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Lord Lester QC makes submission at the Court of First Instance

Lord Anthony Lester QC, representing the Legislative Council said in the Court of First Instance that the judicial review launched by the Applicants, namely Cheng Kar-shun and Leung Chi-kin, on the power of the Legislative Council (LegCo) Select Committee posed a direct challenge to the way Hong Kong was governed, and also to the fundamental concept of "One Country, Two Systems": the basic continuity preserving previous laws and practices and by this challenge, the Applicants were seeking to break that continuity. He pointed out that the Applicants' aim was to weaken the effectiveness of LegCo as Hong Kong's public watchdog in calling the Government to account, and to fetter and hobble the well-established powers of the legislature.

Making his submission at the second-day hearing of the application for judicial review, Lord Lester QC said, "What the Applicants are seeking would amount to a judicial usurpation of the powers, privileges and responsibilities of LegCo: an unnecessary and divisive struggle between legislative and judicial powers for the sake of a case without merit. It would muzzle Hong Kong's public watchdog and weaken its ability to obtain information, to call the Government to account, and to provide information and opinions to the public."

Lord Lester QC emphasized that the issues raised by these proceedings vitally affected the way in which LegCo and its committees were able to function effectively in the public

interest. Misconceived allegations about the Select Committee having exceeded its terms of reference were matters to be dealt with by the President of LegCo and LegCo itself at an appropriate time.

He also pointed out that the Applicants seek to establish that LegCo's power to authorize its committees to exercise the power to summon witnesses under the Legislative Council (Powers and Privileges) Ordinance (LC(PP)O) was incompatible with the Basic Law and null and void. The Select Committee of LegCo under challenge was inquiring into the post-service work of Mr Leung Chin-man and the policies and arrangements governing post-service work of directorate civil servants.

Lord Lester QC stressed that the Select Committee's inquiry concerned a matter of considerable public interest and concern. "The inquiry is entirely about matters of public interest and not about the private affairs of these individuals or their commercial undertakings," he said. He added that there were safeguards in the law and in LegCo's procedures to avoid unnecessary harm to the reputation and personal privacy of witnesses, both because of the importance of encouraging everyone to assist the work of inquiries and to give full and frank evidence, and because of the need to use the powers and procedures fairly.

He said that the operation through committees and the authorization of committees if necessary to require the giving of evidence when conducting investigations and inquiries into matters of public interest was a common feature in legislatures across the world. "The committee system in the Hong Kong Legislature has worked effectively for the past century, is set out in the Rules of Procedure made by the LegCo under the authority of Article 75 of the Basic Law," Lord Lester QC said.

In response to the Applicants' submission that when the Basic Law was enacted in 1990, the power to summon witnesses

under the LC(PP)O had never been exercised, Lord Lester QC pointed out that the composition of the LegCo and the committee system in which LegCo Members carried out their business had made it impossible for LegCo's power to summon witnesses to be exercised by its committees. Members of the LegCo were all appointed before 1985 and it was only in 1991 that the first group of directly elected Members were returned to LegCo. The committees which had the responsibility to monitor Government policies and examine issues of public concern were not formal committees of LegCo before 13 October 1993 and were therefore not subject to the LC(PP)O. It was on 1 December 1993 that a resolution was passed in the Council to authorize its Panel on Security to exercise the power to summon witnesses.

Lord Lester QC said that the makers of the Basic Law had trust and confidence in those who would govern Hong Kong and showed that trust and confidence by enabling them to develop this Region in a way that combined continuity and change.

"The Basic Law is no ordinary law: it is our constitutional instrument, to be read and given effect as our fundamental law, protecting the separation of powers between legislature, executive and the judiciary, and human rights. The makers of the Basic Law saw the need for HKSAR to have a modern unique constitutional framework and they understood the need for the Basic Law to endure for at least 50 years by not to be over-prescriptive as to how it should be woven into the fabric of our political and legal system. They also saw the need to give ample discretion to the Region to introduce its own safeguards and principles, marking the boundaries of the vital separation of powers between the legislature and the executive and between the political branches of government and the independent appointed judiciary, and developing new safeguards against abuse of power, and new remedies for violation of human rights and freedoms suitable to a society governed under the rule of law," Lord Lester QC said.

He also said the Basic Law was an entrenched constitutional document, a living instrument intended to meet changing needs and circumstances. In the interpretation of a constitutional instrument such as the Basic Law, a purposive approach was to be applied. To achieve its aims, our courts had recognized that its language must be respected but not by means of a literal, technical, narrow or rigid approach. Being a constitutional instrument it was designed to endure for future generations, not to be the last will and testament of the political and legal system. Literalism, legalism and legal positivism would ultimately destroy what has been created with such imagination and creativity.

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