central system. These are really acts that will affect national security. However, when security services legislation was enacted in the United Kingdom, the relevant powers were also included in the legislation and the relevant scope was defined.

Therefore, although "national security" is not defined in the United Kingdom, in actual fact there is a definition. We can also see that under the United Kingdom system, what their MI5 does or the wiretapping are regulated by an independent commission. The membership of the commission comprises senior solicitors appointed by the Queen. They can monitor these operations of covert surveillance to see if they are beyond the scope. If they are, the relevant warrant will be cancelled, that is, wiretapping is not allowed to continue. Therefore, the Secretary cannot simply say that he is not doing it because there is no reason why we should have what the other people do not have. We should study whether the other people actually have it or not. This is the first point.

Secondly, the things that any country has or does may not always be good things. We cannot say that as these countries do not have it, such a provision is a good practice. Must we follow the practice of other countries? Of course not. We have to consider the reasons for doing this thing after all. I feel that "public security" should be defined as public security of Hong Kong from terrorist acts or similar acts endangering Hong Kong.

In a while later, Mr James TO will also explain the difference between my amendment and his amendment. Mr James TO will tell you that his definition has something more and also something less. Besides, he has a different look at public security. For instance, he is of the opinion that economic security should be excluded. As a matter of fact, if there is impact on the economy, for example, the financial system of Hong Kong, there is no need to worry, as this falls within the definition of terrorist acts. Therefore, I think this definition of mine is already very sound.

I urge Members to oppose first this meaningless amendment of the Secretary for Security, so that Members can have the opportunity to vote on my

meaningful amendment. Members may also wish to see the difference between the amendment of Mr James TO and mine, so as to judge whose amendment is more reasonable or more to their liking. I will feel equally happy if Members agree to Mr James TO's definition because in any case this will be better than having no definition at all. This will stop the authorities from freely making use of some excuses at any time to equate arbitrarily some crimes which are not so serious with crimes that involve public security, the consequences of which will be very dangerous.

Therefore, I urge Members to oppose first the amendment moved by the Secretary for Security and then listen to the opinion of Mr James TO. If Members wish to support my amendment, I will of course welcome it very much. The strategic voting of the Civic Party is of course in support of the amendment I move. This may affect Mr James TO — we are just dreaming. If the amendment I move is really passed, I will gladly apologize to Mr James TO, saying I am really sorry. I hope Members will first oppose the amendment of the Secretary for Security because there is nothing to lose even if we get nothing at all. Thank you.

MR JAMES TO (in Cantonese): Perhaps let me follow the script in conducting the business. According to the procedure, now is the time for a joint debate on the three proposals. I hope Honourable Members will find the document on your table which is marked "A3" for the purpose of identification.

I will first comment on the Secretary for Security's proposal which changes "public security" to "the public security of Hong Kong". In fact, the effect is only minimal. Why? Because according to the case that the Government provided to us, in 2002, sorry, it should be a case in Britain in 2001 — in the REHMAN case, the person concerned then did not constitute a security threat in Britain and he mainly wanted to return to Sri Lanka to engage in subversive activities. Eventually, the Home Secretary, that is, the British Home Secretary wanted to deport him because the Court of Final Appeal (that is, their Privy Council — not the Privy Council but the House of Lords, which is the Court of Final Appeal) said that although he did not break any law in Britain, he used Britain as a base to engage in activities intended to subvert Sri Lanka. The Home Secretary said that since it was possible that governments anywhere in the world might co-operate with that person, if he returned to the country to engage in subversive activities, it was highly likely that he would affect other places. Therefore, there was reasonable ground to believe that he would indirectly affect

the safety of Britain; therefore, he had an effect on the public security of Britain as well. The meaning of this case is that even though we are now only talking about the public security of Hong Kong, if in the future, there are cases that may actually affect another place, including the so-called national security of our country, they are still covered by the definition of "public security".

In view of this, why do I still want to propose an amendment later? What I want to point out is that since no legislation has been enacted on Article 23 of the Basic Law, the power to enforce the law should not be conferred before the legislation has been enacted. Therefore, it is also necessary to amend the provision there, even if the term there is changed to "the public security of Hong Kong", it is still necessary to introduce an amendment there, otherwise, legally speaking, it is not enough to merely rely on the Secretary's words.

Secondly, the Secretary said in his speech just now that Mr TO had not given a detailed definition in his legislation back in 1997, so they are not going to give a detailed definition now. He sounded as though this is absolutely right. I can tell Members that back then, I only had a very short time and I hoped that the matter could be referred to the Court. Since the time was short, it was not possible to study into this matter adequately and examine the provisions closely. However, we now have a little time to look at some overseas cases and we can see that detailed definitions have indeed been laid down in Australia, New Zealand and Canada. Let me give Australia as an example. Its law includes concepts such as espionage, acts of violence with a political end, the advocacy of communal violence and attacks on Australia's defence system.

Of course, different countries may have different points of emphasis. However, they understand what these points are. We cannot draft the provisions without any well-defined boundaries. If we can discuss in detail, we should discuss how to lay down a definition instead of saying that a definition will be different at different points in time. If this is the case, conceptually, firstly, I think this will make the Judges responsible for vetting and approval feel at a loss as to what to do. What is he supposed to do given certain circumstances? The ideal course of action should be to let the legislature tell the Judges what its legislative intent is and generally, what the scope is. If such information is lacking, the Judges will definitely face difficulties.

I have seen Ms Margaret NG's amendment and initially, I had a little reservation and concern. I have been considering and guessing, as far as I

understand, what concepts and scope are involved in the incidents that have been dealt with by or have aroused the concerns of the Government at present, including the various units of the Security Wing. Frankly speaking, I really cannot think of anything that will fall outside the scope of this amendment proposed by Ms Margaret NG. Perhaps later, Mr YING or the Secretary (of course, the Secretary is the official in charge and the officers next to him can pass paper slips to him) can tell us what possibly can fall outside the scope of Ms Margaret NG's amendment, or at least cite one or two examples to illustrate this point. I think doing so can help us understand what the Secretary's proposal is about.

However, please bear in mind that even if he can point out something that falls outside this scope, it does not mean that he has succeeded in proving that Ms NG's amendment is wrong. This can only show that he does not have a detailed definition of "public security". The Secretary should understand his scope of work thoroughly and should not say that he has found an exception somewhere — after all, that would only be an exception. If he really succeeds in finding such an example, then he should amend Ms Margaret NG's amendment and he should not say that the entire amendment is therefore wrong.

It is because this amendment has its advantages. Firstly, it clearly specifies that it must be an imminent and threatening act of terrorism, since even offences punishable by more than seven years of imprisonment do not necessarily contain such an element. Secondly, on acts that pose an immediate threat to public security, in contrast to public security, this reference at least involves the concept of immediate threat and then this concept is related to public security. I think this concept includes the characteristics of greater urgency, so the likelihood of abuse will be greatly reduced.

Of course, some views maintain that Hong Kong may have to co-operate with the international community to counter terrorism. If it is necessary to counter terrorism, the initial part referring to terrorism will be entailed. When it comes to international agreements, say in the last few years, we have also entered into agreements concerning acts of terrorism. Although no definition of terrorism is given therein, it is still possible to refer to acts that are likely to pose an immediate threat to public security, right? Therefore, in view of this, although I dare not say that full marks should be given to the present definition, I believe it deserves at least more than 90 marks.

In the past, I also had some doubts on this amendment and I am not sure if I should support it, since I am also a serious person. However, I now think that I should support Ms Margaret NG's amendment. I believe if I have to choose the lesser evil, I will at least support Ms Margaret NG's amendment, particularly when the Government said that it would conduct a review only four years later. It seems that this definition will become a permanent one that will be used for four years. Moreover, now that a "sunset clause" has not been enacted, that means the exact time when the Government will conduct a review has not been specified. Furthermore, as one can see that the Administration is wrangling all the time, one knows that the Government in fact does not want to give a detailed definition to public security.

All right, as regards my amendment, I want to delete "economic security". What does it refer to? Firstly, among overseas countries, some of them did once include economic security in their definitions of public security, and Britain did and still have such a concept, however, Members have to know, and I want to point out that the work on public security carried out by an intelligence agency stands apart from others. For example, as we all know, the intelligence agencies of some countries will steal industrial secrets from other countries directly. Why? This is because another country may have machinery or a certain type of know-how that is very important to the production or employment in one's own country.

On this point, conceptually, some intelligence agencies may engage in such behaviour from time to time, be it in the diplomatic or economic realm. For example, when the delegations from two sides discuss the quotas for textile products, the quantities discussed in this process may amount to certain dozens, such as thousands of dozens or tens of thousand dozens. The intelligence agency concerned may consider this industry a vital economic pillar for the country, so it may eavesdrop and secretly record what the delegation of the other side says in the hotel, so as to let the delegation of its own country know the information in advance and obtain good results in the negotiations. Diplomacy may also include other activities. Therefore, the information collection and protective actions taken by some intelligence agencies include protecting certain secrets of important products or commercial secrets of certain companies in its country from being wiretapped by other countries. These are the work that can be carried out by intelligence agencies. However, if you ask me if our police or officers of the ICAC should undertake such work, I believe that this is completely off the point.

Secondly, if some people think that economic security includes, say, some economic activities in Hong Kong society — I mean non-violent activities such as normal speculation. Of course, we will think it is possible that speculative actions on the Hong Kong dollar and some Hong Kong stocks will cause damage to our economy and even suffering, OK? However, the problem is that even if intelligence agencies want to engage in this kind of work, there are different levels, for example, at the international level, and there are differences in the level in the system, in the degree of confidentiality and even the entire legal framework can be different. This we understand. However, if this sort of work is forced upon agencies that are purely responsible for law enforcement and if they are requested to do this sort of work, then I do not think it suitable for the existing law-enforcement agencies to perform this role relating to economic security.

In view of this, I call on colleagues to, firstly, join hands to vote down the amendment moved by the Secretary for Security, and afterwards, support Ms Margaret NG's amendment. Next, if Ms NG's amendment is not passed, then Members should support my amendment.

DEPUTY CHAIRMAN (in Cantonese): Members can now conduct a joint debate on the three proposed definitions.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MS EMILY LAU (in Cantonese): Deputy Chairman, I speak to oppose the amendment moved by the Secretary for Security.

Just now, I have already pointed out in the resumption of Second Reading debate that if the definition is not clear, members of the public in Hong Kong would be very worried. They will be worried that the authorities will make use of such a broad definition to achieve political ends and may even look to Beijing or the Mainland for orders it will give to Hong Kong. Therefore, it is definitely necessary to set things out clearly, however, it is regrettable that the authorities do not understand the concerns that we and members of the public have. If things are not specified clearly, should law-enforcement agencies do anything improper in future, they can get away from it because of the unclear definition. In that event, I believe everyone will find this very regrettable.

Deputy Chairman, we had the last meeting yesterday and scrutinized paragraph 37 of the Code of Practice. I believe some of the provisions in it are worthy of discussion. What is written in it? What does "public security" mean in it? It tells front-line officers that they have to use facts as the basis. What do facts mean? Some examples are provided. I often say that providing examples is a very good approach because people can understand easily. What are the examples provided? They are things that pose very serious threats, for example, terrorism (just as Ms Margaret NG has brought up) or the smuggling of weapons of mass destruction, just like what Saddam HUSSEIN did, which no one could find, or the smuggling of illegal immigrants, which the international community is also very concerned about right now, is it not? These are very concrete and specific matters and these are the matters that are referred to in it.

However, next, it says that there may be some situations in which the effects are indirect, however, there is no mention of them. It only says that other places may be affected and Hong Kong is a member of the international community and so on and so forth. Deputy Chairman, you will remember that I also asked yesterday why there was no further discussion on this. This should be a continuation of those matters, that is, even though the effects will be indirect, this also refers to incidents that will result in massive casualties, terrorism, weapons of mass destruction, and so on. Yesterday, the Permanent Secretary agreed to include this point, however, I have not seen it yet, moreover, Deputy Chairman, I do not know what will be written down either.

The question is, since the authorities have agreed to include this point in the Code of Practice — however, it will not have any legal effect — but they refuse to include it in the Bill, this really arouses concern. Sometimes, I do not understand what the way of thinking of the authorities is. What matters most is not written down in the Bill, or it is written very loosely and it is said that there has to be flexibility. It was only after we have exerted pressure again and again that a few more lines are put down in the Code of Practice, however, of course, the Secretary has a better idea than me of what effect a Code of Practice has. At the end of the day, the public still have to refer to the legislation to know what protection they have and what control there is on law-enforcement agencies. In view of this, why does he still want to do it this way?

Deputy Chairman, this paragraph also mentions Article 23 of the Basic Law but it is assigned to footnote number 9. Yesterday, the authorities agreed

to put this paragraph back to the Code of Practice, however, even so, this does not inspire too much confidence in us. The whole process was so strenuous and after holding the meeting for so many hours, at the last minute, the authorities finally agreed to make a small compromise, that is, to include such minor matters in the Code of Practice. However, I believe that ultimately, the effect will not be very great and ultimately, we will not feel very much at ease.

However, in agreeing to add this point, the authorities have stated that they understand society is concerned about what "public security" means, that is, those incidents that are so shocking. Therefore, I believe Ms NG's amendment is very appropriate — in fact, even the Secretary also puts it down this way. However, what he has proposed is "the public security of Hong Kong" and what does that mean? There is also another point which, even if the Secretary does not put it down in the legislation, he should have done so in the Code of Practice and that is, the "public security of Hong Kong" cannot be equated with the public security of the Mainland. He should tell law-enforcement officers that it is not the case that in the event anything happens on the Mainland, orders can be issued on taking any action in Hong Kong. One cannot say that since something has happened in the neighbouring region, we have to step forward and do something. This point has also made everyone feel very worried.

When the Government drafts its legislation, the provisions are formulated very ambiguously. This is also why, after the attempt to legislate to implement Article 23 of the Basic Law, everybody was so scared, since there were problems with some of the words. It seems the Secretary has not truly learned any lesson from this. I hope Honourable colleagues will oppose the Secretary's amendment and support Ms Margaret NG's amendment.

MR LEUNG KWOK-HUNG (in Cantonese): I wish to thank the Secretary and the Deputy Chairman.

I also want to say thank you to the Secretary because he was being very candid when he made it clear that he only wanted to refer to the "public security of Hong Kong" — that is, he knows that in the process of legislating to implement Article 23 of the Basic Law, everyone was afraid that the Government would copy the national security law of the Mainland in its entirety and apply it to Hong Kong. Therefore, the Secretary is in fact very profound in his thinking and he wants to make clear that it only refers to "the public security of Hong Kong".

However, the problem is that we have not yet enacted the legislation on Article 23 of the Basic Law. As Mr TO said, things that happened in a former British colony Sri Lanka, were deemed to affect the security of Britain because it is a small world, is it not? In other words, if the situation in respect of the public security in Hong Kong is as that in Britain, by extension, if the public security of other places is threatened, this may also affect public security in Hong Kong. In that case, we will be in for something very serious.

To give a very simple example, if a very large-scale strike occurs on the Mainland, say, if the workers of an oil field go on strike, will this affect the economy on the Mainland? It will, so will this lead to political tension on the Mainland? It will. If I in Hong Kong or someone in a certain group in Hong Kong have links with those people on the Mainland, according to this definition, there is the likelihood that I or that person will be placed under surveillance. So this is a very dangerous concept. To take this further, there will even be greater problems if we do not accept what is called imminent danger. It will be very easy to establish a logical relationship. People who are concerned about union activities or who have contacts with lawyers defending civil rights on the Mainland — that is, the likes of Mr Albert HO — they will become targets because he associates with those people, so there is the likelihood that he will affect public security on the Mainland. In that way, he would fit the description and become a target of communication interception or covert surveillance.

In our discussions, we discussed this pointed over and over again. One of the approaches is for the authorities to give a detailed definition to public security. Only in this way can the power be kept in check by means of the definition. That is to say, it will be specified that only in 10 types of circumstances can such actions be taken but not in other circumstances. However, the authorities have not done so. They only say that when the public security of Hong Kong is threatened, it can take such actions, however, the Secretary cannot answer if, when the so-called public security on the Mainland is threatened, the people in Hong Kong who have connections with those people would be put under surveillance or be subjected to wiretapping. In other words, it is meaningless to add the two words "Hong Kong". In fact, it is necessary for the person creating the problem to solve the problem himself.

Since the attempt to enact a national security legislation in Hong Kong in 2003 fell through, so there is no explicit provision in Hong Kong setting out a concept of national security that we would find concrete, that is, this difficulty

will be encountered whenever legislation involving national security and public security is being formulated. In fact, when I was having a litigation with the Hong Kong Government concerning the Public Order Ordinance, I asked the three Judges if they knew what national security meant and they all said they did not and could not answer even after 15 minutes had passed. I asked them why since they did not know, but the Commissioner of Police knew what national security was and he went on to prohibit other people from assembly? They were really lost for an answer because the Judges did not know and the Commissioner of Police did not know either. At that time, I described police officers as a blind person and the Judges as a blind horse, that is, the blind person is riding a blind horse and in the middle of the night, they come to the verge of a deep pool, so it would only be strange if they do not fall to their deaths. This is really how the actual situation is like. If everybody in society has no idea of the definition of something, yet it becomes a condition for restricting basic human rights, this is absolutely unacceptable.

Therefore, it is useless for the Secretary to continue to go on talking slickly — I am only saying that he talks slickly, not craftily — it is useless to talk slickly because today in this Chamber, he can never answer two questions clearly: first, dare he say categorically that the case mentioned by Mr James TO would never be applied to Hong Kong, and that public security in Hong Kong only refers to public security in Hong Kong? I do not think he can do that.

Secondly, since public security on the Mainland is related to public security in Hong Kong, that means public security in Hong Kong is a sham and so long as the so-called public security on the Mainland is threatened or suspected to be threatened, those things can be done in Hong Kong, so how possibly can there be any protection? Furthermore, another problem is that, when I took legal action, I asked the Judges what it actually was and they were lost for an answer, so how could they possibly make decisions? Therefore, when the Court of Final Appeal made a judgement (even though it felt that this was inappropriate because even the Commissioner of Police was not clear about all those concepts such as national security), it requested the Government to reconsider the Public Security Ordinance. However, before any reform can be introduced, this issue has to be brought up again.

Therefore, I think Honourable colleagues should not be fooled by the Secretary and accept such a course of action because the two words "Hong Kong" have been added, since the simplest way is to use the two words "public

security" instead of relating it to Hong Kong or the Mainland. The two words "public security" will suffice. There is no definition of "public security" in Hong Kong but there is on the Mainland. Therefore, the conclusion can only be: if the Government asks the Mainland if it feels that its public security is threatened and if the other side replies in the positive, then we are in for something serious. Doing so will only open a door for the law-enforcement agencies in Hong Kong to obtain powers not due to them through such a side door and makes it highly convenient to decide whether officers from outside the territory or from other jurisdictions can carry out wiretapping in Hong Kong.

In fact, we have also asked the Secretary if, should the National Security Bureau carry out wiretapping in Hong Kong, the authorities can impose any control. The Secretary replied in the negative, saying that there was no legislation. If this is now permitted, if this legislation is enacted in the future, are we not in for something serious? Does that not mean they have even greater legality? Therefore, I think we should by no means support the Secretary as a result of his slick talk. We should not listen to his words and should let him meet the fate of being voted down and punished. It is only right to do so.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR ALBERT HO (in Cantonese): Deputy Chairman, concerning the topic of public security, the Bills Committee has spent a lot of time discussing it and we have also raised many queries. If the term "公共安全" is rendered from Chinese and the translation is public safety, of course, everyone will find this very clear because it is something that directly affects personal safety and everyone knows what it is about. However, the fact is that this is not how the term is translated and the word "security" is used instead. As compared to national security, the meaning is of course more complex and the matters included are more profound. Its meaning does not just include such simple things readily observable to us as the safety of the body and our life.

If we look at the Code of Practice again, the examples given therein include such things as human trafficking and arms sales. If such things happen in Hong Kong, it will be difficult not to conceive of them as serious crimes and as not liable to a penalty of three years of imprisonment or more. If what I have said is wrong, the Secretary can point it out. If human trafficking is carried out

in Hong Kong, why is it not a serious crime? If the sale of arms is carried out, why is it not illegal? Therefore, it is obvious that the meaning of public security as provided for by the Bill has definitely not included serious crimes in its scope. What serious crimes refer to are those that are liable to more than three years of imprisonment. So what are these? We had a lot of doubts throughout. However, even though a lot of examples were given, they still failed to answer the queries that we raised. What are the matters that are not illegal, occurring in Hong Kong but can affect public security?

According to the definition given by Ms Margaret NG on public security, there are mainly two points, one being the concept of terrorism. On this point, in the past, when we were scrutinizing anti-terrorism legislation, we learned about some concepts adopted in many relevant international treaties. If parts of such acts of terrorism or acts involving terrorism occur in Hong Kong, they may not be an offence, for example, recruiting people and training them, however, the operation does not take place in Hong Kong but perhaps in some other places. On such matters, Hong Kong should deal with them and of course, they are dealt with in our anti-terrorism legislation, for example, by prohibiting the activities of the relevant organizations, however, these may not necessarily be serious offences. Therefore, if a connection is made with this type of activities, that is, matters relating to terrorism, then the definition will be a lot more specific.

Secondly, clause 2(2) mentions the effects on public safety. I do not quite understand how great is the difference between public security and public safety. However, there is an additional concept in it, that is, there must be urgency. For matters relating to security, actually, several questions will always be involved: whether it is direct or indirect, distant or urgent and what the scale is like. These three points are all very important. I think the concept of public safety introduced here is a matter of scale. In addition, the concept of urgency also involves directness and something that is to happen soon. Therefore, this point also enables me to understand the meaning more clearly. Of course, if I am asked whether this is the best definition, I would think had there been more time to refer to practices in other countries, it would have perhaps been better.

The present proposal put forward by Ms Margaret NG is anyway superior to the "public security of Hong Kong" as proposed by the Secretary, which is truly meaningless. In reality, a lot of things found in the Government's Code of Practice probably would not happen in Hong Kong, yet they are also included, so

there is actually little significance in adding Hong Kong into the definition. I think this amendment proposed by Ms Margaret NG is definitely much more concrete and is definitely preferable.

The amendment proposed by Mr James TO adopts an approach of exemption, that is, the approach of exclusion by specifying acts that do not fall within the scope of what we call public security. This is to accept a less desirable option, for example, the definition is given by excluding lawful demonstrations and protests that do not develop into violent actions. This way of giving definitions can never be the best approach. The best way is to provide a specific and core meaning directly. Therefore, I also think that in today's circumstances, we should support Ms Margaret NG's amendment. As regards the Secretary's amendment, on the face of it, the definition has been narrowed down, however, in reality, has it been narrowed down and if so, by how much? No one knows. In particular, after reading the Code of Practice, one will only feel more confused and have even more queries.

Therefore, the Democratic Party will support Ms Margaret NG's amendment. Thank you.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR RONNY TONG (in Cantonese): Deputy Chairman, when the Bills Committee was scrutinizing this issue, in fact, the greatest concern was that the definition of the term "public security" is not clear. So far, the amendment proposed by the Government does not serve to clarify the definition. I remember that during the scrutiny by the Bills Committee, I asked the Secretary — sorry, it seems that the Secretary was never present, or, it seems that he was there on one or two occasions; on most occasions, it was Mr YING who attended the meetings most of the time — I asked the Bureau what kinds of behaviour could go under the definition of "public security" but were not covered by the definition of serious crime. After considering this for a long time, the Government gave us three examples. However, they all involve public security outside the territory of Hong Kong.

Now, the Government says that the term "public security" does not refer to "public security outside Hong Kong" but "public security inside Hong Kong".

If so, that means up to now, the Government is perhaps still unable to — sorry, I mean "cannot", not "perhaps still unable to" — say what the "public security" they have in mind is exactly about. In fact, does the present definition of serious crimes, which is so broad, already include everything? Regarding the next amendment, although we have not yet come to the next amendment, we can still take a look at clause 2(5A) proposed by the Government. The clause states, "advocacy, protest or dissent (whether in furtherance of a political or social objective or otherwise), unless likely to be carried on by violent means, is not of itself regarded as a threat to public security.".

If acts of violence are involved, obviously, they are already covered by the definition of serious crimes because actually, our Public Order Ordinance includes peaceful demonstrations not involving violence in its scope of serious crimes punishable by three years of imprisonment. Since the scope of serious crimes is so broad, why is it still necessary to add another category called public security, the definition of which is so vague, under this provision? All along, the Government cannot tell exactly what sort of behaviour it is referring to.

All in all, I think that it is more reasonable to delete the whole provision concerning public security. However, of course, if it can be narrowed down to such an extent that we find it acceptable, it will still be all right. Therefore, I think both Ms Margaret NG and Mr James TO are both considering this matter from such a perspective, trying to narrow it down to acts that we can foresee. If the definition is very vague, such that the acts which we cannot foresee, this will in fact be tantamount to a licence to abuse. Obviously, this will become a strong incentive for law-enforcement officers to exploit the vagueness of the concepts in the definition to carry out covert surveillance or wiretapping. Therefore, I think that the amendments proposed by the Government cannot eliminate our worries and I think that the amendments of Ms NG or Mr James TSUI — sorry, it should be Mr James TO, however, since he is not present, it does not matter *(laughter)* — I think that the amendments of Mr James TO and Ms Margaret NG are far more reliable than that of the Government.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

DEPUTY CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): Deputy Chairman, I wish to talk about several matters. Today, it seems that what everyone has been hearing us discuss the word "definition" all the time. Is this something very academic? In fact, this is by no means so. As I have said in the Second Reading debate, if one wants to know what the meaning and scope of the provisions are and how one will be affected, in fact, all the answers can be found in the definitions.

In discussing the definition of "public security", we mainly have to look at clause 3 of the Bill. It is specified therein when an interception of communications and secret surveillance can be carried out. First, this is defined by the aims and the aims to be achieved are set out below, one of such aims is protecting public security. Therefore, what "public security" means will have a great effect on the circumstances in which law-enforcement officers can intercept communications and conduct wiretapping.

The broader the definitions — insofar as serious offences are concerned, generally speaking, the definitions of such offences are set out in the law. As we all know, since Hong Kong still enjoys the rule of law, the elements of any offence are specified, so offences are fairly specific. However, if one cannot find any excuse in these specific provisions, one can pin one's hope on the term "public security", the extensive meaning of which offers tantalizing possibilities, so that a lot of matters can be placed under wiretapping.

In fact, when we were debating the legislation to implement Article 23 of the Basic Law, what were Hong Kong people most worried about? The most worrying thing was not that one would be sentenced to life imprisonment for the offence of treason, since ultimately, this sort of things rarely happens. What we were most worried about was that if this sort of legislation was passed, the police can use the excuse of crime prevention or detection to carry out wiretapping on members of the public. In fact, the same applies to the discussion today. If we do not want the Government to possess this power and use the excuse of having an effect on public security — no matter if it is from a political perspective or not, however, the Government will never say that it does so for political reasons. How can subverting the Government be considered a political reason? It would only say that it is has to do with public security. How would it say that it is for political reasons? The Government does not care if you

believe in democracy or not. In sum, it will accuse you of jeopardizing public security in Hong Kong. The Government will use this sort of reasons.

(THE CHAIRMAN resumed the Chair)

Therefore, the clearer and more specific the definition of "public security" is, the more it can help reduce instances of abuse of power, since for what purpose the information obtained through the interception of communications can be used will also depend on the aim. Therefore, when Mr Albert HO was speaking just now, I listened very attentively to him. He said that the definition could not be as large as the ocean and "public security" had to be specified. The amendment I will move later requires the authorities to specify what sort of threats they are. In the domain of "public security", it has to be specified clearly what sort of threats they are, moreover, there must be reason to believe that such threats are imminent. In that way, all matters will be very specific and members of the Hong Kong public do not have to worry that some very abstract and vague matters will affect their privacy. Chairman, I want to make clear that although we are discussing so many definitions here, in fact, they are not theories, nor are we discussing the definitions from a philosophical angle.

Chairman, I also wish to summarize several points. Firstly, concerning public security, there is no use in limiting the geographical area since globalization has occurred. However, it is useful to specify the matters which "public security" refers to.

Secondly, a Code of Practice is useless, whereas a Bill is useful and a piece of legislation will serve some purpose. In fact, I also wish to talk about this Code of Practice with members of the public. What are codes of practice usually used for? They are used when, in discussing Bills, we find that there are many areas that are far from clear and we want the authorities to provide clearer definitions but they refuse to do so, so they will propose that they be set out in a code of practice.

The Hong Kong Bar Association requested that the Code of Practice be given the status of subsidiary legislation, however, this was turned down by the Government. In other words, what does this mean? That means the Government undertakes that as long as something is not legally binding, even if it

is wildly extravagant, the Government will still accept it, however, should it involve legal provisions or is legally binding on the Government, then it will not accept it. Mr Bernard CHAN is not in the Chamber now, however, if the Chairman wants to take out an insurance policy, everybody will advise you not to believe the words of insurance agents and they will ask you to read the policy clearly. If it says that payments will be made for something, then this something is covered; however, if it says that something is not covered, then you should not expect to receive any payment for that. Conversely, if he has deleted a part therein and said that payment will by no means be made on it, then you have to believe that payment will definitely not be made on that.

Chairman, this Bill we are looking at is also an insurance policy. Moreover, we can only listen casually to what an insurance agent tells us. Insurance agents are generally very affable people and it is usually very pleasant to talk with them, however, how much protection can actually be provided? In the final analysis, it is necessary to look at the insurance policy. Chairman, what we find most chilling is that, as long as there is no legal effect, a lot of things are negotiable, however, if it is requested that it should be legally binding, then sorry, it is out of the question. In these circumstances, how can the Government win any trust? In fact, we do not place our trust in one person or another, what we trust is the law and what we trust are the legal provisions. That which is not specified in the legal provisions, how can law-enforcement officers be expected to enforce it? What does an undertaking made to the public amount to?

Chairman, once again I call on Members to vote against such a meaningless amendment moved by the Secretary and reserve their votes to support the very meaningful amendments proposed by me and Mr James TO. There can be legal effects for our amendments only if they are passed. It is only in such an event that clause 3 of the Bill will truly be able to safeguard everyone's freedom of communication and safety.

Thank you, Chairman.

MR JAMES TO (in Cantonese): Chairman, when considering public security, it is in fact necessary to look at the whole set of complementary measures. What is the whole set of proposals put forward by the Government about? Of course, if the Government says that it really cannot provide a definition — the Secretary

said in response to Mr Ronny TONG that it was not possible for the Government to provide a definition — well, that means it wants to retain some flexibility. On matters of principle, we may not agree with the comments of the Secretary, however, if the Government can put another set of complementary measures in place, then it can make the public put their minds more at ease.

Let me give an example. At present, the attempt to legislate to implement Article 23 of the Basic Law two or three years ago is still casting its long shadow over the public. If the Government says that with regard to legislating to implement Article 23, not only will it give a verbal undertaking but it will set it down in writing just like an insurance policy, as Ms Margaret NG has suggested and if it will put this down in black and white in the legislation, then all will be fine. However, this is not how the present situation is like. The Secretary has also said just now that legislating to implement Article 23 has not been completed and this would hinder the Government in enacting legislation.

Members, if it is necessary to enact legislation, one can draft consequential amendments This is also the case now, is it not? If the truth of this matter is really the same as what the Government thinks or claims, how would writing it down create obstacles? The truth of the matter is that the Government wants to leave some room so that it can abuse power, and some other room so that it can carry out political surveillance and control, and yet some other room so that it can achieve political ends. However, it would not tell its subordinates that what they are required to execute is for the purpose of political surveillance and for political ends. It would only say that a certain Member is suspected of such and such a thing or a certain trade union is suspected of this and that. All these actions would be taken in such a guise. A real-life example is the United Kingdom two or three decades ago and even three or four decades ago when the Conservative Party was in power, labour unions were subjected to this sort of political surveillance and control.

The situation in Hong Kong is also the same. As far as I understand it, since the Government is apprehensive of the strikes and go-slow actions staged by drivers, therefore, all drivers' unions, in particular, those for cross-boundary drivers, are all subjected to surveillance and control. At present, a lot of cross-boundary drivers are members of the FTU. There is no telling if they are more obedient and can be more easily controlled and maybe, one can settle everything by seeking the assistance of the chairman, CHENG Yiu-tong.

Regrettably, however, it is still doing this all the same. Why? This is because it is said that it is an independent body, so it is necessary to secure such a guarantee, right? This is how I understand this matter. However, the problem is, if we request that it should be written in this way, the Secretary will in the end say to them, "Just believe me!" That was also what the Secretary said earlier. Whenever we requested that something should be written down, the Secretary would say, "That means you do not believe me." This remark really rings a bell. Why? Because that person (that is, Mrs IP) has come back. It was her who would often say, "Just believe me. As a Secretary, I will not deceive you." Today, the Secretary is also saying, "As a Secretary, I will not deceive you. Police officers, just believe me."

However, what we are talking about now is the law and the rule of law, not about trust. When it comes to trust, there is a little gap. There is indeed a little gap. However, even if we want to leave a little gap, it is still necessary to define as much as possible when giving the definitions. What can be defined should be defined, be it in a positive or negative way or by means of exclusion. This is like in the approach of an insurance policy that has been mentioned, by stating which areas will not be covered and setting down in writing what will not be covered. Alternatively, would some words put the minds of the public more at ease, for example, by stating whether the threat to security is rather urgent? Take the United States as an example, the term used is what is called "clear and present danger" and this is what many countries have done when legislating on national security.

Of course, the Secretary has said that things by now have become more relaxed since the September 11 attack. However, please bear in mind that the kind of terrorism facing each place is different. In view of this, the legislation of each place should commensurate with its conditions. Several decades ago, when the United Kingdom had to deal with the then fairly active Irish Republican Army, some of its laws were definitely more draconian and the definitions in them were also broader. However, if we look at the present circumstances in Hong Kong, permission was not even granted to the applications for disclosing the number of actions taken on grounds of public security in the context of the total number of offences, that is, even the total figures cannot be disclosed. In other words, all along, things are done to ensure that this will remain a secret, and all along that the total figures are not disclosed and all along, there is little reassurance for people that they will definitely not be put under political surveillance. Apart from this, what else will there be? All the Secretary

knows is to ask others to believe him because he is the Secretary. However, is this what it is like in a society with the rule of law? Can this be considered to be a sufficient counterbalance to power?

There is no need for me to dwell on the point that our Government is not elected by democratic elections. As Ms Miriam LAU has said, even though it is not democratic, security still will have to be safeguarded. However, the trouble is, if it is not a government formed by democratic elections, it will be necessary to put in more efforts to convince the public by doing whatever it can do, by writing down whatever can be set down clearly, or by including in the Code of Practice. Regardless of what has to be done, it is in any event necessary to close the distance and make the public feel at ease as much as possible. This is what the Secretary should think hard to do rather than exploiting his credibility and saying that the public has all along been trustful of law-enforcement agencies. This is useless. Why? This is because in fact, in the past few years, one can see from various cases that the practice of law-enforcement agencies is that they do not pay heed to anything. Put simply, if a criminal is released on bail, if he is not doing anything in particular, just eavesdrop on him. If he calls his lawyer, his conversation with his lawyer will be bugged and if his lawyer calls the reporters, then his conversations with the reporters will be bugged. In this way, a series of bugging will take place. All these are set down in black and white and I know this from the records of court proceedings.

I think that given such a track record, how can the Secretary call on others to believe him? Can the Secretary try and look for some words as best as he can and try to narrow the differences and enhance other people's confidence in him? A Government that can make the public feel secure will try hard to do so. However, during the scrutiny on this occasion, in some sensitive areas, the authorities are compelled to do something. Even so, what they have only done is a bare minimum that would enable them to clear the legal hurdles and that is all. This will not serve to enhance public confidence in the Government.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MS MIRIAM LAU (in Cantonese): Madam Chairman, first of all, I wish to clarify one point. Several Honourable colleagues have said that the Code of

Practice is useless as things written in the Code of Practice can be regarded as having no effect whatsoever. I want to point that there is an interpretation clause in the Bill, that is, the interpretation of "relevant requirement". "Relevant requirement" means anything applicable under — there are three parts — (a) any provision of this Ordinance; (b) the Code of Practice; or (c) any prescribed authorization or device retrieval warrant concerned. According to clause 54, the head of each department shall make arrangements to keep under regular review the compliance by officers of the department with the relevant requirements; in case of non-compliance, according to clause 52, the department concerned shall submit to the Commissioner a report. It will certainly mean that the people or law-enforcement officers in the department concerned may have to face disciplinary action. When the Commissioner receives such information, he can also review the matter, make recommendations, and so on, so there are consequences. I want to point out that if in case of non-compliance with the Code of Practice, there will be consequences. Why are some information included in the Code of Practice? It is for the sake of greater flexibility. It is more convenient for the Government in making amendments when it wants to, by discussing the relevant information with the Panel on Security of the Legislative Council and then make the amendments. This will enable law-enforcement officers to operate with greater flexibility.

Madam Chairman, you may say that I am not speaking to the question but in fact I am not. I will also go back to "public security". Having heard my Honourable colleagues' speeches, I think that in the Bills Committee, we have really spent a great deal of time discussing public security. I am convinced that all Honourable colleagues agree that we need to safeguard public security in Hong Kong. No one will dispute this point, otherwise, I believe today, not only will the amendments proposed by Ms Margaret NG and Mr James TO seek to amend the definition of "public security" but they will delete the term "public security" altogether. Therefore, I strongly believe they agree that it is necessary to protect the public security of Hong Kong.

However, what can be considered as "public security"? Actually, should the definition of "public security" be set broader or narrower? Earlier on, during the Second Reading debate, I have also mentioned a principle, that is, the principle of balance. From the perspective of protecting human rights, of course, the narrower the definition is, the better. That is, to ensure that it can only be applied in certain circumstances, that is, to give human rights greater protection by adopting a very, very narrow definition. However, from the

perspective of public security, I am afraid the definition will not be broad enough. If the definition is not broad enough, it may not be able to cover offences or acts that should be prevented.

In the course of scrutiny, in fact, some Honourable colleagues have requested that the scope covered by the term public security should be all set out in the greatest detail possible, requesting that the Government should set them out one by one. Honourable colleagues have also repeatedly requested that all the areas covered by the term public security should be listed out one by one. In fact, the aim is to prevent any abuse of power by the Government in the name of safeguarding public security, such as intercepting communications or conducting covert surveillance indiscriminately. Of course, in respect of any legislation, one can set out the relevant definitions in great detail. The problem is, however, in what way can they be set out in detail? If there is any omission in the list, it may leave one or two thing unaccounted for. If the areas set out are very controversial, after they are proposed, the focus may be on debating whether certain definitions should be included. In particular, we can see that in some other countries, for example, in the New Zealand Security Intelligence Service Act 1969, which states that, "The protection of New Zealand from activities within or relating to New Zealand that — (i) Are influenced by any foreign organization or any foreign person ……", there seems to be some resemblance to Article 23 of the Basic Law. I am afraid should the Government propose this, it will provoke a public outcry. Then, our focus will be turned to a debate on whether this should be considered public security, and so on and so forth. Moreover, things like acts of subversion, in some countries, a definition of safety or security are set out and they will be set out as items (1), (2), (3), (4), and so on. However, is doing so really applicable to Hong Kong? We have great doubts about it.

When it comes to this matter, how should we actually give definitions? Let us see if there is actually any authoritative international interpretation of "public security". We have gone through some literature and the answer is in the negative. Let me first talk about, for instance, the 1996 report of the Law Reform Commission (LRC). No definition for "public security" was given in it. There is none in the report on the regulation of covert surveillance published in March this year either. Therefore, the LRC did not offer us any assistance in making a decision in this regard. Next, we try to figure out why there is no definition, so we have further checked some overseas literature. Perhaps let me mention here that, in fact, Mr James TO has also admitted that when he proposed the Interception of Communications Bill in 1997 that he himself had not provided

any definition on the term "public security in Hong Kong". We found that in some overseas literature, such as a rather authoritative book published in 2000 entitled *National Security & the European Convention on Human Rights* written by Iain CAMERON, it is pointed out that "The European Commission and Court of Human Rights are reluctant to give abstract definitions of Convention terms, and this has also been the case with national security. Indeed, the Commission has expressed the view that national security cannot be defined exhaustively." There, a case is provided, namely, the *Esbester v. UK* case of 1993. In this case, the European Commission of Human Rights stated that the term "national security" is not amenable to exhaustive definition. The above are some overseas literature.

Furthermore, there is also another document that I would also like to mention here. It is a report by the European Committee on Crime Problems published in 2003 which also talks about what the scope of the term "security" should be. It gives some examples considered by the European Court of Human Rights to be threats to national security and these include espionage, terrorism and incitement to and approval of terrorism. There are also other examples such as external threats to the economic well-being of the state; money laundering on a scale likely to undermine the banking and monetary system; interference with electronic data relating to defence, foreign affairs or other matters affecting the vital interests of the State; and organized crime on a scale that may affect the security or well-being of the public or a substantial section of it. However, more importantly, after listing so many examples, the report emphasizes that these do not constitute an exhaustive list as to what it means by "national security".

In fact, we can make use of this concept. Although we are not talking about national security now, public security can also borrow the concept of national security because they are about security of the public at large. The report notes that this will change from time to time and will vary from country to country. Therefore, what "public security" refers to depends on the circumstances of a country or the situation there and then.

As I have pointed out on the resumption of the Second Reading debate of the Bill, I cannot say that our two Honourable colleagues, Ms Margaret NG and Mr James TO, are wrong in what they set out to do. Maybe they want to secure a bit more protection for human rights. Therefore, they want to narrow down the definition of public security, thinking that this can prevent any abuse of

power. so as to give a bit more protection to human rights. Of course, one can always demand more at any time, that is, to ask for a bit more, a bit more and a bit more. However, the problem is that it will give those criminal elements or lawless elements more and more scope. Concerning this concept, if we give the term "public security" too narrow a definition, in that event, the scale that I have mentioned earlier on may tip to one side and there may also be some adverse effects. This will not just mean that law-enforcement agencies can do whatever they want but there are many things they cannot do. They cannot do this or that, but is this an appropriate balance? It is a point we should consider.

Of course, the Government has in fact been amenable to suggestions. First, it has restricted the definition of public security to what must be related to "the public security of Hong Kong". It is because originally, some Honourable colleagues were worried that what was called "public security" might purely involve the security of the state and had nothing to do with the security of Hong Kong whatsoever. In this regard, by making this amendment, any security must directly or indirectly involve "the public security of Hong Kong". This is an improvement. Some Honourable colleagues were also worried about demonstrations and processions. It is because in the case of Canada, the definition in this respect has exempted certain lawful demonstrations and processions, although activities such as espionage are set out. Nevertheless, if these demonstrations and processions involve espionage, they are also included in the definition of "public security". However, on hearing that some people are worried that peaceful demonstrations and processions may be included in the definition of "public security", the Government is amenable to these views and excluded this type of activities from "public security"

Here, I want to mention in particular that in Canada, the word "lawful" was deleted from the phrase "lawful demonstrations and processions". What is the reason for that? This is because an Honourable colleague has said that very often, when we want to stage a rally, we would not make an application in advance and without making an application, people who join the rally will regard it as unlawful; if it is unlawful, the relevant rally will be assigned to the domain of "public security" and then people are made targets. Therefore, in the end, even the word "lawful" was struck out and was not written in the provision. In other words, any demonstration or procession will be excluded from the definition of "public security" unless it is highly likely that they are staged violently. This is mainly to put the minds of our Honourable colleagues or the public at ease when taking part in such activities.

I think the present approach adopted by the Government in dealing with "public security" cannot be described as the best. However, after so much discussion, and looking from the perspective of striking a balance, this is an acceptable proposal.

Thank you, Madam Chairman.

MR LEUNG KWOK-HUNG (in Cantonese): The discussion just now on whether the definition for "pubic security" should be broad or narrow has in fact proven one thing, that is, the discussion on this piece of legislation has been very immature, so we still have to wrangle even at the final stage.

In fact, just as Ms Miriam LAU said, the concept of "public security" will change as a result of the changes in the history, culture or politics of a place. Therefore, if today, we give a definition to "public security", for example, that it includes 10 points, then in the future, Hong Kong people may think that 10 points are too many and there is a lack of balance and they may request that two points be removed, is that possible? There is such a possibility, but the point is, it must go through a very thorough-going consultation and amendment process. Therefore, it is proper and appropriate for the Security for Security to define what "the public security of Hong Kong" is and list it out to the best of his ability or that of a certain colleague of his in the Government, since amendments can still be proposed in the future. No squares or circles can be drawn without a ruler or a compass. What can be done if there is no trace of anything, man? Just call it "the public security of Hong Kong" and that is all. Nothing can be done. If 10 points are listed out in the definition, someone would have requested today that five points be deleted or three points be added. It is just as simple as that.

In fact, the whole problem lies in the fact that the Secretary for Security is certainly aware of the sore spot in the heart of Hong Kong people, so it is not possible for him to introduce the "national security" of the Mainland or the "public security" of the Mainland into Hong Kong, so he added the words "of Hong Kong". However, the point is that if we cannot make Hong Kong people reach a consensus (be it just a momentary one) on the definition of "public security", such an empty concept cannot actually allay the concerns of Hong Kong people. Just now, Ms Miriam LAU cited some cases. All she wanted to do was just to point out that the concept of "public security" will change and the list of cases cannot be exhaustive. This is right because everyone knows that

when there is a regulation, there will be a negation of it; and when there is negation, there will be a regulation. This is in fact the norm.

Therefore, what should our approach be? It should be a two-pronged approach: delete and list out. This will eliminate the worries gradually. However, it is a pity that our Government is not doing it this way. Our Government cannot even tolerate the very minor amendments proposed by Ms Margaret NG and Mr James TO. The Administration merely says, "I cannot care that much. I will simply call it 'the public security of Hong Kong' and that is it.". This has actually reached the stage of being not amenable to reason. If the definition proposed by Ms Margaret NG is wrong or contains too many elements, it can be reduced; if it is too narrow, additions can be made. How can the Government cast it aside, saying, "That's it. Just call it 'the public security of Hong Kong'!" This is by no means convincing. This is just like someone who has to buy something, say a bag of rice which costs $30 per catty but not knowing whether it is "See Mew rice" or Thai Golden Elephant brand rice, anyway, it is something called rice. After the rice has been taken home, one finds on having a look that it is in fact low-grade rice. The seller has the guts to do that. He of course has to give some description to his goods, for example, that the place of origin is Bangkok of Thailand and what variety of rice it is. Something like this must be done, so how can one's behaviour run counter to this kind of common sense?

Therefore, to be fair, what the Secretary for Security has done, even though it may be a virtuous act, is just halfway measure. His approach is: since the public dreads "public security" on the Mainland, he does not offer it to them. However, he himself does not know what public security is. This in fact amounts to just a perfunctory performance of his duty. That is to say, since the public is worried, he will refrain from making them worried but he will not help them solve their actual worries.

On this point, just as Ms Miriam LAU has said (her remarks are very simple): How can a balance be struck? I think that there is only one way. For the time being, where is the point of balance? It is right here. We, this group of people, are casting our votes. Who have proposed the amendments? Take me as an example, there is no use saying anything more as I have not proposed any amendment, so even if I want to add 10 amendments now, it is not possible. Therefore, the crucial point here is: as everyone knows, among these three amendments, the most shoddy and insincere one is the one proposed by the

Secretary for Security. Therefore, why should we support him? I really do not see any reason to.

Therefore, I hope that our Honourable colleagues will support a more specific definition given to "public security", particularly when Ms Miriam LAU has pointed out that the Code of Practice should also be taken into account. What is set down in the Code of Practice can also be regarded as having been written in the legislation. This can avoid further arguments, right? So, it is necessary to look up the Code of Practice frequently. I think politics is actually very simple, that is, there is nothing that cannot be expressed. Things should be written as they are and there is no harm done. After it is written but is found that it does not work, it can be deleted and that is it. Therefore, I hope that all Members, including those who support the Government (that is, those are always inclined to supporting the Government), can also think about this issue. I hope a miracle will take place and it will enable our definition for "public security", though still not very comprehensive now, to have a slim chance of getting passed. Thank you, Chairman.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR JAMES TO (in Cantonese): Chairman, I wish to say a few words in response to the speech given by Ms Miriam LAU just now.

Firstly, "national security" and "public security" are actually two different concepts. Why? National security is in fact related to Article 23 of the Basic Law that we talk about. Therefore, what we are concerned about is turning the "national security" of other countries into "public security" before we have enacted legislation on Article 23 of the Basic Law. The Government has adopted of the concept of "national security" of other places. Why are we worried? In other places, intelligence agencies are involved. Therefore, their way of thinking, the entire structure and their operation are all completely different from our law-enforcement agencies, unless the Government is telling us that our law-enforcement agencies are actually intelligence agencies. However, that is not what the Government is saying. Moreover, we have not yet enacted legislation on Article 23 of the Basic Law, so the Government should not introduce the concept of "national security" from overseas countries into Hong Kong and say that things should be like this and that. This will not do.

However, the worst thing is that even though at present, the definition of "public security" has not been not set out clearly, Ms Miriam LAU has referred to New Zealand, Canada or Australia and said that activities such as subversion are also included. Of course, Members may ask whether the three appointed Judges would say when cases come before them that those are intelligence agencies and public security is not involved but that is about law and order. Would it be necessary to argue in this way? However, we have to bear in mind that no outsider will know about this. Moreover, the party whose privacy and secrecy in communication are affected has no representative to present to the Judges other views in society because it is an *ex parte* application.

Furthermore, a Judge will face a very difficult situation, that is, should anything go wrong, it seems that he will be the one who has to assume responsibility. He is the one who grants authorization in secrecy and this will not be known to other people. Therefore, if he does not grant the authorization but something terrible happens, he may be under very heavy pressure. Conversely, if he grants the application, even if there is any abuse of power by law-enforcement agencies which exceeded their scope of power, the person affected may in the end be unaware of this since the whole process takes place in secret. Of course, I do not mean any disrespect for the appointed Judges, but if we look from a very simple angle, so long as there is anything that is not clearly specified, they will certainly be under heavy pressure when making decisions.

Secondly, about the Code of Practice. So long as the Secretary does not change the Code of Practice, it will certainly have partial legal power, but we have to bear in mind that the Code of Practice can be amended by the Secretary himself. However, if it is incorporated into the legislation, be it the subsidiary legislation or the principal legislation, it has to be amended by tabling before the Legislative Council. That is where the difference between the two approaches lie. As long as the Secretary can amend the Code of Practice at any time, then the third level, that is, compliance with the legislation, will also change.

Another point is, if it is said that in a government which is popularly elected, in addition, due to certain circumstances, it is necessary to have a broader definition, then just take a look at some overseas examples. Take Britain as an example, to whom does it answer to? It has to report to the intelligence committee of the British parliament in secret. In the United States, even the intelligence agency has to report to a similar intelligence committee.

The scope of "public security" is very broad, so much that it covers people who are detained at Guantánamo Bay or prisons set up in Eastern Europe. A report has to be made at least to voters' representatives. However, do we have such a mechanism? The answer is no. No general figures have been given, nor is there any reporting to the representatives of the public. Everything is in the hands of the executive authorities under the Chief Executive.

If this point is not clear, nor is the definition accurate, and one merely copies and fuses all of the laxest systems in the world together without paying heed to other people's practices of requiring reports, concepts, figures and a macroscopic perspective, one can call this a "hodgepodge approach". Then it is said things are like this and since intelligence agencies are responsible for implementation in other countries, so things will also be dealt with as if by intelligence agencies here. The present Bill is such a hybrid and such a fusion. In this way, what sort of protection does the Hong Kong public expect? They will be very vulnerable indeed.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MS AUDREY EU (in Cantonese): Chairman, I wish to respond to a point made in Ms Miriam LAU's speech and add a few words concerning the point mentioned by Mr James TO just now on the definitions in other countries, since in her speech, Ms Miriam LAU has cited other people's comments and cases which often have to do with international conventions.

Regarding some definitions in international conventions, such as the term "national security" which she has mentioned just now, since international conventions are conventions among nations, when applied to different places, there is a well-known or accepted practice called the margin of appreciation, that is, each country is allowed to make its own interpretation in view of geographical differences or laws. Therefore, in these circumstances, it is inappropriate in some international conventions to give definitions to some broad terms such as "national security".

Nevertheless, the same can by no means be applied to this Bill under discussion. When we discuss this Bill on the interception of communications or covert surveillance, we are talking about legislation in Hong Kong. When

discussing for what ends law enforcement officers may carry out wiretapping or covert surveillance, the ends must be very clear. Therefore, the definition also has to be very clear.

Moreover, I also wish to remind Ms Miriam LAU that in fact, there are also cases in Hong Kong relating to the same term. In a case relating to Mr LEUNG Kwok-hung, the Court of Final Appeal stated that terms like *l'ordre public* are too broad and cannot satisfy the rigourous requirements that should be inherent in enacting legislation in Hong Kong. In view of this principle, Ms Margaret NG has proposed that a very clear definition be given to the term "public security".

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MS MARGARET NG (in Cantonese): I also wish to add one point in response to Ms Miriam LAU's speech. In fact, both Ms Miriam LAU's speech given in the Second Reading debate on the Bill and other speeches delivered earlier share one thing in common, that is, they all aim at watering down the amendments proposed by Mr James TO and me. She said that a balance should be struck, that which we wished to introduce a greater element of human rights, she wanted to give law-enforcement agencies a greater flexibility, that it did not really matter. For if there was a bit more, that was fine but even if there was less, there was just a little bit less.

Here I want to point out one important concept and that is, the certainty of law, which means that there should be clear definitions as to on what grounds my rights or my fundamental rights can be infringed on. It is not purely a matter of drawing a broader boundary and then the scope of human rights can be made broader …… sorry, it should be, if the definition is narrowed down a bit, there will be greater scope for human rights. In fact, this is not the way in which this matter should be explained. If we are looking at the contents of this Bill, it says that the goal to be achieved by carrying out an interception of communication or covert surveillance is public security. However, what actually is it? If there is a lack of certainty, there will be no protection whatsoever for the public.

Another common point is that it seems Ms Miriam LAU is saying that we are always talking about protecting the rights of the thugs. That is why at an

early stage, she used a comic in the *South China Morning Post* as an example. I almost thought that she was comparing us to those thugs who swindled people by exploiting their religious faith and who were exposed on television. Fortunately, that was not the case. She only meant that the thugs were seeking protection from the Basic Law. In fact, this is definitely not the case. She cannot take all people in the world to be thugs. The people that we seek to protect are not thugs. We are just saying that the right of privacy of the general public should not be eroded when targeting thugs because Hong Kong is a very open society and we cannot afford to have this kind of erosion.

Therefore, we suggest that this law should be made certain, otherwise, law enforcement agencies can abuse their powers. At the same time, I will also point out a very special situation and these matters cannot be disputed in the Court. For example, if I say that it should be like this but she disagrees and holds contradictory views, then, we can argue and in the end, let the Court decide. However, in the event of covert surveillance and the interception of communications, the person whose rights are affected cannot defend himself. In view of this, is it necessary to make the definitions in the legislation concerned very clear and accurate? Also, we heard that the Code of Practice is binding. When talking about its binding effect, Ms Miriam LAU presented many reasons to explain why it is binding. Since it is binding, we may as well include the definition in the law itself because it should either be flexible or inflexible. She said that since things were already regulated by the Code of Practice, hence, she said that they should also be regulated in the law. In view of this, I do not understand why we cannot define the term "public security" in order to protect the right of Hong Kong people to secret communication and to put in place a very clear and accurate piece of legislation. Thank you, Chairman.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR RONNY TONG (in Cantonese): Chairman, I just want to make some brief additional comments and respond to the speech delivered by Ms Miriam LAU just now. It is a shame that she has now left the Chamber.

Chairman, in fact, clear and fairly stable laws is an internationally recognized fundamental requirement and principle in the rule of law. If the

Government only includes a provision in the Code of Practice and this provision can be changed at any time, and the Government tells us to trust it, this is only a kind of request resulting from the rule of people. This by no means conforms to the principle of the rule of law. A government that respects the rule of law should by no means do so.

Therefore, we demand that the legislation be clarified and made stable. These important definitions must not be included in documents that can be changed at any time, since this does not conform to the principle of the rule of law.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, Members have wasted much time debating on this subject as this has been said by Ms Miriam LAU earlier, I have nothing to add.

I should reiterate that the amendment proposed by the Government is appropriate. I would call to all Members to support the amendment proposed by the Government.

MR RONNY TONG (in Cantonese): I feel very much offended. Why did the Secretary say a lot of time had been "wasted"? Did he mean we were wasting his time? If it is so, I can only feel very sorry about it.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Before I put to you the question on the Secretary for Security's proposed definition of "public security", I wish to remind Members that if that amendment is agreed, Ms Margaret NG and Mr James TO may not move their amendments.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr Albert HO rose to claim a division.

CHAIRMAN (in Cantonese): Mr Albert HO has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Mr James TIEN, Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Miss CHAN Yuen-han, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted for the amendment.

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Dr Joseph LEE, Mr Alan LEONG, Mr LEUNG Kwok-hung, Dr KWOK Ka-ki, Dr Fernando CHEUNG, Mr Ronny TONG, Mr Albert CHENG and Miss TAM Heung-man voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that there were 51 Members present, 30 were in favour of the amendment and 20 against it. Since the question was agreed by a majority of the Members present, she therefore declared that the amendment was carried.

CHAIRMAN (in Cantonese): As the amendment moved by the Secretary for Security has been passed, Ms Margaret NG and Mr James TO may not move their respective proposed definitions of "public security", which are inconsistent with the decision already taken.

CHAIRMAN (in Cantonese): The Secretary for Security and Ms Margaret NG have separately given notice to move the addition of subclause (5A) to clause 2, while Mr James TO has given notice to move the addition of subclauses (5A) and (5B) to that clause.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon the Secretary for Security to move his amendment.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I propose the addition of subclause (5A) to clause 2. Details of the amendment have been set out in the papers circularized to Members.

The proposed subclause (5A) provides for an exclusion provision for the term "public security". According to this provision, advocacy, protest or

dissent (whether in furtherance of a political or social objective or otherwise), unless likely to be carried on by violent means, is not of itself regarded as a threat to public security. As such, peaceful advocacy is not of itself regarded as a threat to "public security", and will not constitute a cause for interception of communications or covert surveillance.

A point worth mentioning is, in other common law jurisdictions where there are similar provisions, only lawful advocacy, protest or dissent will be protected. Our amendment, however, does not confine to lawful acts of advocacy, protest or dissent. It covers, therefore, a broader area of protection.

The Government objects to the new clause 2(5A) proposed respectively by Ms Margaret NG and Mr James TO.

The new clause proposed by Ms Margaret NG specifically mentions the Basic Law and the related rights under international treaties applicable to Hong Kong.

The authorities have already proposed an amendment which clearly specifies that advocacy, protest or dissent, unless likely to be carried on by violent means, is not of itself regarded as a threat to public security. This arrangement has already provided additional protection to the freedom of demonstration, assembly and speech endowed by the Basic Law. As a matter of fact, the relevant legislation in Canada mentions specifically that only lawful advocacy, protest or dissent will be protected. Our amendment does not have such a requirement. And we cannot identify any other common law jurisdictions having a similar provision for rights other than assembly and freedom of speech. Comparing to other common law jurisdictions, the authorities' amendment has provided a greater protection to the relevant rights.

The Basic Law, and many other international conventions applicable to Hong Kong, specifies that the exercise of the relevant rights is limited by the law. Ms Margaret NG's proposed amendment does not mention this point, which may lead people to misunderstand that it is correct to protect such rights outside the limits of the law. This is not appropriate.

Furthermore, the laws of Hong Kong and the powers exercised by the authorities are all regulated by the Basic Law. And we must certainly be bound by the provisions of the Basic Law and other international conventions applicable

to Hong Kong, including provisions in connection with the protection of human rights. Other laws may not have mentioned the Basic Law. It is however not appropriate to say that they are therefore not regulated by the Basic Law, or else we will have to re-write all the laws of Hong Kong. We consider that there is no need for this provision to mention the Basic Law specifically. Moreover, Ms NG's proposed amendment does not recognize the fact that the Basic Law does specify that the exercise of relevant rights may be regulated by legal provisions.

Clause 3 of the Bill has provided for the criteria for the test of "proportionality" and "necessity", and it requires the authorization authority to take account of all relevant considerations. In response to the request of some Members, we have also proposed an amendment to clause 3 of the Bill to specify clearly the relevant factors that the authorization authority should consider whilst applying these criteria, in order to facilitate the authorization authority to consider such factors as the effect upon human rights. The relevant criteria have already been clearly established in precedent cases relevant to human rights, covering all aspects of basic rights and freedom.

We trust that under the Bill, through the balancing measures specified under the various stages of covert activities, there are sufficient safeguards in our proposal with regard to the regulation of application and authorization on grounds of public security. The Government considers that there is no need, nor it is appropriate, to further narrow down the confine of threats to public security.

Mr James TO's proposed clause 2(5A) proposes to add the reference to such activities as "association, assembly, demonstration, confrontation and strike" to the relevant additional protection provisions proposed by the authorities with regard to the freedoms of assembly and speech. The proposed additional reference concerns the means for "advocacy, protest or dissent", the inclusion of which may confuse the purpose as well as the confine of the original reference to "advocacy, protest or dissent", as a result of which the coverage may be reduced, and there will be consequential effects on other laws that include similar references. The authorities therefore consider it inappropriate.

Apart from this, Mr TO also proposes to amend "likely to be carried on by violent means" to "intended to be carried on by violent means (more than negligible)". We consider that the test for an objective evaluation of "likely" is

more appropriate than the test for the subjective "intention" which is hard to prove. On a practical level, it will be difficult to ascertain an intention in advance.

The Government objects to Mr James TO's proposed addition of clause 2(5B).

Mr James TO proposes the addition of clause 2(5B) to clearly specify that, unless those related activities under Article 23 of the Basic Law are intended to be carried on by violent means, these activities should not of themselves be regarded as a threat to public security. As I have clearly pointed out in the resumption of the Second Reading debate speech, there is no relation between the Bill that we are now debating upon and the enactment of legislation to implement Article 23 of the Basic Law. After the passage of the Bill, the law-enforcement agencies will not be able to exercise their power to investigate into any criminal offences which have not been created under Article 23 of the Basic Law. We do not agree to Mr James TO's proposed amendment to exclude the acts under Article 23 of the Basic Law since the enactment of legislation for Article 23 of the Basic Law has not been completed. The proposed provision will not help clarify the coverage of this Bill, and may restrict enactment of the legislation for Article 23 of the Basic Law in future. By doing so, we will truly be linking this Bill up with the enactment of legislation for Article 23 of the Basic Law.

The authorities have carefully considered the recommendations of the Bills Committee before proposing the amendment on clause 2(5A). All factors have been considered with a view to achieving an appropriate balance. I therefore wish that the Committee would object to Mr James TO's and Ms Margaret NG's proposed amendments and support the amendment proposed by the authorities.

Thank you, Madam Chairman.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG and Mr James TO to speak on the amendment moved by the Secretary for Security as well as their own amendments respectively. However, they may not move their respective amendments at this stage.

MS MARGARET NG (in Cantonese): Chairman, later on I shall call on Members all to reject the Security for Security's amendment, not only because that my amendment and Mr James TO's amendment have to wait our turn until after the rejection of the Secretary's amendment, it is because the Secretary's amendment looks pretty good on the surface, but not so in substance. The Secretary says that unless violence is used, activities will not be regarded as a threat to public security. We would think that the Government has given way. As we look deeper into the content, however, we will know that it is more or less like the last amendment, that is, the words of "public security of Hong Kong" are included. Members should look closer: the Government has not given way. Why? It is not for the purpose of protecting citizens' freedom of demonstration and assembly that the Government will carry out covert surveillance of these activities. The current amendment has the provision of the term "unless". That is to include in the exclusion provision something more. How can this be achieved? That is to exclude those activities "likely to be carried on by violent means." Who is to judge whether or not something is "likely"? This is the first point.

As a matter of fact, this is not the most important point. The most important point is "is not of itself regarded as a threat to public security". It is only "of itself" and that is all. But it will depend on many other things. It is a statement that is always true because a demonstration by itself alone will not cause a threat to public security. On the other hand, if we say that "advocacy, protest or dissent" by themselves will be regarded as a threat to public security, there will be outcry in whole world and people will wonder what a place the HKSAR has become. Therefore, the amendment has in effect said nothing.

Chairman, when the Bill was scrutinized by the Bills Committee, I raised the question that, with regard to the condition "is not of itself regarded as", will there be any other factors that will render those "advocacy, protest or dissent" though not likely to be carried out in violence, are susceptible to covert surveillance for "public security" reasons? After some discussion, I sketched out this scenario: during a peaceful demonstration, if the other party (maybe a group of people) treats us with some violent means, would it render the new additional clause meaningless, as there will be an excuse for covert surveillance and interception of communications? The answer we got was in the affirmative. Yes, it would happen. After a lengthy tussle, they eventually said that it was possible that such a situation could arise, but they believed that it would not arise.

If such situation should arise, it would be because the opposite party had showed a threat of violence. Whilst they would carry out wiretapping against the opposing party, the opposing party would also wiretap them. The opposing party would therefore be very co-operative.

However, would the situation be like this? Just now when I was deep in handling papers concerning the Bill, a reporter asked me to come out to the Chamber, informing me that the Chief Executive has written a letter to Members, requesting them not to support our amendments. Will we be given a copy of the letter? Certainly not. Am I correct? This Government does not have any concept of equal treatment. The Government may think that it is unrealistic to expect any co-operation from this group of people who take to the street and demonstrate against the Government. There will be no point to talk to them. The major reason remains that this provision will not protect anyone. Whenever the government departments or the Government considers that someone, or some people in the group will do things through violent means..... Margaret NG is a member of the Civic Party, she may look very gentle, right? However, there may be a possibility that someone will make use of the procession, or some extremists may get into the group. There will be no point for the Government to look for me, because I will certainly deny, and I am certainly not an extremist. There are other people in the processions against whom the Government will carry out covert surveillance. Will this be possible? Chairman, during a discussion, there is nothing that is impossible and the Government has not excluded such possibilities. Therefore, notwithstanding the fact that this exclusion provision does exclude certain issues, it amounts to a "useless" provision. I call on all Members to object to such a provision.

Indeed, we may very well leave it to the Government to say those empty words, right? However, if we support provisions like this, we will not be getting any more substantial provisions. My proposed amendment adds the following: "For the purposes of this Ordinance, the exercise of any right enjoyed by any person under the Basic Law or under international treaties, conventions or instruments applying to the Hong Kong Special Administrative Region or under common law shall not be regarded as a threat to public security.". This amendment will give us a general principle. Our thinking is that, when someone comes before a panel Judge and asks for an authorization for wiretapping on the ground of public security under clause 3, perhaps the panel Judge may consider whether a balance can be achieved according to this provision.

Chairman, frankly speaking, I do not hold any real hope that my proposed amendment will be carried, because all these will be done in secret. We would have more confidence if there is a public debate. But please listen to the reasons of the Secretary's objection. His arguments are totally unconvincing. He says that this amendment will lead people to think that the rights given under these conventions, the Basic Law and other international treaties are absolute. Secretary, who are you cheating? This provision is not for us to use. It is to be put before the authorization officer or the Commissioner for them to decide whether the law-enforcement officers have abused their power, and whether they have given due regard to "public security". Indeed it should not have involved "public security". Why would we consider the panel Judges would regard those rights as absolute? Here I have not mentioned legal restrictions. The Secretary considers that there should be absolutely no need for legal restrictions, and that these rights are just there. We all know it too well, and we all understand, that certain basic human rights are absolute, but there are very few of these rights. Most rights are not absolute, and the extent they can be exercised are determined by the law. Why does the Secretary say that in my amendment I take it that there are no legal restrictions? I really do not understand?

The Secretary is also contradicting himself in saying on the one hand that he objects to my proposed amendment because the above two points will mislead people, but on the other, he says there is no need for my proposed amendment, because I have already pointed out that the provisions of the Basic Law are applicable to the law. This applies to the SAR and all the laws. This is like saying nothing at all. Chairman, I would request the Secretary to decide for himself which argument he would like to take. Does he intend to point out that my proposed amendment is harmful because it gives people the impression that there is no legal restrictions to those rights, or that there is no need to raise the point since it is clear enough and is already understood by all. Would the Secretary please decide?

(THE CHAIRMAN'S DEPUTY, MS MIRIAM LAU, took the Chair)

Deputy Chairman, there is one further point to which I would like to respond. The Secretary says that his amendment is lax enough, and it is generous to all concerned, because processions and demonstrations do not have to be lawful. Deputy Chairman, as such, why do we have to request for the

deletion of lawful from the original provision? It is because according to the prevailing Public Order Ordinance, a procession will become illegal if we fail to give due notice. The Secretary tells us that our Government is generous while the other countries have not done that. Do other countries adopt a similar legal requirement for assemblies and processions? Are the situations the same here and there? Deputy Chairman, I have always thought that the authorities are highly selective in telling us that how our Government is better than other countries in its practices. However, the Government will not let us see the full picture. Simple enough, when there is such an evil public order law, there will be no difference whether or not notification is required. The major point is, such a provision is an empty one, and it will not of itself cause any threat to "public security".

Deputy Chairman, sometimes I am feeling somewhat disgusted. Would the Secretary please do not try to be "sweet mouthed". In reality, the Government has not given way at all. Please do not put up a merciful face. I really cannot stand it. Deputy Chairman, perhaps it is already quite late today. We have listened to one unreasonable amendment after another. We know that the Government ignores the rights of the citizens, and it is not protecting only the rights of trouble-makers like us or the thugs. I have always asked the Secretary to keep in mind that Hong Kong is a very open international city. Should he not provide protection to the flow of our information, or should he define every issue in such a loose way that all will not feel the definition of public security concrete enough that they can feel at ease, and consider that their privacy and communication rights will not be intruded upon?

Therefore, Deputy Chairman, I call on all Members once again. This amendment of the Secretary for Security is nothing but an empty one. It serves us no purpose. I hope Members will all reject this amendment. There is no regret in losing this amendment because after that you may then be able to choose mine or James TO's. Our amendments have their respective merits. If my amendment is rejected, I will be happy to support Mr James TO's amendment. Thank you, Deputy Chairman.

MR JAMES TO (in Cantonese): Deputy Chairman, I could only assume that the Government's reply, in particular that of the Secretary, has been seen by officials in the Department of Justice. But if the Secretary's reply has indeed already been seen by officials in the Department of Justice, the matter is really beyond my wildest imagination.

Why? When he commented upon Ms Margaret NG's proposed amendment, he said that exercising the rights given under the Basic Law or the international convention (also called the human rights convention) would make people think that these are absolute rights. I was really shocked by it. This means that he considers that this way of presentation will lead a common law trained Judge to consider that the rights protected under the Basic Law are those related to violent assemblies, violent processions, violent demonstrations, and violent strikes, and that all these rights exercised through violent means are all absolute.

I am really surprised. In recent years, there are numerous precedents cases, be they cases of the right of abode, or the cases in respect of Mr LEUNG Kwok-hung, or cases related to demonstrations and processions, when these cases reached the Court of Final Appeal, the basic fundamentals were explained in detail. How would any Judge have such a misunderstanding about the Basic Law? If the Secretary really considers that such addition is a superfluous act, I would wish Ms Margaret NG could explain to him why it is not.

He does not choose to do so. The Secretary attacks by saying that her amendment will render these rights absolute when they are exercised, to the effect that "public security" will be threatened. The charge is extremely serious. His officials in the Department of Justice might probably have written to him like that, telling him that these international conventions may give absolute powers to these rights which threaten "public security". I would be surprised if this is the case. Many laws have taken account of, and are consistent with, the rights as found in the provisions of international conventions. Would those rights also become absolute rights? He should look for a more appropriate answer, one which can demonstrate an appropriate level of legal analysis.

Well, Deputy Chairman, back to my proposed amendment. As a matter of fact, just as Ms Margaret NG has said, I find that the restrictions in the original provision are those which include some restrictions in the so-called protection. There are not many of them, and they can be specified more clearly. It is in Canada that advocacies and protests, and so on, are used in the expression. In Hong Kong, however, be it in our Basic Law or in the rights that we have so far freely exercised, the citizens know clearly enough the meaning of associations, assemblies, processions and strikes. My intention is to express them more clearly. Nevertheless, a reply based on an analysis made by capable officials from the Department of Justice surprisingly sets out those rights in parallel terms, and advocacy, protest or dissent are defined in narrower terms.

Wow! How ridiculous, misunderstood and distorted it is! I trust that the officials in the Department of Justice have before this consulted numerous precedent cases. They should know very well that these rights are exclusive — in the sense that they are excluded from the coverage of "public security". Those terms excluded can match those rights covered by the Basic Law word by word. In contrast, advocacy, protest or dissent are not covered in the Basic Law.

(THE CHAIRMAN resumed the Chair)

If the authorities indeed have drafted the Bill in such terms, and if the Legislative Council does deliberately adopt those terms, would any Judge who has his training in common law possibly mistake that those few added terms will refer to a narrower meaning? This is beyond my wildest imagination. Shame on you! Is it really be possible that the several hundred officials in the Department of Justice have given such advice?

Chairman, the new proposed subclause (5B) concerns the exclusion related to Article 23. The Government's reply is strange — if you ask me, I would have thought its reply would be "there is no need for that, or please have faith in the Government, or the Government has already given its words." This is one way of replying. However, the Government does not reply in this way. Surprisingly it says that setting these out here it would disrupt law enactment, that is, enacting the legislation for Article 23. Wow, what a charge it is? Will the inclusion of such provision interrupt the enactment of legislation for Article 23? Insofar as the enactment of legislation for Article 23 is still incomplete, how can it be enforced? This is really beyond my wildest imagination. Since we have not yet completed enacting laws for Article 23, what is the need for mentioning it? Why is it necessary to mention that this Bill has nothing to do with enacting laws for Article 23? If the legislative procedure is not yet complete and that there is no relation between the two, what is the reason for mentioning it? Right?

Similarly, if the subject matter, that is, "public security", will certainly not cover the incomplete legislative procedure regarding Article 23, why can it not be similarly set out in the law? Upon the enactment of legislation for Article 23, corresponding amendments can be effected to this provision. In a way similar to the corresponding amendments we are doing now, we may amend the official

secrets law accordingly. We may always amend prevailing laws, and we may also amend, at a later time if necessary, those laws the legislative procedures of which are not yet completed and which will be enacted in the future. When the law related to Article 23 is enacted, there will be the need to define certain acts or offences, or to prohibit certain acts like association and assembly and certain offences may be liable to punishment or penalty. Upon the completion of the procedure to enact laws relating to Article 23, in order to enforce the law or to prohibit certain acts, the Secretary will have to be empowered — probably the power to search, or the power to seize, or the power to wiretap, or the power for covert surveillance. We do not have to consider these powers as yet. Are we putting the cart before the horse if we do all the preparatory work now through the definition of "public security"? How can we carry out our legislative work this way? For laws that have not been enacted, the secret and disguised pathway is taken, using the disguise of "public security". When all is done, what protection can we rely upon? Do we rely upon what the Secretary tells us today, or the Code of Practice, one which can be revised and amended any time, and freely by the Secretary himself?

The law cannot be amended at will at any time. The law belongs to a much higher plane. This is our protection. If the Government is not willing to include the intended amendments into the law, I can only infer that the Government has done a lot in the dark, something filthy and ugly. That the activities are not prohibited under the law will be used as the excuse. Government officials will then be doing such activities with a peace of mind. People carrying out wiretapping will be remunerated with a high salary, because they are not breaking any laws.

As a matter of fact, the Government has been doing this all the time during these recent months. The Court had ruled that there were problems, but the Government still said to its people that, "Do not be afraid, colleagues. We will give you an Executive Order to counter-act this. We have the necessary legal backing. When we attend the Legislative Council's Panel on Security, we will state that we have legal backing. Do relax and do not fear. Keep on doing what you have been doing, get on with the wiretapping, just do it — it is not violating any laws because we have a statutory order. Our Secretary for Security and our Secretary for Justice are both saying this." What is the outcome at the end? What is the judgement from the Judge? Courts at three levels all come to the same judgement, but the Government insists on arguing, and eventually takes the case to the Court of Final Appeal.

Similarly, since the exclusions are not set out in the provision, the Government may continue to tell its people that the Secretary may amend the work for today and tomorrow. Also, that the exclusions are not expressly set out is only because of the consideration for "public security", not for any political reason. As for wiretapping on processions and protests, no mention is made that this is due to the protection of "public security". Other reasons are used to conduct wiretapping, such as obstructing traffic, possibly causing power generation problems, or possibly obstructing the passage of ambulances. All these reasons are used as excuses to engage in wiretapping. These people may not be using violence, but they may easily cause obstruction to the ambulances. So they should be wiretapped to see whether they will change the route of their procession, and should they change the route of their procession, what preparation should be made. Furthermore, (as pointed out by Ms Margaret NG) will there be wiretapping done for the purpose of protecting victims? These are all unresolved issues.

This notwithstanding, though we may not have a solution for all these, we may still fare well if the higher level of protection proposed by Margaret NG can be carried. I am telling my Honourable colleagues, as well as the public, that here on offer is a limited menu of ABC dinner sets. There is nothing that we can do about it. However, if the Secretary's amendment is passed, our menu of ABC dinners will be forfeited. I would therefore wish all Members will understand that the reason that I am proposing all these amendments is to establish a protection on a legal level, rather than listening to the Secretary's "sweet words". A Code of Practice which can be changed and revised all the time is no substitution for protection on a legal level.

CHAIRMAN (in Cantonese): Members may now proceed to a joint debate on the various proposed provisions.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MR RONNY TONG (in Cantonese): Chairman, the Secretary's current amendment is closely related to the last amendment. It shows us the perspective that we should take in considering the extent of coverage of the term "public security".

The Security wishes us to believe that it is his intention to narrow down the coverage. However, when we see the wording of the amendment, we will discover that the degree that he wishes to narrow down is actually extremely small. Why would I put it this way? It is because while his only proposal is to allow for advocacy, protest or dissent, but if these activities are likely to be carried out through violent means, they will be regarded as a threat to "public security".

The problem is that, if it is not possible to explain or establish its meaning in law, the term "violent means" may include certain activities that people generally may not regard as threatening to public security. Why? It is because violent means may not necessarily refer to acts of violence against the human body. Mr LEUNG Kwok-hung — who is currently not present — prefers processions and tearing up booklets of the Basic Law. Legally, this may be regarded as "violent means". Or he may kick at a lamp post or a railing while in rage. This may also be regarded as "violent means".

Therefore, Mr James "TSUI" — I am sorry, it should be Mr James "TO" — includes in his amendment the few words "more than negligible" with a view to defining the extent of "violent means". In other words, there are many other means in achieving this. Mr James TO has narrowed down the otherwise very broad term to a clear enough level.

Looking at the wording of the amendment that the Secretary now proposes, however, I do not think it cannot successfully narrow down the coverage of "public security" in terms of "violent means". In this context, I do not consider it acceptable. Why? It is because deep down in our mind, we are taking "public security" in the context of very grave and serious offences.

When discussing the last amendment, I pointed out that I could not think of any behaviour which poses a threat to "public security" without any association with the definition of serious offences. Indeed I cannot. Now that I have taken a look at the definition given by the Secretary, our worry is fully justified: according to the definition now adopted, activities posing threat to "public security" may include those that are not implicated with serious offences. Circumstances in which communications may be intercepted and covert surveillance conducted have greatly increased. In view of this, we can certainly not accept such a definition.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I would like to reiterate that those views raised today have already been raised during the debate in the Bills Committee. The impassioned remarks made by Mr James TO earlier in particular, had already been said in the Bills Committee. Mr James TO has said more today, however: he labels others shameful. Mr James TO and I are both Christians. There is a saying in the *Bible*: "you look at a speck in your brother's eye and pay no attention to the plank in your own eye." I would wish the citizens to judge who is shameful: Mr TO, me or the Secretary of Departments.

MR JAMES TO (in Cantonese): Chairman, there is a context for my statement. I was not saying that the Secretary is shameful as a person. I was saying that there being so many lawyers within the Department of Justice, it was shameful that such an argument can be put forward to tell people that the inclusion of those words will undermine people's rights, and that Ms Margaret NG's proposed amendment will render the exercise of those rights absolute.

What I feel shameful is that despite having so many officials here who can render advice, the Secretary has provided such a poor reply. It is very shameful. Let me say it once more, shameful!

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR MARTIN LEE (in Cantonese): Chairman, just now I was sitting up there. I was the last Member taking the supper. I sat before the television and listened to all the speeches. I did not miss anything.

Mr James TO has said that it is shameful. After hearing what the Secretary has just said, I would say it is ridiculous.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR LEE WING-TAT (in Cantonese): Chairman, it appears it is the first time the Secretary asks for the comments of the citizens on his views. If he could have adopted such an attitude at the early stage when the Bill was being examined, there might not be such a fierce debate today.

The Secretary is correct in saying that discussions in a more pacified mood will let more people see the truth. However, as a Christian, the Secretary should comment on himself. How much time, in his opinion, have the citizens been given to understand this Bill in order to be able to offer their views on it? Since he is going to look at the subject from the perspective of a Christian, I would wish he could think it over tonight. He is a very experienced administrative officer, and for a Bill which is so important, only five months have been spent on discussing it. Although I did not take part in the examination of this Bill, I have taken part in examining others in the past. Take for example the waterworks-related legislation where matters of water seepage and water tariff of a few hundred dollars or some ten thousand dollars are concerned, we spent several months examining it. It has nothing to do with wiretapping, nor is it related to Article 23. It is only an ordinary subsidiary legislation concerning the increase of water tariff.

Chairman, we have very strong views on this subject. James TO has certainly expressed his views, that it is very dangerous for the colleagues in the Government and the Department of Justice to presume that the citizens will have a tendency towards using violence while exercising those rights. This became the approach they adopted when drafting the provision and when they came to the actual writing of this provision. As a matter of fact, when this subject was discussed, we did not touch on too many contexts.

Hong Kong is well experienced in handling processions, assemblies and demonstrations over the years. Basically, all processions, assemblies and demonstrations in the past were peaceful ones. I do not wish to bring up some political issues. For assemblies with real acts of violence, we will have to go back to 1967. Nothing quite like that has happened ever since. There were no such problems even in the pro-democratic movement in 1989 when there were several assemblies of one million people.

Therefore, I do not quite understand why the Secretary is so sceptical of the Democratic Party's amendment. Not only do we think we are justified in law, but also in the political reality, the Government cannot give us any evidence to prove that there are any examples or tendencies that in exercising the rights given under the Basic Law, the citizens of Hong Kong will act in any way that may cause the Government to feel that violence may appear easily.

Chairman, certainly we will have to talk reason in responding to government officials' comments. However, we must speak up when we feel that the issues raised by the Government are not grounded in reason. In particular, the Secretary has just now mentioned the perspective of a Christian. Personally I do not have any religious belief, but Christians are talking about practising God's justice on earth. I am sorry that I cannot agree with the Secretary, if he thinks the way the Bill is written will bring about God's justice on earth.

Thank you, Chairman.

MR LEUNG KWOK-HUNG (in Cantonese): I just learned that the Secretary is a Christian. I have the "Ten Commandments" at hand, the ninth of which is "do not bear any false witness". Do not bear any false witness, do you know that?

Indeed, I seldom cast any doubt on people's soul, as I do not believe in religions. However, back to the basic facts: we all have a judgement in our own mind as to whether or not it is shameful. I have called Mr TSANG shameful. Indeed, I do not wish to call others shameful.

Mr WONG, the Secretary for Justice, is not present today. I would indeed wish to ask Mr WONG: Mr TSANG asserted here the other day that his Executive Order was invincible, although later it turned out to be rather feeble. Had he first consulted you? It would be somewhat better if he indeed had consulted you, otherwise he would be just like a tyrant. He also indicated that he had the support of the three Secretaries of Departments together with the 11 Directors of Bureaux — it is indeed susceptible to causing fatal problems, leaving three corpses and costing another 11 lives. It indeed is a problem.

Today, I bring along with me the "Ten Commandments". I have three additional photocopies. However, I do not wish to read them out aloud here, because there are differences in various translations. We should all take a look

at the "Ten Commandments": Do not bear any false witness. It means that you should not make false statements, am I correct? It does not matter whether or not you believe in God.

As for today's debate — lest the Chairman will blame me for not speaking on the subject — I think Ms Margaret NG's amendment is fine. She is actually not particularly smart and she is only pointing out a very simple fact, that is, you cannot deny the existence of the rights which are already in existence. Margaret NG's amendment has clearly included those relevant international conventions, the Basic Law, Bill of Rights and other things derived from them. I cannot see why the Secretary does not agree to her amendment.

In refuting James TO's argument, the Secretary says that taking things like "association, assembly, demonstration, confrontation, strike", and so on, as the defining condition, the coverage of the Secretary's own condition of "unless advocacy, protest or dissent" will be narrowed down. This is undesirable. Based on this argument, would Margaret NG's amendment be more desirable? He always talks about choosing the lesser evil. Indeed there is no such thing as perfect in this world. Why would the Secretary choose to discard an alternative provision which has a broader coverage and which provides a more precise protection to human rights?

He will have to understand that, even though I do not doubt his soul, I do believe in logic. All who have public powers would wish to expand these powers. For this very reason, constitutions come in, and also the need for a contract: If one who is entrusted with the powers does not act according to the contract, problems may arise, or he may suffer the consequences or he may have to step down. For the subject now under discussion, the scenario should be the same.

How did the "Ten Commandments" in the *Bible* come about? Either because God did not trust in men, or men did not trust in God, so they signed a contract. Please listen to the "Ten Commandments": Do not bear false witness. We have signed a contract, and now all of a sudden something is taken away from the protection of human rights. What is the purpose of that contract? I would therefore ask the Secretary to stay calm. I would not say that he is shameful. I would rather say that he is selfless and faultless: because he cannot differentiate right from wrong and good from bad. I wish he could think twice, and would get rid of his prejudices. Seeds fallen on a rock will not grow. And prejudices are that piece of rock. Thank you, Chairman.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

(The Secretary for Security indicated that he did not wish to speak again)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr James TO rose to claim a division.

CHAIRMAN (in Cantonese): Mr James TO has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Mr James TIEN, Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Miss CHAN Yuen-han, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie

LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr Abraham SHEK, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted for the amendment.

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Andrew CHENG, Ms LI Fung-ying, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Dr Joseph LEE, Mr Alan LEONG, Mr LEUNG Kwok-hung, Dr KWOK Ka-ki, Dr Fernando CHEUNG, Mr Ronny TONG, Mr Albert CHENG and Miss TAM Heung-man voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that there were 51 Members present, 29 were in favour of the amendment and 21 against it. Since the question was agreed by a majority of the Members present, she therefore declared that the amendment was carried.

CHAIRMAN (in Cantonese): Ms Margaret NG, you may move your amendment.

MS MARGARET NG (in Cantonese): Chairman, I move the addition of subclause (5A) to clause 2.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Ms LI Fung-ying, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr James TIEN, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, seven were in favour of the amendment and 20 against it; while among the Members returned by geographical constituencies through direct elections, 24 were present, 14 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Mr James TO, you may move your amendment.

MR JAMES TO (in Cantonese): Chairman, I move the addition of subclause (5A) to clause 2.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr James TO rose to claim a division.

CHAIRMAN (in Cantonese): Mr James TO has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Ms LI Fung-ying, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr James TIEN, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, seven were in favour of the amendment and 20 against it; while among the Members returned by geographical constituencies through direct elections, 24 were present, 14 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Mr James TO, you may move your other amendment.

MR JAMES TO (in Cantonese): Chairman, I move the addition of subclause (5B) to clause 2.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr James TO rose to claim a division.

CHAIRMAN (in Cantonese): Mr James TO has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr James TIEN, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, six were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 24 were present, 14 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

SUSPENSION OF MEETING

CHAIRMAN (in Cantonese): Members, the Secretariat issued to you a notice on 31 July, indicating that I would suspend the meeting at about 10.00 pm this evening and resume it at 9.00 am tomorrow. However, from tomorrow onwards, I would adjust the timing of suspension in the light of the progress of examining this Bill. In other words, if the progress of proceeding is relatively slow, I may not suspend the meeting at 10.00 pm but rather at a later time.

I now suspend the meeting until 9.00 am tomorrow.

Suspended accordingly at twelve minutes past Ten o'clock.