

立法會
Legislative Council

LC Paper No. CB(2)3045/05-06
(These minutes have been seen
by the Administration)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 24 July 2006 at 4:30 pm
in Conference Room A of the Legislative Council Building

- Members present** : Hon Margaret NG (Chairman)
Hon LI Kwok-ying, MH, JP (Deputy Chairman)
Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP
- Member attending** : Hon Jasper TSANG Yok-sing, GBS, JP
- Members absent** : Hon Martin LEE Chu-ming, SC, JP
Hon Miriam LAU Kin-yeet, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon MA Lik, GBS, JP
- Public Officers attending** : Item III
Judiciary Administration

Ms Sally WONG
Deputy Judiciary Administrator (Development)

Miss Vega WONG
Assistant Judiciary Administrator (Development)

- Attendance by invitation** : Item III
The Hong Kong Bar Association
Mr Philip DYKES, SC
Mr PY LO
Hong Kong Human Rights Monitor
Mr LAW Yuk-kai
Director
- Clerk in attendance** : Mrs Percy MA
Chief Council Secretary (2)3
- Staff in attendance** : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2
Ms Amy YU
Senior Council Secretary (2)3
Mrs Fanny TSANG
Legislative Assistant (2)3
-

Action

- I. Confirmation of minutes of meeting**
(LC Paper No. CB(2)2737/05-06 – Minutes of the meeting on 22 May 2006)
- The minutes of the meeting held on 22 May 2006 were confirmed.
- II. Information papers issued since last meeting**
(LC Paper No. CB(2)2688/05-06(01) – Administration's response concerning review of the Ombudsman Ordinance)
2. Members noted that the above paper had been issued to the Panel.
- III. Political affiliation of judges**
(LC Paper No. CB(2)2517/05-06(05) – LegCo question on "Judges joining political organizations" raised by Hon MA Lik at the Council meeting on 24 May 2006 and the Judiciary's reply

Action

LC Paper No. CB(2)2443/05-06(01) – Guideline in relation to part-time Judges and participation in political activities issued by the Chief Justice on 16 June 2006

LC Paper No. CB(2)2517/05-06(06) – Paper provided by the Judiciary Administration on "Political affiliation of judges"

LC Paper No. CB(2)2281/05-06(01) – Submission from the Civic Party on "Judicial Independence and Freedom of Association – Criteria and balance"

LC Paper No. CB(2)2500/05-06(01) – Submission from Hon LI Kwok-ying on "Principles of the independence and impartiality of the Judiciary"

LC Paper No. CB(2)2530/05-06(01) – Letter from the Law Society of Hong Kong on "Part-Time Judges and Participation in Political Activities"

LC Paper No. CB(2)2530/05-06(02) – Submission from JUSTICE, The Hong Kong Section of the International Commission of Jurists on "Affiliations of Judges"

LC Paper No. CB(2)2578/05-06(03) – Submission from the Hong Kong Human Rights Monitor on "Whether part-time judges can be members of political parties"

LC Paper No. CB(2)2612/05-06(01) – Letter dated 27 June 2006 from Hon LI Kwok-ying

LC Paper No. CB(2)2794/05-06(01) – Letter dated 20 July 2006 from the Judiciary Administration

LC Paper No. CB(2)2794/05-06(02) – LegCo question on "Appointment of judges" raised by Hon MA Lik at the Council meeting on 12 July 2006 and the Administration's reply

LC Paper No. CB(2)2794/05-06(03) – An extract of the draft minutes of meeting on 26 June 2006 on "Political affiliation of judges")

3. The Chairman said that the item was discussed at the last Panel meeting on 26 June 2006 and this meeting was held for further discussion on the item. The Chairman further said that, as in the last meeting, she and Mr LI Kwok-ying would not preside over the discussion of this item. She invited the Panel to elect another member to be the Presiding Member for the discussion of this item. Ms Emily LAU was elected as the Presiding Member.

Discussion

4. Deputy Judiciary Administrator (Development) (DJA) said that the different requirements on full-time and part-time judges in respect of political affiliation, as set out in the relevant guidelines issued by the Judiciary, were appropriate, having regard to the differences between the two categories of judges. Unlike full-time judges, part-time judges were not on the Judiciary's establishment and sat for only limited periods, their full-time occupation being legal practitioners.

5. DJA further said that there were well-established legal principles laid down in case law, which applied to both full-time and part-time judges, as to when a judge should disqualify himself from sitting in a particular case. The circumstances included those giving rise to apparent bias. The test was whether the circumstances were such as would lead a reasonable, fair-minded and well-informed observer to conclude that there was a real possibility that the judge would be biased. DJA further advised that the "Guideline in relation to part-time Judges and participation in political activities" (the Guideline) was promulgated by the Chief Justice having regard to all the relevant considerations, including the rights and freedoms of judges, both full-time and part-time. The Judiciary's position was that the relevant guidelines issued by the Judiciary were consistent with the rights and freedoms of full-time and part-time judges. DJA added that the Guideline had the support of the Bar Association, the Law Society and JUSTICE.

6. Ms Emily LAU asked whether the Guideline for part-time judges was the same as that in the U.K. DJA responded that the Chief Justice had considered the practice in the U.K. However, the Guideline was not a replicate of that in the U.K. In preparing the Guideline, the Chief Justice had also taken into account other relevant considerations such as the situation in Hong Kong.

7. Mr Philip DYKES of the Bar Association said that the rule against bias, a rule of law, applied to both full-time and part-time judges. The rule applied to any person who sat in the decision making capacity, whether it be judicial or administrative. Mr DYKES further pointed out that people affiliated with political parties who provided public service by sitting on tribunals or boards of reviews were also caught by the same rule. However, he had not heard any call for imposing restrictions on the political affiliation of appointees to these bodies.

8. Mr Jasper TSANG requested DJA to explain why the Judiciary considered the Guideline for part-time judges appropriate. If the legal principle on disqualification could safeguard judicial impartiality, Mr TSANG questioned the need for requiring full-time judges to refrain from political membership. Referring to the comment made by some deputations that the freedom of association of part-time judges would be infringed if they were not allowed to be members of political parties, Mr TSANG said that he did not understand why the same consideration did not apply to full-time judges.

Action

9. In response, DJA reiterated that the Chief Justice had taken into account all relevant considerations in preparing the Guideline. To ensure public confidence in the Judiciary and the administration of justice, it was of fundamental importance that judicial independence and impartiality be maintained and seen to be maintained. The appropriate standard was whether a reasonable, fair-minded and well-informed member of the community would consider that participation of the judge in the political activities in question would likely undermine judicial independence or impartiality. This standard would be applied in the context of the prevailing circumstances of Hong Kong. Other relevant considerations taken into account by the Chief Justice included –

- (a) Judges, as citizens, enjoyed rights and freedoms, including the freedom of association. Certain restrictions on these freedoms were, however, necessary to ensure that judicial independence and impartiality were maintained and seen to be maintained. The extent of such restrictions should be guided by the principle of proportionality;
- (b) the legal principles laid down in case law on disqualification applied to both full-time and part-time judges;
- (c) judicial review cases were not listed before part-time judges; and
- (d) part-time judges sat for only limited periods and were in full-time practice in the legal profession.

DJA added that in the light of the above considerations, and in line with the proportionality principle, the different requirements on full-time and part-time judges in respect of political affiliation, as set out in the relevant guidelines issued by the Judiciary, were appropriate.

10. Mr Jasper TSANG said that although part-time judges sat for only limited periods and did not hear all kinds of cases, they had the same powers and duties when sitting as judges. Allowing part-time judges to join political parties would undermine the principle that justice must manifestly be seen to be done.

11. Mr Philip DYKES said that while full-time and part-time judges exercised the same judicial powers, there were significant differences between them. Full-time judges had committed themselves for the rest of their working lives to be judges and enjoyed security of tenure; whereas part-time judges were full-time lawyers who took up judicial work as public service. Serving as a part-time judge also provided an opportunity for a barrister or solicitor to ascertain whether he was temperamentally suited to be a full-time judge. Part-time judicial work should therefore be encouraged. Mr DYKES added that administrative rules were in place in the Judiciary to ensure that part-time judges did not sit on the kind of cases (i.e. public law cases) where charges of political bias might arise.

12. In response to Mr LI Kwok-ying, DJA further explained the arrangements concerning disqualification from sitting. She said that when a question of apparent bias arose in a particular case, the judge should resolve it by applying the apparent bias test, taking all material facts into account. If a party to the litigation objected to the judge hearing the case, the judge would consider the submissions from both parties and decide whether disqualification was required. If the judge decided to proceed to hear the case and the litigant was not satisfied with the judge's decision, he could appeal against it in accordance with the established appeal mechanism.

13. Mr LI Kwok-ying pointed out that it was the judge who would make the ultimate decision whether or not to sit in a particular case. He was of the view that requiring all judges, whether full-time or part-time, to refrain from political membership would afford greater protection to judicial impartiality.

14. Mr LI Kwok-ying further said that according to the opinion polls conducted by the Sun Daily, the Oriental Daily News and the Democratic Alliance for Betterment of Hong Kong and Progress of Hong Kong (DAB), some 80% - 90% of the respondents were of the view that allowing part-time judges to join political parties would undermine public confidence in judicial independence and impartiality. The Guideline therefore failed to satisfy the principle that judicial independence and impartiality should be seen to be maintained.

15. Referring to the second last paragraph of the submission from the Human Rights Monitor, Mr LI Kwok-ying sought Mr LAW Yuk-kai's views on whether it was necessary to allay the public concern that judicial independence and impartiality would be impaired if part-time judges were allowed to join political parties, as reflected in the findings of the opinion polls.

16. Mr LAW Yuk-kai responded that judges enjoyed the same rights and freedoms as other citizens, and any restrictions to such rights and freedoms should be guided by the principles of necessity and proportionality. The Guideline issued by the Judiciary in relation to part-time judges, which had taken due consideration of the normal practice in other common law jurisdictions as well as internationally recognised principles on human rights, was appropriate and reasonable, having regard to the fact that part-time judges were full-time legal practitioners and did not enjoy the security of tenure of full-time judges. Mr LAW further said that so far there had not been in-depth discussion in the community on the political affiliation of part-time judges. He believed that the public concern would be allayed if relevant considerations such as the differences between full-time and part-time judges, restrictions on active political participation of part-time judges beyond mere membership, and common law principles on disqualifying a judge from sitting, were brought home to the public after more in-depth discussion on the subject.

17. Mr LI Kwok-ying stressed that as far as public interest was concerned, judicial impartiality should prevail over freedom of association. Moreover, judicial independence was not an entitlement of judges, but a right belonging to the citizens.

Action

He hoped that the Judiciary would consider revising the Guideline for part-time judges so as to allay the concern of the public.

18. DJA reiterated that in preparing the Guideline, the Chief Justice had taken note of all relevant considerations.

19. Ms Emily LAU said that while members belonging to the DAB might have different views as to the content of the Guideline issued by the Chief Justice concerning political affiliation of part-time judges, the Guideline was a matter for the Judiciary to decide. She hoped that members would respect the Guideline promulgated by the Judiciary and the independence of the Judiciary.

20. In concluding the meeting, Ms Emily LAU said that members had fully expressed their views on the matter during two meetings of the Panel, and requested DJA to relay members' views and concerns to the Chief Justice for his consideration. DJA agreed.

Judiciary
Admin

IV. Any other business

21. There being no other business, the meeting ended at 5:22 pm.

Council Business Division 2
Legislative Council Secretariat
19 September 2006