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Your ref: CB4/PL/AJLS 20th November, 2012

The Hon. Priscilla Leung,
Chairman of the Panel on
Administration of Justice & Legal Services,
Legislative Council, HKSAR,
Legislative Council Complex,
1 Legislative Council Road,
Central, Hong Kong.

Dear Priscilla,

Panel on Administration of Justice & Legal Services

Meeting on 27 November 2012

Thank you very much for your letter dated the 8th instant inviting me to attend a meeting of the above Panel scheduled on the 27th instant.

I understand from your said letter that the reason for your invitation is because 15 members of the Panel expressed great concern over some remarks made in my talk to a local education institution on the 6 October, 2012 and that you would like me to share my views with the Panel members.

I thank you for your invitation but I doubt whether the Panel meeting is an appropriate venue for discussing my remarks or their concern. Should any Legislative Councillor be interested in discussing with me any of my remarks or his/her concern, he/she can contact me

directly and arrange for a mutually convenient time and venue to do so. It should not intrude upon the valuable time for the Panel meeting or utilize public resources for such purpose.

As the Hon. Mr. Justice Bokhary, Non-Permanent Judge of the Court of Final Appeal, pointed out, Hong Kong is a free society and anyone is entitled to his/her own views and the freedom of speech, and other members of the society are free to agree or disagree. My remarks are also subject to other people's criticism. Inviting me to attend the Panel meeting simply because some Legislative Councillors take issue with what I have said (and your letter warning me that no protection or immunity would be given for addressing the Panel) may well create a dangerous precedent for turning Panel meetings into McCarthy Hearing.

Out of respect for Legislative Council, I hereby forward to you the written submission you asked for in your letter. Your invitation to appear before the Panel is respectfully declined.

Yours sincerely,

(Leung Oi Sie, Elsie)

Submission to the Meeting of Panel on Administration of Justice and Legal Services on 27 November, 2012

On 8th November, 2012, the Hon. Priscilla Leung, Chairman of the Panel on Administration of Justice and Legal Services ('the Panel') ,wrote to me stating that at its last meeting in October, 2012, fifteen members of the Panel expressed great concern over some remarks made in my talk to a local institution on 6 October, 2012, and that she would like to provide a good opportunity for Panel members to share our views with each other and invited me to attend the Panel's meeting on the 27 November, 2012. For reasons stated in my reply, I do not think that the Panel meeting is the proper venue to discuss my remarks or their concern but would accept her invitation to provide a written submission to the Panel meeting. The letter did not specify what remarks of mine caused the members' concern or what their concern is. I could only gather from the media reports what they are.

Back ground of my talk on 6 October, 2012

2. I was invited by the Hong Kong College of Technology to give a pro bono talk on "Legal Challenges Since Reunification" in a series of seminars entitled "A Fifteen Years' Review and Perspective of 'One Country Two Systems'" at their school premises on 6 October, 2012. I began my talk with the historical background of the concept of 'One Country, Two Systems', the meaning of high degree of autonomy, Hong Kong people ruling Hong Kong, and fifty years unchanged. I then talked about the legal system of Hong Kong and the applicable laws, interpretation of the Basic Law and then cited the following cases as

examples of the legal challenges which occurred since reunification, namely:

(1) HKSAR v. David Ma [1997] HKC 315 challenging the legality of the Provisional Council;

(2) Right of abode cases(Stage I) including Ng Kar Ling v. Director of Immigration [1999] 1 HKLRD 577 (FACV 14/1998) and Lau Kong Yung v. Director of Immigration [1999] 3 HKLRD 778 which also dealt with interpretation of the Hong Kong Basic Law by the Standing Committee on the 22 June, 1999;

(3) HKSAR v. Ng Kung Siu & another (1999) HKCFAR 552 – the National Flag and Regional Flag case;

(4) Chan Wah v. Hang Hou Village Affairs Committee [1999] 2 HKLDR 286 (sex discrimination in village election);

(5) Chan Shue Ying v. CE of HKSAR [2001]1 HKLRD 405 – abolition of Urban Council and Regional Council;

(6) Right of abode cases (Stage II) including Director of Immigration v. Chong Fung Yuen [2001] 2 HKLRD 533 (right of abode of child born in Hong Kong) and Ng Siu Tung and others v. Director of Immigration [2002]1 HKLRD 561- doctrine of legitimate expectation;

(7) Lau Kwok Fai(& 16 Ors. V. HKSARH(CAL 177/2002, FACV 15 & 16/2004 及 FACV 8/2005) and Scott v. SJ (HCAL 38/2004);

(8) Cheung Man Wai Florence v. Director of Social Welfare [2000] HKCA 497, [2000]3 HKLRD 225 –constitutionality of Social Workers Registration Ordinance;

(9) Equal Opportunities Commission v. Director of Education [2001] 2 HKLRD 690 – allocation of secondary school places;

(10) Leung Kwok Hung & Anor v. HKSAR [2005] HKCFA 40 – Public Order Ordinance, and in particular 'ordre public';

(11) Favour Mind Case – alienage jurisdiction;

(12) Chen Li Hung & Anor v. Ting Lei Miao & Ors.[2000] HKCFAR 9 – enforcement of order made in bankruptcy proceedings by Taiwan court;

(13) Re 'Hua Tien Loong' [2010] 3 HKLRD 611- sovereign immunity of PRC government department; and

(14) FG Hemisphere Associates LLC v. Democratic Republic of Congo & Ors. (CACV 42/2009) – sovereign immunity of foreign country.

3. It will be seen therefore that it was a balanced presentation of cases reported since the reunification and were not directed towards criticism of the courts or judges only, although I was not in complete agreement with the views of some judges in some of the judgments. In fact the conclusion which I drew was summarized as follows:

(a) That 'One Country, Two Systems' is a new concept. Hence it is not surprising that there are frequent arguments as to what it means. The legal profession has different views on the meaning of the Basic Law, and even after the courts have made decision on certain issue, some people still would not accept it. For example, the authority of the Standing Committee of the NPC to interpret the Basic Law either upon referral by the Court of Final Appeal, or by the State Council, or on its own volition. This is also due to the differences of the legal systems practiced in Hong Kong and in the Mainland because under the Common Law. In western societies, there is a division of powers in the government and only the courts have the power to make authoritative interpretation of the laws. Our new constitutional order provides that the Standing Committee of the NPC has the power of interpretation of the Basic Law (Article 158 of the Basic Law).

(b) In the early days of the establishment of the HKSAR, there was not sufficient understanding of the relationship between the Central People's Government and the HKSAR which led to the

Clarification by the Court of Final Appeal in FAFC 14/1998 on the 26 January, 1999. In adaptation of law, disputes arose over the equivalent of 'Crown' which formerly included both the British government as well as the colonial government, but attempt was made to cut off the Central Government and replace 'Crown' with HKSAR Government only.

(c) Some people think hat the Central People's Government should have nothing to do with the affairs of HKSAR except in defence and foreign affairs. This is in correct because the Central People's Government is also responsible for the appointment of the Chief Executive and Principal Officials, constitutional development of Hong Kong, Hong Kong's mutual legal assistance with Mainland and other countries, etc. and such powers are listed out in the Basic Law.

(d) That as citizens of a former British Colony, Hong Kong people had only vague nationality concept, hence the disputes over sovereign immunity issues (Re Hua Tien Loong's case and FG Hemisphere Associates LLC v. Democratic Republic of Congo & Ors. cited above).

(e) There is conflict between the Common Law and the Basic Law, and if we insist on interpreting the Basic Law made under the Chinese legal system according to the Common Law only, then there are bound to be anomalies, e.g. Article 7 of Annex I and Article 3 of Annex II of the Basic Law and sovereign immunity issue.

(f) Legislation lags behind societal development, e.g. secondary school allocation of places and village election.

(g) Common law is itself continuously evolving, e.g. the argument of legal scholars on 'purposive interpretation', 'judicial activism' and 'judicial restraint', the threshold for judicial reviews are some examples.

4. Therefore my criticism of the judgments and the legal profession was necessarily part of the talk but was not directed towards putting pressure on any judge or in respect of any proceedings before the court. Indeed, I declined an invitation for interview by the media after the talk since it was given purely for the benefit of the participants. I was surprised that the Hong Kong Bar Association and the Law Society of Hong Kong and those criticizing me had seen fit to tread upon academic autonomy of the Hong Kong College of Technology and my freedom of speech by calling upon me to stop making such remarks.

Judicial Independence

5. The accusation against me is that my remarks amount to interfering with judicial independence. Judicial independence in Hong Kong is protected by a solid system for appointment of judges which provides them with security of tenure of office (Articles 88 & 89 of the Basic Law), and Article 85 of the Basic Law reads: "The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions". As the Hon. Mr. Justice Lam pointed out in paragraph 2 to paragraph 6 (both inclusive) of his Judgment in Vallejos Evangeline

Banao v, Commissioner of Registration & Anor. (HCAL 124/2010) dated the 30 September 2011, judges should not be affected by public comments even on issues before them, and I cite his following remarks for reference by Members of the AJLS Panel. He said:

"2. Cases on right of abode often bring about debates amongst members of the public. Since the resumption of sovereignty over Hong Kong in 1997, there have been several cases of this nature. A decision in a right of abode case would inevitably have social, economic and political impact on the society. It is not surprising that people in Hong Kong are concerned as to the possible outcome. . .

3. The court respects the freedom of expression of our citizens. At the same time, public discussions on the case often go beyond the legal issues which the court can properly resolve in the litigation. Again this is not surprising since the socio-economic and political implications of a particular outcome necessarily transcend the legal analysis of the issues before the court.

. . .

5. In the light of public attention drawn to this case and the intensity with which the question of right of abode for foreign domestic helpers have been addressed at various quarters in the public arena, it is right that I should state clearly the nature of the judicial process at the outset. As mentioned, I can quite understand why this case generates so much public interest. I have no intention of stopping people from having discussion on the topic based on their own perspectives. However, what I should not allow to happen is to let such discussion influence this court in the process of judicial adjudication. Unlike the political process, the judicial process is not subject to any lobbying. It is important that judges are able to perform their judicial function independently, impartially and fearlessly. Our judicial oath requires judges to serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit.

6. I say these not because I feel any pressure in the present case. As far as I am aware, the public discussions so far represent different views on the topic held by different persons and none of them seek to influence this court in the judicial process. . ."

6. By making the accusation against me, those alleging that my remarks amounting to an interference of judicial independence are in fact underestimating the integrity and magnanimity of our judges as shown by the said judgment of the Hon. Mr. Justice Lam. I have full confidence that our judges are well equipped to fulfill the judicial oath which they take upon accession to office and am grateful that the said judge has dealt with the issue at length which I hope will alley the fears of any member of the public who thinks otherwise.

7. Some said that I should not speak because I am the Deputy Director of the Hong Kong Basic Law Committee. This is again misconceived. The Hong Kong Basic Law Committee is a working party under the Standing Committee of the NPC whose functions are restricted to Articles 17, 18, 158 & 159 of the Basic Law, and is advisory and not administrative by virtue of its constitution. Furthermore, the remarks of the Standing Committee itself, in the absence of a formal interpretation of the Basic Law under Article 158, was totally ignored by the highest court in Hong Kong, i.e. the Court of Final Appeal, in the case of Chong Fung Yuen cited above (at p. 223D to E). How could the remarks of a member of the HK Basic Law Committee under it influence the courts of Hong Kong?

<u>Matters following my talk on the 6 October, 2012</u>

8. Upon reading the statements made by the Hong Kong Bar Association and the Law Society of Hong Kong on the subject of

interference with judicial independence, I wrote to them in response to their statements on the 11 October, 2012, to provide them with information on what was spoken at the talk and my grounds for disagreeing with their conclusion. However, two matters had arisen as a result of which some critics continued their attacks on me which I feel obliged to clarify.

9. The first is the remarks of the Hon. Mr. Justice K. Bokhary upon his retirement as a Permanent Justice of the Court of Final appeal on the 2 October, 2012. I thank him for speaking fairly on my right to speak. Of course, this is a democratic society, everyone has the right to speak but at the same time is accountable for what he or she said, and his/her remarks are subject to criticism by others. I do not know what gave him the cause of alarm for saying that 'Clouds heralding a "storm of unprecedented ferocity" are gathering over the rule of law in Hong Kong. I remember he said something similar in his dissenting judgment of FG Hemisphere Associates LLC v. Democratic Republic of Congo & Ors. cited above when he refused to refer articles 13, 19 and 160 of the Basic Law to the Standing Committee of the HKSAR for interpretation. In his farewell remarks, he said that I was wrong in suggesting referral of the right of abode issue of non-resident mothers seeking to give birth to babies in Hong Kong, because in his view, the Standing Committee of the NPC should only interpret the Basic Law when referred to by the Court of Final Appeal. Suffice it to say that since reunification, the Standing Committee had on four occasions interpreted articles of the Basic Law, (i.e., Articles 22(4), (24(2)(3), Article 7 of Annex I and Article 3 of Annex II, Article 53(2), Article 13(1) and 19), only one such occasion

was the interpretation referred by the Court of Final Appeal, whilst the other 3 were referrals by the State Council and on the Standing Committee's own volition respectively, and the Hong Kong courts have not held against the validity of any of these interpretations. With due respect, no matter how much the Hon. Mr. Justice Bokhary resents it, he must respect the decision of our courts as he was and still is a non-permanent member of the Court of Final Appeal, for their decisions are our law.

10. The remaining issue was my remarks when interviewed by Global Daily appearing on the 7 November, 2012. The remark complained of was that I advocated changing the legal system. This is totally false. When asked for my views on the development of our legal system since the reunification, I said as follows:

> "Some people think that "50 years unchanged" means that all things in Hong Kong should remain as at 30 June 1997, and if there
> is no change, it would mean success. This is wrong. "50 years unchanged means that the fundamental policies of the Central People's Government towards Hong Kong shall remain unchanged, and not that everything in Hong Kong shall remain unchanged.
>
> The Legal system itself evolves continuously. Everything else is the same, they must be in the process of development. In the course of evolution there are bound to be differences in opinion. We cannot say that just because there are differences of opinion that the legal system is damaged, and we cannot conclude that "One Country, Two Systems" has failed just because we meet with some problems in its implementation.
>
> Hong Kong has a solid foundation, protected by the Basic Law. Its systems do not lightly change. (The Basic Law and) the

common law integrate with each other and are not repugnant to each other. In the process of integration there may be some problems, but I am not worried. On the face of turmoil, Hong Kong society and systems are still robust."

I give as example the cases of Lau Kwok Fai & 16 Ors. v. HKSAR, Scott v. SJ and Cheung Man Wai Florence v. Director of Social Welfare cited above as authorities for saying that Hong Kong may develop its policies in various fields. Development must mean changes, and if it is for the benefit of the community, changes are all the more important.

11. If the legal system of Hong Kong has not been developing, the Chinese community must still be governed by customary law deriving from Tsing Law. Amongst the merits of the common law system is its versatility to act according to the progress of the society. However, the Basic Law ensures that the changes will not affect the fundamental policies enunciated therein, for example, national law of the People's Republic of China shall not be applicable to Hong Kong except when included in Annex III and such laws listed in Annex III shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the HKSAR.

12. Therefore those who claimed that I intend to introduce into Hong Kong changes that would impair the Hong Kong legal system or the rule of law has no substance in their contention, and their remarks are made purely for the purpose of scaremongering the public, disparaging me and causing disharmony in the society.

13. I hope that by my submission, I could placate the concern of those Legislative Council Members of the AJLS Panel who called for the meeting, and I appreciate the opportunity to share my views on the issues arising from my talk on 6 October, 2012.

(LEUNG Oi-sie, Elsie)

19 November, 2012