

Consultation Paper on Process of Appointment of Judges

1. Composition of JORC and the criteria for appointing members to JORC

Composition

Membership of Secretary for Justice

I think that the presence of the Secretary for Justice as a member of JORC undermines the independence of Judiciary and separation of powers. Therefore it is advisable to remove the Secretary of Justice as a member in order to show that JORC is independent from the executive branch of the government. In this regard, it should be noted that Article 88 of the Basic Law provides that the judges of the HKSAR shall be appointed by the CE on the recommendation of *an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors*.

Membership of persons from other sectors

There are now three members of JORC who are not connected in any way with the practice of law. No doubt the presence of them will improve the public's confidence of the Judiciary. However, it seems that the three non-legal members are all from the upper middle class. This will give the impression to the public that the law in Hong Kong is manipulated by the wealthy people. I think it is perfectly possible to appoint a prominent leader who represents the interests of the gross root class as a member of JORC.

Criteria for appointing members to JORC

In my view, the power to appoint members of JORC by the CE is fundamentally flawed as the CE is not directly elected and there is very little check and balance in the exercise of the CE's power in the appointment of the members of JORC. In order to improve the mechanism, I think greater transparency is necessary in the appointment process. I think that greater transparency will help to improve public's perception of the Judiciary and the credibility of JORC.

I do not think it is a problem in appointing political figures as members of JORC so far as the political figures are accountable to the people of Hong Kong. In UK, the Sovereign appoints judges on the advice of the Prime Minister. The system works because the Prime Minister is directly elected and there is proper check and balance in the exercise of the Prime Minister's power. For example, I do not see any problem at all in appointing a LegCo member who is directly elected as a member of JORC. In this regard, I consider that section 4(1) of the JORC Ordinance should be amended.

2. Accountability of JORC

I think JORC should be required to publish an annual report to enhance its transparency and accountability. The report should contain the appointments made or considered and the voting of the members.

3. Open recruitment of judicial vacancies

There is no doubt that the qualities of the judges are of paramount importance in our legal system. Article 92 of the Basic Law provides that judges and other members of the judiciary of the HKSAR shall be chosen on the basis of their judicial and professional qualities. It is noted open recruitment is limited to vacancies at and below District Court level only. I think there is no logic at all if open recruitment is adopted at the lower level but not at the higher level. In particular, I find it unconvincing that open recruitment may dissuade eligible candidates from applying as an unsuccessful application might cause embarrassment to them. Does it mean that there will not be embarrassment caused to the unsuccessful applicants in the lower level? Or, we simply do not care about the embarrassment (if any) caused to the eligible candidates at the lower level. Therefore, I propose that open recruitment should be adopted to judicial vacancies at all levels.

4. Mechanism for handling complaints against judges

In my view, the move to establish a formal system in handling complaints against judges must proceed with great prudence. The system to be established will give rise to the issue of independence of judiciary. Clearly, it is of extreme importance that a judge can decide a case without fear of reprisals. The important question to be considered is which body will be responsible for handling the complaints against judges.

I think there is no need to establish a formal mechanism for handling complaints against judges and I suggest that the status quo should remain. In my view, the present system is adequate provided that there are freedom of expression and freedom of press. Under the existing system, the judges at all levels are not immune from public opinion and they can be criticized by the media if they mis-behave.

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