

*The Process of Appointment of Judges in Hong Kong and Some Foreign Countries:  
Overall Comparison*

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**Table 1 - Judges and Appointment Authority**

<b>Jurisdictions</b>	<b>Judges Concerned</b>	<b>Appointment Authority</b>
United States	Judges of the Federal Courts (i.e. Justices of the Supreme Court, judges of the Courts of Appeals and the District Courts)	The President.
United Kingdom	Lords of Appeal in Ordinary, Heads of Divisions, Lords Justices of Appeal and Justices of the High Court	The Queen.
Canada	Judges of the Supreme Court and the Federal Court	The Governor in Council.
HKSAR*	Judges of the Court of Final Appeal and the Chief Judge of the High Court	The Chief Executive.

\* Hong Kong Special Administrative Region.

**Table 2 - Role of the Legislature**

<b>Jurisdictions</b>	<b>Role of the Legislature</b>
United States	The Senate must give advice and consent in the appointment process. Senators often recommend potential nominees for judgeship of the federal courts. Senate Judiciary Committee is responsible for investigating, testifying and voting on the nominees.
United Kingdom	No role except the Prime Minister, who is head of Government and leader of the majority party in Parliament.
Canada	No role except the Prime Minister, who is the head of the executive branch.
HKSAR	The Legislative Council endorses the appointment.

**Table 3 – Selection Authority**

<b>Jurisdictions</b>	<b>Selection Authority</b>
United States	Attorney General + White House Counsel's Office
United Kingdom	The Lord Chancellor
Canada	The Prime Minister + Minister of Justice
HKSAR	Judicial Officers' Recommendation Commission (headed by the Chief Justice)

**Table 4 – Who are Consulted**

<b>Jurisdictions</b>	<b>Who are Consulted</b>
United States	Senators, Members of the House of Representatives, federal and state judges, members of the legal community, state Governors, state judicial selection panels, citizens and the American Bar Association which in turn consults judges and lawyers in the candidate's community.
United Kingdom	Lords of Appeal in Ordinary, Heads of Divisions and Lords Justices of Appeal - All judges of the relevant benches (i.e. House of Lords and Court of Appeal). Justices of the High Court - Lords of Appeal in Ordinary, the Lords Justices of Appeal, the Justices of the High Court, Chairman of the General Council of the Bar, Circuit Leaders and the consultees nominated by the applicant.
Canada	Chief Justice and Judges of the Supreme Court and the Chief Justice of the Federal Court - Minister of Justice who in turn consults provincial attorneys-general. Judges of Federal Court - Advisory Committee on Judicial Appointments, senior members of the judiciary, the bar, the appropriate provincial and territorial attorneys-general and ministers of justice.
HKSAR	Senior members of the Judiciary and the legal profession.

**Table 5 – Nominations and Recommendations**

<b>Jurisdictions</b>	<b>Authority Responsible for Nominating and Recommending Candidates</b>
United States	Attorney General recommends candidates. The President nominates candidates.
United Kingdom	The Prime Minister recommends candidates for appointment as Lords of Appeal in Ordinary, the Heads of Divisions and the Lords Justices of Appeal. The Lord Chancellor recommends candidates for appointment as Justices of the High Court.
Canada	The Prime Minister recommends candidates for appointment as the Chief Justice and judges of the Supreme Court and the Chief Justice of the Federal Court. The Minister of Justice recommends candidates for appointment as judges of the Federal Court.
HKSAR	Judicial Officers' Recommendation Commission recommends candidates.

**Table 6 - Confirmation and Endorsement**

<b>Jurisdictions</b>	<b>Authority Responsible for Confirmation and Endorsement</b>
United States	Senate Judiciary Committee - confirmation hearing and voting. Full Senate - voting.
United Kingdom	Not applicable.
Canada	Not applicable.
HKSAR	The Legislative Council - endorsement by way of a resolution of the Council.

**Table 7 – Criticisms Against and Support For the Current System**

<b>Jurisdictions</b>	<b>Criticism</b>	<b>Support</b>
United States	<ul style="list-style-type: none"> <li>• the process has become increasingly complex and prolonged, it may lead to the situation that highly qualified persons may be reluctant to seek or accept nomination because of the burdensome and redundant screening and vetting process. They may also be concerned about personal privacy and low judicial salaries"</li> <li>• the process can, and perhaps does, impinge on the independence of the judiciary.</li> </ul>	<ul style="list-style-type: none"> <li>• the process manifests checks and balances between the executive and legislative branches and the judiciary.</li> </ul>
United Kingdom	<ul style="list-style-type: none"> <li>• system of consultation is unstructured.</li> <li>• comments were drawn from people who were selected from a narrow pool.</li> <li>• the Lord Chancellor's role contravenes the principle of separation of powers.</li> </ul>	<ul style="list-style-type: none"> <li>• greater chance of making the correct decision if the candidates have been assessed for a long period of their professional lives and the Lord Chancellor and the judges being consulted were advised of such assessment.</li> </ul>

**Table 7 – Criticisms Against and Support For the Current System (Cont'd)**

Jurisdictions	Criticism	Support
Canada	<ul style="list-style-type: none"> <li>• unstructured and lacking in transparency.</li> <li>• no committee to advise the federal government on appointments to the Supreme Court.</li> <li>• Advisory Committee on Judicial Appointments is only advisory in nature, not a nominating committee.</li> <li>• lack of consultation by the Minister of Justice with the Attorneys General and Chief Justices of various provinces.</li> </ul>	<ul style="list-style-type: none"> <li>• "Advisory Committees on Judicial Appointments" have been set up in provinces and territories for consultation purposes.</li> <li>• judges are now believed to have been selected more for their legal merits than for political considerations.</li> </ul>
HKSAR	<ul style="list-style-type: none"> <li>• lacking in transparency.</li> <li>• insufficient information provided by the Administration to the Legislative Council.</li> <li>• the number of dissenting votes permissible for a JORC resolution to be effective should not be two.</li> <li>• the membership of the Secretary for Justice in JORC is seen to have a tendency to undermine the independence of the JORC.</li> <li>• Appointment of political figures as members of JORC.</li> </ul>	<ul style="list-style-type: none"> <li>• Judges appointed are respected.</li> </ul>

### **Analysis: Reference for Hong Kong**

1.1 The process of appointment of senior judges in the jurisdictions under study varies. In the United States and Hong Kong, the legislature is vested with the authority to confirm or endorse judicial appointments. Senators in the United States are also involved in nominating and selecting candidates. Moreover, the Senate holds confirmation hearings on federal judicial nominees which are open to the public. However, in the United Kingdom and Canada, the Parliament is not involved in the process of appointment and the executive branch has full responsibility for the entire process of appointment of senior judges.

1.2 Questions relating to the appointment of judges can be summarized into two main issues: degree of transparency and participation by stakeholders such as legal professional bodies and relevant parties such as legislators. The system adopted in the United States has a high degree of transparency and participation, while those in the United Kingdom and Canada have been criticized as not being entirely satisfactory.

1.3 The United Kingdom and Canada both conduct open recruitment for certain judges while such practice is not adopted in the United States for federal judicial appointments. We note that open recruitment in the United Kingdom is adopted for vacancies in the High Court whereas open recruitment in Hong Kong is limited to vacancies at or below the District Court level.

1.4 On 24 April 2001, the Panel on Administration of Justice and Legal Services discussed the setting up of a working group to further study the process of appointment of senior judges in Hong Kong. In the light of overseas experience covered in this series of research studies on the process of appointment of judges and the views expressed by Legislative Council Members in debates on judicial appointments in the past, the proposed working group, if it were to be set up, may wish to consider the following points:

- (a) what kind of information on the selection process should be made public by the Administration;
- (b) whether or not open recruitment should be extended to senior judgeship in Hong Kong;
- (c) the composition and quorum of JORC;
- (d) whether or not the Chief Executive has the power not to appoint persons recommended by JORC;
- (e) the process of endorsement by the Legislative Council; and
- (f) the co-ordination between JORC, the Chief Executive and the Legislative Council.

## Appendix I

### **Reform recommendations made by the American Bar Association**

(Extracted from "Report of the ABA Commission on Separation of Powers and Judicial Independence", August 1996)

1. Senators, in their "advice and consent" role, should identify good judgeship candidates before a vacancy occurs and the candidates should be thoroughly appraised and "vetted" either before the vacancy occurs or within 30 days after it;
2. Senators should recommend two or more names to the President, in order of priority, for each vacancy to avoid delays in case a potential nominee becomes unavailable. In no case should a senator's recommendation go to the executive branch later than 90 days after a vacancy occurs.
3. If a senator doesn't respond to the request for more than one name, the Administration should notify the senator of additional names the Administration would like to consider. The executive branch too should maintain lists of prospective judicial nominees.
4. If senators haven't made recommendations within 90 days of a district court vacancy, the President should proceed with the administration's own nominee, and if confirmation is delayed, make a temporary, or "recess" appointment.
5. The White House, Department of Justice, FBI and American Bar Association all should complete their investigations of candidates within 90 days of a vacancy.
6. The ABA should have more than one representative from each circuit court on its Standing Committee on Federal Judiciary and should provide a brief explanation for its rating, to avoid charges that it sometimes takes political considerations into account.
7. The White House and Justice Department should review current procedures to simplify them and avoid duplication and should consider eliminating personal interviews with candidates, to avoid the appearance of trying to influence candidates' judicial views.

8. The Senate Judiciary Committee should increase the number of its staff attorneys investigating judicial nominees.
9. If a nominee is noncontroversial, the Senate Judiciary Committee should forgo holding confirmation hearings.
10. The committee should clear nominees for full Senate confirmation within two months of receipt of a President's nomination.
11. Prospective nominees should be required to complete only a single questionnaire that supplies all the information sought by the Department of Justice, White House, ABA and Senate Judiciary Committee.
12. Those agencies should explore whether it is really necessary or appropriate to obtain all the information presently sought.
13. Congress should enact a statute providing that an additional judgeship is created on the date an incumbent becomes eligible for senior status (semi-retirement) even if the incumbent doesn't take senior status on that date. The number of authorized judgeships would be reduced by one when the incumbent takes senior status, fully retires or dies.

## Appendix II

### **Reform recommendations made by Sir Leonard Peach, ex-Commissioner for Public Appointments,**

(Extracted from “Independent Scrutiny of the Appointments Process of Judges and Queen’s Counsel in England and Wales”, December 1999)

#### **Commission for Judicial Appointments<sup>1</sup>**

- *Role*

A Commission for Judicial Appointments should be established. The Commission should be concerned with the ongoing audit of the processes and policies for making and renewing judicial appointments, for handling grievances and appeals resulting from the application of these processes/policies and for recommending improvements and changes to the Lord Chancellor.

- *Membership*

A part-time Chairman or First Commissioner and ten or so part-time Commissioners should be appointed. Not more than one third of the membership will have a legal background; judges or retired judges may be appointed as part-time Commissioners, but not as the First Commissioner; the other members will be lay, though a number will have special knowledge of selection techniques and processes. There will be female and ethnic minority representation. Members will receive appropriate training. Members of the Commission will share the commitment of the Lord Chancellor to ensuring that his principles are implemented.

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<sup>1</sup> the "Commission" has not yet been officially established as of the date of publication of this research report.

- *Activities*

The Commission will meet quarterly as a body to discuss its plan of work, exchange experiences and formulate recommendations to the Lord Chancellor.

The First Commissioner/Chairman or appointed members will handle grievances and complaints from individuals or bodies, providing that the existing procedures in the case of individuals, notably the feedback system, has been exhausted.

The First Commissioner/Chairman and the Commission will provide advice to the Lord Chancellor and the Permanent Secretary on the workings of the judicial appointments system and areas where improvements or reviews should be undertaken.

The Lord Chancellor may ask the Commission to audit or scrutinise any part of the judicial appointments procedures or policy.

The Commission may initiate an investigation resulting from a complaint and recommend action based on the outcomes.

The Commission will publish an annual report which shall be part of the Lord Chancellor's report to Parliament.

- *Powers and Authority*

The Commission must have access to all relevant documents.

The Commission in the case of a successful appeal will have the right to restore the complainant concerned, in the subsequent cycle of the appointment which he or she is seeking, to the point at which he or she was disadvantaged. This is subject to practicality since there are one-off competitions, or competitions in respect of a single post.

The Commission will have powers to amend or expunge part of the records of any individual.

The Commission will be available to Members of Parliament or organisations for the discussion of appointment processes.

Other than in the above and in initiating an investigation, the Commission will not have the powers to take unilateral action and will recommend any proposed actions to the Lord Chancellor for his approval.

### **Succession Planning for Senior Judicial Appointments**

- That a formal meeting is held between the Lord Chancellor and senior judges, notably the Lord Chief Justice, the other Heads of Division - and others - at least every six months and more frequently if required. This should be dedicated to the discussion of candidates for appointment to the High Court, the Court of Appeal and Heads of Division posts.
- That succession lists should be drawn up which should be divided into those categories of candidates agreed to be immediately capable of filling the posts and lists of others who will be contenders within a specified period of time (usually two to three years). Candidates will be identified from applications and by nomination and each meeting will include consideration of lists of the best available female and ethnic minority candidates, solicitors and barristers.
- The Lord Chancellor will recommend for appointment individuals chosen from the list of short or long term successors and if he wishes to depart from the lists will return to the meeting for further discussion of alternative candidates.
- The Commissioner for Judicial Appointments will be a member of this meeting.

## Appendix III

### **Reform recommendations made by the Canadian Bar Association**

(Extracted from "Submission to the Minister of Justice on the Federal Judicial Appointment Process", November 1993)

#### **The Canadian Bar Association recommended:**

1. that the relevant judicial appointment committee should be consulted by the Minister of Justice on all vacancies occurring in its jurisdiction and should submit to the Minister a short list of individuals who had been reviewed and recommend by the committee.
2. that confidentiality for the appointment process be maintained and that application forms be amended to make it clear that inquiries regarding the applicant's qualifications would be made and that these inquiries would be carried out on a confidential basis.
3. that members of the judicial appointment committees sign an undertaking acknowledging their responsibility for maintaining the secrecy and confidentiality of the process.
4. that the Minister of Justice establish written guidelines to assist committee members to fulfil their responsibilities.
5. against the creation of separate committee for appointments to specialised courts.
6. that all elevations, including provincial court judges to superior courts, should be subject to review by the judicial appointment committees.
7. that the Minister of Justice clarify the meaning of "recommended" and "highly recommended" to ensure that "recommended" is a very high threshold and that "highly recommended" should be reserved for applicants who are so far beyond this threshold so as to be truly exceptional.

8. against including an interview as part of the review process.
9. that the criteria for appointment be amended to include "personal habits".
10. that written guidelines should include a direction to give due consideration to all the experience of a given candidate, including that which is outside the mainstream of private practice.
11. that individual committee members not provide individual recommendations to the Minister.
12. that legal members of judicial appointment committee be subject to a cooling-off period before they are permitted to apply for judicial appointment.
13. that members of Parliament, the Senate or legislative assemblies be subject to a two-year cooling-off period before they are permitted to apply for judicial appointment.
14. that the membership of judicial appointment committees should be made on the basis of overlapping terms.
15. that the current procedure of nominating organisation naming two or three candidates for membership on judicial appointment committees be continued.

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**Research Paper No.:**

**Title:**

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