

**Extract from draft minutes of meeting of
Panel on Administration of Justice and Legal Services on 26 June 2006**

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VII. Political affiliation of judges

(LC Paper No. CB(2)2517/05-06(05) – LegCo question raised by Hon MA Lik at the Council meeting on 24 May 2006 and the Judiciary's reply

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")

48. The Chairman said that as the Civic Party was involved in the matter of which she was a member, and the agenda item was proposed by the Deputy Chairman, Mr LI Kwok-ying, both of them had agreed not to preside over the discussion of this item. The Chairman invited the Panel to elect another member to be the Presiding Member for the discussion of this item. Ms Miriam LAU was elected as the Presiding Member for this item.

49. JA briefed members on its paper entitled "Political affiliation of judges". Members noted that there were two broad categories of judges in the Judiciary, namely full-time judges and part-time judges (i.e. Recorders of the High Court and External Deputy Judges at various levels of Court). Full-time judges were on the Judiciary's establishment, while part-time judges were not. Part-time judges sat for only limited periods and were either in full-time practice in the legal profession or retired Judges. The Guide to Judicial Conduct which provided that judges should refrain from membership in or association with political organisations or activities

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applied to full-time judges. As indicated in the “Guideline in relation to part-time Judges and participation in political activities” issued by the Chief Justice on 16 June 2006, the Judiciary did not consider it objectionable for a part-time judge simply to be a member of a political party, though different considerations would apply to more active participation by a part-time judge in political activities.

50. Mr LI Kwok-ying highlighted the following points made in his submission –

- (a) it was of fundamental importance that judicial independence and impartiality be maintained and seen to be maintained. Judicial independence was not an entitlement of judges, but a right belonging to the citizen;
- (b) given that the duty of both full-time and part-time judges was the same, i.e. to exercise civil and criminal jurisdictions as conferred by law, there was no reason for part-time judges not to be subject to the same code; and
- (c) in the Guideline issued by the Chief Justice on political affiliation of part-time judges, it was recognised that certain restrictions had to be imposed on freedom of association so as to ensure that judicial independence and impartiality were maintained. As far as public interest was concerned, judicial independence should prevail over freedom of association.

51. Ms Audrey EU presented the salient points of the submission from the Civic Party as follows-

- (a) internationally recognised principles of judicial independence and impartiality reaffirmed that judges enjoyed the same rights and freedom as ordinary people, including the freedom of association;
- (b) a proper balance should be struck between judicial independence and impartiality on the one hand and freedom of association on the other by drawing a distinction between political membership and other types of political activities, and between full-time judges and part-time judges;
- (c) there were many differences between full-time judges and part-time judges, which explained why they should be subject to different restrictions in respect of political affiliation. A full-time judge enjoyed security of tenure and was expected never again to return to private practice as a barrister or a solicitor, whereas a part-time judge would only sit as a judge for four weeks in any given year and his full-time occupation was practising in the legal profession. Moreover, unlike a full-time judge, a part-time judge could vote in the elections of the legal functional constituency of the Legislative Council and of the Election Committee constituted under the Chief Executive Election Ordinance;

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- (d) the public's right to a fair hearing was protected by the common law principles as to when a judge should disqualify himself from sitting in a particular case, which applied to both full-time and part-time judges; and
- (e) as the Judiciary was independent of both the executive and the legislature, and the Chief Justice had already issued a Guideline in relation to the political activities of part-time judges, neither the executive nor the legislature should further interfere in the matter.

52. Mr Philip DYKES of the Bar Association informed members that according to the feedback he had received from members of the Bar Association so far, the Guideline issued by Chief Justice in relation to part-time judges was considered reasonable and appropriate. He said that it would be disproportionate to place further restrictions on part-time judges, having regard to the fact that serving as a part-time judge was a form of public service which should be encouraged, and that it was a feature of our system that the Judiciary could rely on the barrister and the solicitor professions to provide competent, fair and impartial judges.

53. Mr DYKES further said that he did not see any actual conflict between political membership and judicial independence. He added that protection of the right to a fair hearing was afforded by the established legal principles regarding bias, as recently updated by the English Court of Appeal in Locabail Ltd. v. Bayfield Properties (2000), which provided for the disqualification of a judge from sitting where there was actual, presumed or apparent bias.

54. Mr Ruy BARRETTO of JUSTICE highlighted the following points in JUSTICE's submission –

- (a) the Guideline promulgated by the Judiciary in relation to part-time judges had struck the right balance between the principle of judicial impartiality on the one hand, and the principles of freedom of association and independence of the judiciary/separation of power on the other;
- (b) the principle of separation of power should be respected. There should be no further interference from the legislature on the guidelines on judicial conduct formulated by the Judiciary; and
- (c) a general ban on persons from taking up part-time judicial appointments on the basis of their political beliefs was unnecessary and discriminatory. Instead of a general ban on political membership across-the-board, the proper approach to ensuring judicial impartiality was to apply the legal test on bias in a given case, which provided that a judge should be disqualified from sitting if 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.

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55. Mr LAW Yuk-kai of the Hong Kong Human Rights Monitor agreed that as far as political affiliation was concerned, part-time judges should not be subject to the same restrictions as full-time judges, as part-time judges were full-time legal practitioners and did not enjoy the security of tenure of full-time judges. He further said that the Guideline issued by the Judiciary in relation to the political affiliation of part-time judges was reasonable and had taken due consideration of the normal practice in other common law jurisdictions.

(Post-meeting note: The submission from the Human Rights Monitor was issued to members vide LC paper No. CB(2) 2578/05-06(03) on 27 June 2006.)

56. Referring to Annex B to the Judiciary Administration's paper, Mr Jasper TSANG sought confirmation on his understanding that full-time judges in all the three overseas jurisdictions mentioned in Annex B had to sever all ties with political parties, and that this requirement did not infringe the right to freedom of association.

57. JA responded that paragraphs 76 and 77 of the Judiciary's Guide to Judicial Conduct, which was promulgated by the Chief Justice having regard to all the relevant considerations, had set out clearly the guidelines concerning political affiliation for full-time judges.

58. Mr Jasper TSANG said that the information provided by the Judiciary Administration on judicial participation in political activities in overseas jurisdictions (i.e. Annex B) did not show unequivocally that part-time judges in other jurisdictions were not subject to the same guidelines on political affiliation as their full-time counterparts. In the case of Canada and Australia, the relevant guidelines did not expressly address the position of part-time judges. As for England and Wales, he pointed out that paragraph 3.7 of the Guide to Judicial Conduct stated that "the guidance applies to fee-paid as well as full-time and part-time judges", which seemed to be at odds with the Judiciary Administration's claim, in paragraph 2 of Annex B, that fee-paid judges was the equivalent of part-time judges.

59. JA responded that the information as set out in Annex B was based on the Judiciary's understanding. She added that it was the Judiciary's understanding that part-time judges in UK included fee-paid as well as non-fee-paid judges.

60. Ms Margaret NG said that to her understanding, fee-paid judges in England and Wales included part-time judges such as Recorders and Deputy Judges. She further said that the guidance which was said to be applicable to "fee-paid as well as full-time and part-time judges" in paragraph 3.7 referred to the guidelines on disqualification of a judge from hearing a case, rather than the ban on political membership.

61. Mr Albert HO said that he concurred that there was no need to subject part-time judges to the same restrictions in respect of political activities as full-time judges, as there was a world of difference between them.

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62. Mr CHAN Kam-lam, however, said that despite their differences, full-time judges and part-time judges exercised the same judicial power. Part-time judges should therefore be subject to the same code of conduct applicable to full-time judges.

63. Ms Margaret NG said that the fact that full-time judges and part-time judges exercised the same judicial power meant that they should be subject to the same rules on disqualification from sitting, not the same restrictions on political activities. In many jurisdictions similar to Hong Kong, there were no rules preventing part-time judges from joining political parties. She further said that the Judiciary had already issued its own guidelines in relation to part-time judges and the Panel should not become a vehicle for interference with the independence of the Judiciary.

64. Mr LI Kwok-ying said that as the terms of reference of the Panel was, inter alia, to monitor policy matters relating to the administration of justice and legal services, he saw no reason why the issue could not be discussed by the Panel. He added that the issue should be further discussed at another meeting so as to allow more time for discussion.

65. Ms Margaret NG cautioned against the legislature overstepping the line and pressurising the Judiciary over its internal guidelines on the political affiliation of judges.

66. Mr CHAN Kam-lam said that there was no question of the legislature pressurising the Judiciary. He added that if there were problems with the system, members should raise their concerns.

67. Due to time constraint, Ms Miriam LAU suggested that the issue should be further discussed at another meeting to be scheduled.

(Post-meeting note: Mr LI Kwok-ying wrote to the Chairman on 27 June 2006 requesting that the issue be further discussed at another meeting (LC Paper No. CB(2) 2612/05-06(01)). As agreed by members, the item had been scheduled for discussion at the meeting on 24 July 2006.)

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