

***The Process of Appointment of Judges
in Hong Kong since 1976***

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EXECUTIVE SUMMARY

1. Before 1 July 1997, the process of appointment of judges of the Supreme Court can be summarised into the following procedures: (1) the Judicial Service Commission (JSC) gave advice to the Governor; and (2) the Governor appointed the judges by Letters Patent under the Public Seal with the instructions given through a Secretary of State.
2. After 1 July 1997, the process of appointment of the Chief Justice and judges of the Court of Final Appeal and the Chief Judge of the High Court can be summarised into the following procedures: (1) the Judicial Officers Recommendation Commission (JORC) advises or makes recommendation to the Chief Executive; (2) the Chief Executive accepts the recommendation of JORC, and subject to the endorsement of the Legislative Council will make the recommended appointment; and (3) the Chief Executive reports the appointment to the Standing Committee of the National People's Congress for the record.
3. Before 1 July 1997, the Legislative Council was not involved in the process of appointment of judges of the Supreme Court. Members of the Legislative Council had raised questions about the system of judicial appointments, but not on any particular appointment.
4. After 1 July 1997, the Chief Executive shall obtain the endorsement of the Legislative Council on the appointments of judges of the CFA and the Chief Judge of the High Court. Such endorsement is sought by way of a resolution of the Council.
5. The Judicial Service Commission was established in 1976. The main function of the Commission was to "advise the Governor regarding the filling of vacancies in judicial offices". In 1997, the name of the Commission was changed to Judicial Officers Recommendation Commission. The scope of judicial officers under its purview was enlarged and the main function was to "advise or make recommendations to the Chief Executive regarding the filling of vacancies in judicial offices".
6. According to the Judicial Service Commission Ordinance, "[A] person shall not be appointed to be a member of the Commission if he is a member of the Legislative Council" and no member of the Legislative Council had ever been appointed as a member of the JSC up to 1997. This provision of not appointing members of the Legislative Council as members of JORC has remained unchanged since 1997.
7. The criticisms on the process of appointment of judges include lack of transparency, number of dissenting votes permissible in the JORC and presence of the Secretary for Justice and appointment of political figures as members of the Commission.

THE PROCESS OF APPOINTMENT OF JUDGES IN HONG KONG SINCE 1976

PART 1 - INTRODUCTION

1. Background

1.1 On 28 November 2000, the Panel on Administration of Justice and Legal Services (AJLS) requested the Research and Library Services (RLS) Division of the Legislative Council (LegCo) Secretariat to conduct a study on the historical development of the process of judicial appointment in Hong Kong.

2. Scope

2.1 This research studies the historical development of the process of appointment of judges in Hong Kong since 1976. This research only studies the appointment of the Chief Justice and judges of the Court of Final Appeal (CFA) and the Chief Judge of the High Court in accordance with Article 73(7) of the Basic Law and judges of similar rank before 1997. This research starts with the year of 1976 when the Judicial Service Commission (JSC) was set up.

3. Methodology

3.1 This study involves a combination of information collection, literature review, and analysis. Information has been obtained from relevant academic and professional institutions.

3.2 Collection of information is subject to the constraints of confidentiality under which Judicial Officers Recommendation Commission Ordinance (Cap. 92) operates.

PART 2 - SOME BASIC INFORMATION
4. Court System, jurisdictions and judges

4.1 The court system and judges of High Court and above before and after 1 July 1997 are summarised in Table 1.

Table 1 – Court System and Judges of High Court and above before and after 1 July 1997

Before 1997	After 1997
<p>Judicial Committee of the Privy Council Jurisdiction The Judiciary Committee Privy Council, located in London, was the final court of appeal for Hong Kong. It heard appeals on civil and criminal matters from the Supreme Court.</p> <p>Judges Members of the Judicial Committee of the Privy Council*</p>	<p>Court of Final Appeal Jurisdiction The Court of Final Appeal is the highest appellate court within the Hong Kong Special Administrative Region. It hears appeals on civil and criminal matters from the High Court.</p> <p>Judges The Chief Justice, Permanent Judges, Non-permanent Hong Kong Judges and judges from other common law jurisdictions</p>
<p>Supreme Court Supreme Court consists of Court of Appeal and High Court of Justice (High Court).</p>	<p>High Court High Court consists of Court of Appeal and Court of First Instance.</p>
<p>Court of Appeal Jurisdiction It heard appeals on civil and criminal matters from the High Court and the District Court, as well as appeals from the Lands Tribunal. It also made rulings on questions of law referred to it by lower courts.</p> <p>Judges The Chief Justice and Justices of Appeal</p>	<p>Court of Appeal Jurisdiction Same as before 1997.</p> <p>Judges The Chief Judge and Justices of Appeal</p>
<p>High Court Jurisdiction It had unlimited jurisdiction in both civil and criminal matters. It also operated as an Appeal Court for cases from some lower courts.</p> <p>Judges Judges of High Court</p>	<p>Court of First Instance Jurisdiction Same as before 1997.</p> <p>Judges Judges of Court of First Instance</p>

Remark: * The appointment of judges of the Judicial Committee of the Privy Council is not examined in this report.

Source: *Hong Kong Judiciary Annual Report 2000* and Peter Wesley-Smith, *An Introduction to The Hong Kong Legal System*, 2nd Edition, Hong Kong: Oxford UP, 1993.

5. Authority for Judicial Appointment

Before 1997

Supreme Court Judges

5.1 Judges of the Supreme Court were appointed by Letters Patent under the Public Seal by the Governor with the instructions given through a Secretary of State.¹

After 1997

The Chief Justice and Judge of the Court of Final Appeal and the Chief Judge of the High Court

5.2 The Chief Justice and judges of the CFA and the Chief Judge of the High Court are appointed by the Chief Executive and such appointments should be endorsed by the Legislative Council.²

6. Judicial Appointments

1976 - 1997

6.1 Between 1976, when the Judicial Service Commission was set up, and 1997, a total of two Chief Justices, 25 Justices of Appeal and 64 judges of the High Court were appointed. Of the appointed judges, the one Chief Justice, 23 Justices of Appeal and 39 judges of the High Court were elevated from the lower bench.

1997 - 2000

6.2 From 1 July 1997 to 31 December 2000, one Chief Justice, five permanent judges and 13 non-permanent Hong Kong judges of the CFA as well as nine judges of the CFA from other common law jurisdictions were appointed. Also, nine Justices of Appeal of the Court of Appeal and 12 judges of the Court of First Instance were appointed.

¹ *Letters Patent, XIV and Supreme Court Ordinance, s.6(1).*

² *Basic Law, Art. 90.*

6.3 All permanent judges of the CFA and Justices of Appeal of the Court of Appeal were elevated from the lower bench. Among the 12 judges of the Court of First Instance appointed after 1 July 1997, seven of them were elevated from the lower bench. The judicial appointments from 1976 to 2000 are summarised in Appendix I.

7. Judicial Service Commission/Judicial Officers Recommendation Commission

7.1 The Judicial Service Commission (JSC) was established on 20 February 1976 under the Judicial Service Commission Ordinance.³ The name of the Commission was changed to Judicial Officers Recommendation Commission (JORC) on 1 July 1997.

1976 - 1990

7.2 The main function of the Judicial Service Commission was to "advise the Governor regarding the filling of vacancies in judicial offices and advising on any matter affecting judicial officers".⁴ According to the reply from the Administration, the Governor had not appointed a judge without taking the advice from the Commission.⁵

7.3 The Commission comprised Chief Justice who is ex officio the Chairman, the Attorney General, the Chairman of the Public Services Commission and not more than three members appointed by the Governor.

7.4 Officials of the Hong Kong Civil Service might not be appointed although this prohibition did not extend to retired officials. Also, members of the Legislative Council might not be members of the Commission.⁶

7.5 The Chairman and not less than two members may exercise and perform any of the functions, powers and duties of the Commission, but the Commission shall not pass a resolution except by the unanimous vote of the Chairman and every member who considers the resolution.

³ The Legislative Council passed the Judicial Service Commission Bill 1975 on 23 October 1975.

⁴ *Hong Kong Judicial Service Commission Chairman's Report 1976 and 1977.*

⁵ *Letter from the Judiciary Administrator, 22 March 2001.*

⁶ *Judicial Service Commission Ordinance.*

7.6 The Commission published the "Hong Kong Judicial Service Commission Chairman's Report" from 1976 to 1982.⁷ The reports gave a general account of the composition and functions of the Commission. A summary table of the activities of the Commission from 1976 to 1982 is in Appendix II.

7.7 The Secretary of the Commission is the Registrar of the Supreme Court who undertook the secretarial duties on a part-time basis.⁸

⁷ There were six editions published by the Commission: 1976 and 1977, 1977-1978, 1978-1979 and 1979-1980, 1980-1981, 1981-1982, 1982 and 1983.

⁸ The Secretary of the Commission was replaced by the Judiciary Administrator in 1994. *Civil and Miscellaneous Lists 1995*.

1990 - 1997

7.8 On 11 July 1990, the Legislative Council passed the Judicial Service Commission (Amendment) Bill 1990.⁹ The major changes to the Commission included:

- (a) the membership of the Commission was increased from six to nine;
- (b) the Chairman and no fewer than six rather than two members may exercise and perform any of the functions, powers and duties of the Commission;
- (c) "the Commission shall not pass a resolution except by the unanimous vote of the Chairman and every member who considers the resolution" was changed to "a resolution is effective if :-
 - (i) where 7 members are present, at least 5 vote in favour;
 - (ii) where 8 members are present, at least 6 vote in favour; and
 - (iii) where 9 members are present, at least 7 vote in favour";
- (d) the Chairman of the Public Service Commission was no longer required to be a member of the Commission; and
- (e) one barrister and one solicitor were appointed by the Governor and before making such appointments the Governor shall consult the Bar Committee of the Hong Kong Bar Association and the Council of the Law Society of Hong Kong. The Bar Committee of the Bar Association may recommend any barrister to the Governor for appointment and the Council of the Law Society may so recommend any solicitor, but the Governor might appoint a person other than a person so recommended.¹⁰

⁹ The Judicial Service Commission (Amendment) Bill 1990 was first introduced into the Legislative Council by the Chief Secretary on 22 June 1988. *Hansard*, 22 June 1988, 8 November 1989 and 11 July 1990.

¹⁰ *Judicial Service Commission Ordinance*. The Secretary of the Law Society replied that "usually the person recommended [by the Society] for appointment [as member of the JSC] has been the current President of the Law Society" and he is not aware that any recommendation has ever been rejected. *Letter from the Secretary of the Law Society*, 1 February 2001. We received no reply from the Bar Association as of the date of the publication of this report.

7.9 In 1995, the Legislative Council passed the Court of Final Appeal Ordinance (Cap. 484).¹¹ Amendments were made to the Judicial Service Commission so as to ensure that it was in full conformity with the Basic Law. Major amendments included:

- (a) the function of the Commission was changed to "advise or make recommendations to the Chief Executive";
- (b) sections were added to avoid conflict of interest of some members during discussion in the Commission,¹² and
- (c) "Chief Justice and Judge of the Court of Final Appeal" were added into the list of judicial office to be advised and recommended by the Commission.

After 1997

7.10 On 1 July 1997, the name of the Judicial Service Commission was changed to Judicial Officers Recommendation Commission. The function of the Commission was changed to "advise or make recommendations" to the Chief Executive regarding the filling of vacancies for judicial officers.¹³

¹¹ The Final Court of Appeal Ordinance was passed by the Legislative Council in 1995 and came into operation after 30 June 1997. *Hong Kong Court of Final Appeal Ordinance*, Hong Kong Government Gazette, Ordinance No. 79 of 1995.

¹² The following sections were added: "(5B) ... a member who is or may reasonably be regarded as a candidate for selection to fill any such vacancy or whose term of office is being considered for extension shall disclose whether or not, if he were to be selected or if the extension of his term of office were to be recommended as the case may be, he is willing to accept appointment or the extension and that disclosure shall be recorded in the minutes.... (5C) A member who, under subsection (5B), discloses a willingness to accept an appointment or extension - (a) shall not take part in any deliberation of the Commission with respect to that appointment or extension as the case may be and shall not vote on any question concerning the same; and (b) shall, for the purposes of subsection (6), with respect to any deliberation of the Commission concerning that appointment or extension as the case may be and any question concerning the same, be treated as being unable to act." *Hong Kong Government Gazette*, Ordinance No. 79 of 1995.

¹³ *Judicial Officers Recommendation Commission Ordinance*.

Membership of the JSC and JORC

7.11 The membership of the Judicial Service Commission in 1997 and the Judicial Officers Recommendation Commission in 2000 is summarized in Table 2.

Table 2 - Membership of JSC in 1997 and JORC in 2000

1997 [^]	Provisions of JSC Ordinance	2000*	Provisions of JORC Ordinance
The Honourable Sir Ti Liang YANG (Chief Justice)	s.3(1)(a): "the Chief Justice, who shall be the Chairman".	The Honourable Mr. Justice Andrew LI Kwok-nang (Chief Justice of the CFA)	s.3(1)(a): "the Chief Justice, who shall be the Chairman".
Mr. Jeremy Fell MATHEWS, C.M.G., J.P. (Attorney General)	s.3(1)(b): "the Attorney General".	Ms. Elsie LEUNG (Secretary for Justice)	s.3(1)(b): "the Secretary for Justice".
The Honourable Mr. Justice Henry Denis LITTON, O.B.E.	s.3(1)(c)(i): "two shall be judges".	The Honourable Mr. Justice Patrick CHAN	s.3(1)(c)(i): "two shall be judges".
The Honourable Mr. Justice Patrick CHAN	s.3(1)(c)(i), ditto	The Honourable Mr. Justice PANG Kin-kee	s.3(1)(c)(i), ditto
Ms. Jacqueline P. LEONG, Q.C.	s.3(1)(c)(ii): "one shall be a barrister and one shall be a solicitor, each holding a practising certificate issued under the Legal Practitioners Ordinance (Cap. 159)".	Ms. Gladys Veronica LI, S.C., J.P.	s.3(1)(c)(ii): "one shall be a barrister and one shall be a solicitor, each holding a practising certificate issued under the Legal Practitioners Ordinance (Cap. 159)".
Mr. Roderick WOO Bun, J.P.	s.3(1)(c)(ii), ditto	Mr. Roderick WOO Bun, J.P.	s.3(1)(c)(ii), ditto
Dr. Victor FUNG Kwok-king, C.B.E.	s.3(1)(c)(iii): "three shall be persons who are not, in the opinion of the Governor, connected in any way with the practice of law".	Dr. Victor FUNG Kwok-king	s.3(1)(c)(iii): "three shall be persons who are not, in the opinion of the Chief Executive, connected in any way with the practice of law".
Mrs. Eleanor LING Ching-man, O.B.E. J.P.	s.3(1)(c)(iii), ditto	Mr. CHAN Wing-kee, J.P.#	s.3(1)(c)(iii), ditto
Sir Joseph E. HOTUNG	s.3(1)(c)(iii), ditto	Professor CHANG Hsin-kang, J.P.	s.3(1)(c)(iii), ditto

Remark: [^] up to 30 June 1997.

* updated: 1 July 2000.

deputy to 9th National People's Congress, People's Republic of China.

Sources: Civil and Miscellaneous Lists, Hong Kong Government .

Criteria Adopted in Making Appointments to the JORC

7.12 At the Council meeting on 19 May 1999, the Administration was asked in a written question by a Legislative Council member about the criteria adopted by the Chief Executive in making appointments to the JORC. The Chief Secretary for Administration replied that:

“in appointing a person to serve on the JORC, consideration would be given to the candidate's integrity, standing in the community, judgement, and ability in carrying out the statutory functions of the Commission independently and impartially.”¹⁴

¹⁴ Hansard, 19 May 1999.

PART 3 - THE PROCESS OF APPOINTMENT

8. Constitutional and Legal Provisions

1976 - 1997

8.1 The Letters Patent, the Supreme Court Ordinance and the Judicial Service Commission Ordinance provide the following procedures:¹⁵

- Step 1: the JSC gave advice to the Governor; and
- Step 2: the Governor appointed the Judges by Letters Patent under the Public Seal with the instructions given through a Secretary of State.

After 1997

8.2 The Basic Law, the Hong Kong Court of Final Appeal Ordinance and the Judicial Officers Recommendation Commission Ordinance provide the following procedures:¹⁶

- Step 1: the JORC advises or makes recommendations to the Chief Executive;
- Step 2: the Chief Executive accepts the recommendation of JORC, and subject to the endorsement of the Legislative Council will make the recommended appointment;¹⁷
- Step 3: the Chief Executive reports the appointment to the Standing Committee of the National People's Congress for the record.

8.3 The legal provisions relevant to the appointment of judges are summarized in Appendix III.

¹⁵ *Letters Patent, XIV and Judicial Service Commission Ordinance, s.6.*

¹⁶ *Basic Law, Art. 90 and Juridical Officers Recommendation Commission Ordinance, s.6.*

¹⁷ *Brief for the Legislative Council, 30 November 2000.*

9. Process of Appointment

1976 - 1997

Selection

9.1 In law, the process of appointment of judges is confidential. According to Judiciary Administrator, as only candidates of very high standing would be considered for appointment to the Supreme Court, vacancies for judges in the Supreme Court were not advertised. Instead, when such vacancies arose, the Chief Justice made enquiries to see if any senior practitioners were interested in joining the Bench. In addition to outside candidates, he would include in a shortlist for consideration by the JSC suitable judges and judicial officers and legal practitioners serving in the legal group of departments nominated by their heads of departments.¹⁸

9.2 In addition to the Chief Justice nominating suitable judges and judicial officers and making enquiries among senior members of the legal profession, the Attorney General and the Director of Legal Aid could nominate suitable officers from their departments. Legal practitioners in the private sector as well as those working in the legal group of departments could also put themselves forward for consideration.¹⁹ The process has not changed between 1976 and 1997.

9.3 A meeting of the Commission was convened whenever it was thought that members would prefer a discussion, or if a matter of importance had to be dealt with. Otherwise, decisions are taken by circulating papers to members. When a resolution on a judicial appointment was passed by the Commission, it would be communicated to the Governor for his consideration.²⁰

¹⁸ Information provided by the Judiciary Administrator, *letter from the Judiciary Administrator*, 22 March 2001. Legal group of departments refers to lawyers in government departments e.g. the Department of Justice and Legal Aid Department.

¹⁹ *Letter from the Judiciary Administrator*, 22 March 2001. Member of the Legislative Council Mr Ronald ARCULLI said that during his tenure as a member of JSC (1983-1985), application for judicial offices was open to the public. This was because the vacancies of judicial offices were generally well known to the legal profession. Apart from interested individuals who put themselves forward, the Bar Association might persuade a person whom it felt was suitable to put in his/her application to JSC. Mr ARCULLI opined that one of the main reasons for keeping the appointment process confidential was because many legal professionals did not wish to have their unsuccessful applications made known to the public. *Minutes of meeting*, AJLS Panel, 3 June 2000.

²⁰ *Hong Kong Judicial Service Commission*, Chairman's Report, 1976 and 1977 to 1982 and 1983. Letters were sent to the Administration for more information on this aspect after 1983 and we received no reply as of the publication of this report.

Appointment

9.4 Judges of the Supreme Court were appointed by Letters Patent under the Public Seal by the Governor with the instructions given through a Secretary of State.

9.5 Since 1976 all the appointments of judges in the Supreme Court were under the advice of the Judicial Service Commission.²¹

After 1997

9.6 The process of appointment of the Chief Justice and judges of the CFA and the Chief Judge of the High Court can be divided into different stages: selection, recommendation, appointment, endorsement and reporting.

Selection

9.7 According to Judiciary Administrator, as only eligible persons of the highest standing will be considered for appointment, such persons are generally well known to the Judiciary, the legal profession and members of JORC. No advertisement is placed.²²

9.8 According to Judiciary Administrator,²³ it is normal practice that the secretary to JORC would in consultation with the Chairman put up a list of candidates for JORC's consideration. In coming up with the proposed list, a number of steps are taken: first, the pool of all potential qualified candidates who may be able to comply with the minimum legal requirements for the post would be identified.

9.9 Second, having regard to the size of the pool of potential candidates, and the responsibilities and the qualities required of the post holder, the Chairman may advise that only those highly experienced candidates should be put to the JORC for consideration, instead of all candidates that meet the minimum legal requirements.

²¹ Letter from the Judiciary Administrator, 22 March 2001.

²² Letter from the Judiciary Administrator to the Clerk to LegCo Panel on AJLS, 6 December 2000.

²³ Ibid.

9.10 The proposed list submitted, apart from containing a sufficiently large number of candidates, is not meant to be exhaustive. It can be revised and any JORC member is also at liberty to put forward further names.

9.11 After deliberation, JORC would then come up with a shortlist of candidates having regard to the responsibilities and the qualities required of the post holder.

9.12 In the appointments of the Chief Justice of the CFA in 1997 and the Chief Judge of the High Court in 2000, the Administration provided a more detailed description of the selection process. A summary of the selection process is in table 2.

9.13 According to the statements given by the Secretary for Justice and the information provided by the Director of Administration:

Table 3 – Selection by the JORC

Chief Justice of the CFA ²⁴	Chief Judge of the High Court ²⁵
<p>(a) Members canvassed the views of senior members of the Judiciary and the profession to gauge their perception of the qualities of the Chief Justice of the CFA as well as their assessment of the candidates.</p> <p>(b) When canvassing such views, no precondition was made on what people could say and who they could support. Full consideration was given to the views obtained.</p> <p>(c) Members also considered information and materials provided by the candidates themselves.</p> <p>(d) There had been a systematic narrowing of choice in considering the candidates at successive meetings.</p> <p>(e) Members also took time to reflect on the views obtained.</p> <p>(f) In the end, members relied upon their own assessments and made up their own minds.</p>	<p>(a) JORC would first note the responsibilities of the Chief Judge of the High Court;</p> <p>(b) JORC would then consider the qualities required of the Chief Judge of the High Court;</p> <p>(c) JORC would then come up with a short list of candidates having regard to (a) & (b) above and taking into account the eligibility requirements as stipulated under the Basic Law and the High Court Ordinance (Cap. 4);</p> <p>(d) JORC would then give detailed consideration to the suitability of the shortlisted candidates;</p> <p>(e) JORC would decide on the person to be recommended for appointment as the Chief Judge of the High Court; and</p> <p>(f) The Chief Justice would confirm with the recommended candidate that he/she is able and willing to serve and to comply with the eligibility requirements including the Chinese nationality requirement before a submission would be made to the Chief Executive.</p>

²⁴ *Official Record of Proceedings*, 24 May 1997.

²⁵ *Brief for the Legislative Council*, 30 November 2000.

Recommendation of JORC

9.14 Under section 3(3A) and 3(3) of the JORC Ordinance, a resolution is not effective if there are more than 2 votes not in favour; the quorum is seven members which included the Chief Justice. The recommendation of the JORC is then communicated to the Chief Executive.

9.15 In his communication to the Chief Executive on the recommendations of JORC on the seven CFA judicial appointments since 1 July 1997 (two Permanent Judges, two non-permanent judges and three judges of the CFA from other common law jurisdictions), the secretary of JORC set out the following information to the Chief Executive for consideration:²⁶

- (i) the background to the current exercise;
- (ii) the present composition and functioning of the CFA;
- (iii) the legal qualifications for the CFA judges;
- (iv) how the statutory disclosure under section 3(5B) and how the requirements of section 3(5C) of the JORC Ordinance were complied with;
- (v) the lists of names of eligible persons;
- (vi) the deliberations of JORC leading to its recommendations of the appointments including the names of and discussion concerning individual eligible persons involved in each appointment exercise;
- (vii) the intended effective dates of the appointments; and
- (viii) attendance list of each meeting and declaration of interest by JORC members.²⁷

²⁶ *Brief for the Legislative Council*, 17 June 2000.

²⁷ *Minutes of meeting*, AJLS Panel, 13 June 2000.

Appointment by the Chief Executive

9.16 According to the Director of Administration, the Chief Executive shall, pursuant to Article 90 of the Basic Law, appoint judges of the CFA and the Chief Judge of the High Court, on the recommendation of the Judicial Officers Recommendation Commission. The appointment(s) will not be legally effective until and unless LegCo has given its endorsement.²⁸

Endorsement by the Legislative Council

9.17 Under the Basic Law, the Chief Executive shall obtain the endorsement of the Legislative Council on the appointments of judges of the CFA and the Chief Judge of the High Court. Such endorsement is sought by way of a resolution of the Council.²⁹

9.18 By the end of March 2001, the Legislative Council has passed two motions to endorse the appointments of seven judges of the Court of Final Appeal and the Chief Judge of the High Court. In response to queries raised by members of the Legislative Council, the Administration had clarified and confirmed that the appointment of these judges would not be legally effective until and unless the Legislative Council's endorsement had been obtained.³⁰

Report to the Standing Committee of the NPC for Record

9.19 After the Chief Executive obtains the endorsement of the Legislative Council on the judicial appointments, he will report such appointment to the Standing Committee of the National People's Congress (NPCSC) for the record.³¹

²⁸ *Brief for the Legislative Council*, 17 June 2000.

²⁹ "The Basic Law does not specify any particular procedure by which the endorsement of the Legislative Council is to be achieved. Although a resolution of this Council would therefore suffice, it is considered appropriate for these first appointments to be endorsed in this Bill." *Official Record of Proceedings*, 1 July 1997.

³⁰ *Brief for the Legislative Council*, 17 June 2000 and 30 November 2000.

³¹ *Basic Law*, Article 90.

10. Appointment Criteria

10.1 Basic Law Article 92 states:

"Judges and other members of the judiciary of the Hong Kong Special Administrative Region shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions."

10.2 In the process of selection of candidate for the Chief Justice of the CFA in 1997, based on feedback from the senior members of the Bench and the professions, the JORC has amplified the qualities for judicial appointment to embrace the following:³²

- personal qualities of honesty, integrity, industry, independence and intellectual capacity;
- outstanding competence as a lawyer and the ability to project a sense of professional excellence;
- judicial qualities of mastery of facts and law, clear, concise and convincing expression and the ability to develop the law consistently with principle and practical needs;
- vision, drive and leadership qualities which will set a clear direction for the Judiciary; and
- the ability to work with people and to engender respect and trust from members of the Judiciary and the legal profession so that together with them he could lead the development of the Court of Final Appeal and the legal system to achieve the necessary local and international respect.

³² Hansard, 24 May 1997.

**PART 4 - TRANSITIONAL ARRANGEMENTS : JUDICIAL APPOINTMENTS
ON 1 JULY 1997**

11.1 Transitional arrangements were put in place before 1 July 1997. In April 1997 the Office of the Chief Executive announced the membership of the JORC for a two-year term, which would take effect on 1 July 1997.³³ Since the relevant Ordinances on the appointment of the Chief Justice would not come into effect until 1 July 1997, JORC (Designate) was tasked to complete preparatory work before 1 July 1997 in order to ensure the timely establishment of the HKSAR Judiciary. Its first task was to make recommendations to the Chief Executive in respect of the appointment of the Chief Justice of the Court of Final Appeal. On 20 May 1997, JORC (Designate) unanimously recommended that Mr. Andrew K N LI be appointed Chief Justice of the HKSAR's Court of Final Appeal. On 24 May 1997 the Secretary for Justice moved a motion "to seek support from the Provisional Legislative Council (PLC) for Mr LI to be appointed as Chief Justice of the CFA" and the PLC passed the motion on the same day.³⁴

11.2 On 12 June 1997, the JORC (Designate) announced its recommendations of Mr Justice LITTON, Mr Justice CHING and Mr Justice BOKHARY as permanent judges of the CFA and Mr Justice Patrick CHAN as Chief Judge of the High Court and the Chief Executive accepted the JORC (Designate)'s recommendations on the same day. On 14 June 1997 the Secretary for Justice moved a motion to seek support from the Provisional Legislative Council (PLC) for their appointments and the PLC passed the motion on the same day.³⁵

11.3 On 21 June 1997 the Provisional Legislative Council passed the Judicial Service Commission (Amendment) Bill 1997 which amended the law and added a transitional provision to ensure that the recommendations on the appointment of judges made by JORC before 1 July 1997 could not be challenged simply because the members, owing to time constraints,³⁶ have not taken their oaths pursuant to Section 7 of the Judicial Service Commission Ordinance, which imposed an oath taking requirement on members on their first appointment, prior to making the recommendations.³⁷

³³ The membership of the JORC did not include the Chief Justice of the CFA. One of the first tasks of the Judicial Officer Recommendation Commission was to recommend the appointment of the Chief Justice of the CFA. *Press Releases*, 11 April, 1997.

³⁴ *Press Releases*, 20 May 1997 and *Official Record of Proceedings*, 24 May 1997.

³⁵ *Press Releases*, 12 June 1997 and *Official Record of Proceedings*, 14 June 1997.

³⁶ Legally speaking, members of the JORC should have taken their oaths before making recommendations on the appointment of judges; and these two steps should precede oath taking by Judges at the inauguration ceremony of the SAR Government. However, due to time constraints, this arrangement was not possible on 1 July 1997.

³⁷ *Official Record of Proceedings*, 21 June 1997.

11.4 On 1 July 1997, after the President of the People's Republic of China had formally declared the establishment of the Hong Kong Special Administrative Region, the Chief Executive, Principal Officials, Members of the Executive Council and Provisional Legislative Council and the Judges of the Court of Final Appeal and the High Court were sworn in.³⁸

11.5 Immediately after this ceremony, the Provisional Legislative Council held its first session in the HKSAR, at which the appointment of the judges of the CFA and the Chief Judge of the High Court were endorsed by section 4 and Schedule 2 of the Hong Kong Reunification Ordinance.³⁹

³⁸ "The Handover and Related Ceremonies", *Hong Kong Annual Report 1997*.

³⁹ Section 4 and Schedule 2, *Hong Kong Reunification Ordinance*, 1 July 1997.

PART 5 - THE ROLE OF THE LEGISLATURE IN THE PROCESS OF APPOINTMENT OF JUDGES

12. Before 1997

12.1 Before 1 July 1997, the Legislative Council was **NOT** involved in the process of appointment of judges of the Supreme Court.

12.2 Members of the Legislative Council had raised questions about the system of judicial appointments, but not on any particular appointment.⁴⁰

12.3 According to the Judicial Service Commission Ordinance, "[A] person shall not be appointed to be a member of the Commission if he is a member of the Legislative Council" and no member of the Legislative Council had ever been appointed as a member of the JSC. This provision remained unchanged up to 1997.

13. After 1997

13.1 Basic Law Article 73(7) :

"The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions....To endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court."

13.2 In June 2000, the Legislative Council endorsed the appointments of two permanent judges, two non-permanent judges and three judges of the CFA from other common law jurisdictions. In December 2000, the Legislative Council endorsed the appointment of the Chief Judge of the High Court.

⁴⁰ *Official Record of Proceedings*, 14 July 1982, 13 May 1987, 27 April 1988, 14 November 1990, 6 July 1994. *Hansard*, 22 June 1988, 8 November 1989 and 11 November 1990.

13.3 At an AJLS Panel meeting on 28 November 2000, a Legislative Council member asked whether the practice of first seeking the endorsement of LegCo on a judicial appointment before the Chief Executive made the appointment would be followed in future appointments. The Director of Administration replied in the positive. He said that the arrangement with regard to the current appointment exercise was adopted in accordance with the requirements of the Basic Law, and having regard to the concerns expressed by members of the Panel concerning the appointment of seven judges of the Court of Final Appeal in May 2000 that the Chief Executive's appointment should not be made prior to obtaining the LegCo's endorsement.⁴¹ In other words, LegCo's power in endorsing judicial appointments was confirmed to be substantive.

13.4 According to the Director of Administration, because of the provisions of the Judicial Officers Recommendation Commission Ordinance,⁴² JORC has a limit in providing information to Legislative Council in seeking its endorsement of a judicial appointment. JORC can only provide information to the Legislative Council on the working of JORC relating to judicial appointments generally outside the context of particular judicial appointments. JORC cannot disclose any information without the Chief Executive's permission. Information such as the list of eligible persons and the deliberations of JORC leading to its recommendation of a judicial appointment is considered confidential because it involves the names of and discussions concerning individual eligible persons involved in the exercise.⁴³

13.5 The extension of the term of office of the Chief Judge of the High Court does not require the endorsement of the Legislative Council, nor does it require to be reported to the Standing Committee of the National People's Congress for the record.⁴⁴

13.6 The provision of JORC Ordinance of not appointing members of the Legislative Council as members of JORC has remained unchanged since 1997.

⁴¹ *Minutes of meeting*, AJLS Panel, 28 November 2000.

⁴² *Judicial Officers Recommendation Commission Ordinance*, s.11(1) states, "[A]ny member of the Commission or other person who, without the permission of the Chief Executive, publishes or discloses to any unauthorised person or otherwise than in the course of duty the contents or any part of the contents of any document, communication or information whatsoever which has come to his knowledge in the course of his duties under or in connexion with this Ordinance shall be guilty of an offence and shall be liable on conviction to a fine of \$2000 and to imprisonment for 1 year." *Cap.92 s.11(2)* states, "[I]f any person having any information which to his knowledge has been disclosed in contravention of this section publishes or discloses such information to any other person otherwise than for the purpose of any prosecution under this Ordinance, he shall be guilty of an offence and shall be liable on conviction to a fine of \$2000 and to imprisonment for 1 year".

⁴³ *Minutes of meeting*, AJLS Panel, 13 June 2000 and 28 November 2000 and *letter from the Judiciary Administrator to the Clerk to LegCo Panel on AJLS*, 10 June 2000.

⁴⁴ *Letter from the Director of Administration to the Clerk to LegCo Panel on AJLS*, 6 December 2000.

**PART 6 - COMMENTS ON THE PROCESS OF APPOINTMENT OF
JUDGES AFTER 1997**

14.1 The Law Society of Hong Kong has criticised the process of judicial appointments as lacking in transparency.⁴⁵ There were also criticisms from Legislative Council members that the information provided by the Administration relating to specific judicial appointments was not adequate e.g. how the list of potential candidates was drawn up and the criteria for and process of shortlisting the candidates leading to the final recommendation for appointment.⁴⁶

14.2 In 1990, the ad hoc group of the Legislative Council set up to study the Judicial Service Commission (Amendment) Bill 1990 recommended that the number of dissenting votes permissible for a resolution to be effective should be one. The reason was that a resolution might be carried even if there were two dissenting voices. In other words, a candidate can be appointed to the Bench even if members representing the Hong Kong Bar Association and the Law Society of Hong Kong both objected to the nomination.⁴⁷ The new Judicial Officers Recommendation Commission Ordinance kept the relevant legal provisions as they were passed in 1990 where a resolution could still be effective at a Commission meeting when there were two dissenting votes. This criticism was reiterated during the Council's debate on the resolution of the appointment of the CFA judges in 2000.⁴⁸

14.3 The presence of the Secretary for Justice (the Attorney General before 1997) as an ex-officio member of the JORC (JSC before 1997) has long been criticised.⁴⁹ At an AJLS Panel meeting in June 1997, members of the Panel shared the view expressed by the Hong Kong Bar Association's submission that the Attorney General being an ex-officio member on the Executive Council should not be a member of the JSC and the future JORC.⁵⁰

14.4 Members of the AJLS Panel also shared the view expressed by the Hong Kong Bar Association's submission that appointment of political figures as members of the Commission would undermine the public's perception of the Judiciary and the credibility of the JORC.⁵¹

⁴⁵ Letter from the Law Society of Hong Kong, 1 February 2001 and Hansard, 22 June 2000.

⁴⁶ Hansard, 22 June, 2000.

⁴⁷ Hansard, 11 July 1990.

⁴⁸ Hansard, 22 June, 2000.

⁴⁹ At an AJLS Panel meeting, Mr. Johannes Chan, representative of the Hong Kong Bar Association, told the committee that criticisms about the presence of the Attorney General in the JSC had been made in legal literature since 1970s, such as comments made in the Hong Kong Law Journal. *Minutes of meeting*, AJLS Panel, 16 June 1997.

⁵⁰ *Minutes of meeting*, AJLS Panel, 16 June 1997.

⁵¹ Ibid.

Appendix I

Appointment of Senior Judges from 1976-2000

Year	Chief Justice	Justices of Appeal			Judges of the High Court		
		Number of judges	Sources of appointed judges		Number of judges	Sources of appointed judges	
			From lower bench	From barrister /solicitor		From lower bench	From barrister / solicitor
1976	Sir Geoffrey Gould BRIGGS (appointed as CJ on 26.5.73)	2	2	--	8	7	--
1977	--	--	--	--	9	1	1
1978	--	--	--	--	10	1	--
1979	Sir Denys ROBERTS	3	1	--	13	3	1
1980	--	6	4	--	15	5	2
1981	--	9	3	--	16	3	1
1982	--	--	1	--	19	1	3
1983	--	--	--	--	20	1	--
1984	--	10	1	--	--	--	--
1985	--	9	--	--	22	2	2
1986	--	--	1	--	--	--	2
1987	--	10	2	--	--	2	1
1988	Sir Ti Liang YANG	9	1	--	20	--	--
1989	--	--	1	--	--	1	1
1990	--	--	--	--	19	1	1
1991	--	--	1	--	21	3	1
1992	--	--	--	1	23	1	2
1993	--	--	3	--	--	1	2
1994	--	10	1	--	25	2	2
1995	--	9	1	1	--	2	2
1996	--	--	--	--	24	2	1

Year	Judges of the Court of Final Appeal		Judges of the High Court					
	Chief Justice	Number of Permanent Judges	Justices of Appeal of the Court of Appeal			Judges of the Court of First Instance		
			Number of judges*	Sources of appointed judges		Number of judges	Sources of appointed judges	
				From lower bench	From barrister /solicitor		From lower bench	From barrister /solicitor
1997§	Andrew LI Kwok-nang	3	10	3	--	21	1	1
1998	--	--	--	--	--	25	1	3
1999	--	--	12	2	--	24	3	1
2000~	--	--	10	4	--	21	2	--

Remarks: ¶ Information up to 30 June 1997.
 § Started from 1 July 1997.
 * Included the Chief Judge of the High Court.
 ~ Information updated to 31 December 2000.
 -- No change.

Source: The Judiciary Administrator.
 Civil and Miscellaneous Lists, Hong Kong Government.

Appendix II

Activities of the Judicial Service Commission from 1976-1982

Year *	Number of meetings held	Number of posts filled on the advice of the Commission			Number of posts falling within purview
		All posts	Justices of Appeal	Judges of the High Court	
1982-83	11	29	1	2	125
1981-82	7	53	3	5	130
1980-81	7	40	1	4	115
1978-79 and 1979-80	10	56	4	9	89
1977-78	4	18	0	2	86
1976-77	4	16	2	1	83

Remark: * No report published after 1983.

Source: Hong Kong Judicial Service Commission, Chairman's Report.

Appendix III

**Legal Provisions Relevant to
the Appointment of Judges in Hong Kong from 1975 - 1997**

Date	Legal Provisions
23 October 1975*	Judicial Service Commission Bill 1975 - Judicial Service Commission established in 1976.
19 December 1984#	Sino-British Joint Declaration Annex I (III) "The Chief Executive appoints judges in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons.... Appointment or removal of principal judges (i.e. those of the highest rank) shall be made by the Chief Executive with the endorsement of the HKSAR legislature."
4 April 1990@	Basic Law Articles 48, 73, 88 and 90 Article 48(6): "The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions....To appoint or remove judges of the courts at all levels in accordance with legal procedures." Article 73(7): "The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions....To endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court." Article 88: "Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent Commission composed of local judges, persons from the legal profession and eminent persons from other sectors." Article 90: "In the case of the appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region, the Chief Executive shall...obtain the endorsement of the Legislative Council and report such appointment or removal to the Standing Committee of the National People's Congress for the record."
11 July 1990*	Judicial Service Commission Bill (Amendment) Bill 1990 - Increased the membership of the Commission from 6 to 9. Removal of the requirement for the decisions to be unanimous. Removal of the Chairman of the Public Service Commission.
3 August 1995+	Court of Final Appeal Ordinance - Sections added which specified members disclosed a willingness to accept an appointment or extension shall not take part in any deliberation of the Commission.
21 June 1997^	Judicial Service Commission (Amendment) Bill 1997 - Added a transitional provision to ensure that the recommendations on the appointment of judges made by JORC before 1 July 1997 could not be challenged.
1 July 1997^	Section 4 and Schedule 2, Hong Kong Reunification Ordinance Court of Final Appeal (Amendment) Ordinance 1997 Judicial Service Commission (Amendment) Ordinance 1997

* bill passed in the Legislative Council.

signing of the Sino-British Joint Declaration.

@ promulgation of the Basic Law.

+ consent by the Governor.

^ bill passed in the Provisional Legislative Council.

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Useful websites

12. Bilingual Laws Information System, Department of Justice, HKSARG
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