

立法會
Legislative Council

LC Paper No. CB(4)1000/18-19

Ref : CB4/HS/1/18

Paper for the House Committee meeting on 21 June 2019

Report of the Subcommittee on Proposed Senior Judicial Appointments

Purpose

This paper reports on the deliberations of the Subcommittee on Proposed Senior Judicial Appointments ("the Subcommittee").

Background

Constitutional and statutory provisions on senior judicial appointments

2. Article 48(6) of the Basic Law ("BL") confers on the Chief Executive ("CE") the power and function to appoint judges of the courts at all levels in accordance with legal procedures. In accordance with BL 88, judges shall be appointed by CE on the recommendation of an independent commission, namely, the Judicial Officers Recommendation Commission ("JORC"). JORC is established under section 3 of the Judicial Officers Recommendation Commission Ordinance (Cap. 92) ("the JORC Ordinance").

3. In the case of the appointment of judges of the Court of Final Appeal ("CFA") and the Chief Judge of the High Court ("CJHC"), BL 90 provides that CE shall, in addition to following the procedures prescribed in BL 88, obtain the endorsement of the Legislative Council ("LegCo"). Subject to the endorsement of LegCo, CE shall report such appointment to the Standing Committee of the National People's Congress for the record. BL 73(7) correspondingly confers on LegCo the power and function to endorse the appointment of CFA judges and CJHC.

4. Pursuant to BL 88 and the JORC Ordinance, JORC is entrusted with the function of advising or making recommendations to CE regarding the filling of vacancies in judicial offices. Under BL 88, JORC as the independent commission shall be composed of local judges, persons from the legal profession and eminent persons from other sectors. As prescribed in the

JORC Ordinance, JORC consists of the Chief Justice of CFA ("CJ") as the Chairman, the Secretary for Justice ("SJ") and seven other members appointed by CE comprising two judges, one barrister, one solicitor and three other persons who are not connected with the practice of law. CE is required by the JORC Ordinance to consult the Bar Council of the Hong Kong Bar Association and the Council of the Law Society of Hong Kong regarding the appointment of the barrister and the solicitor respectively.

The current appointment exercise

5. The Director of Administration wrote to the Chairman of the House Committee on 22 May 2019 advising that CE had accepted the recommendations of JORC to appoint:

- (a) the Right Honourable Lord Jonathan SUMPTION as a non-permanent judge from another common law jurisdiction ("CLNPJ") of CFA; and
- (b) the Honourable Mr Justice Jeremy POON Shiu-chor as CJHC.

Appointment of CLNPJs

6. CFA is the final appellate court in Hong Kong hearing both civil and criminal appeals. It consists of CJ and the permanent judges ("PJs"). Non-permanent judges ("NPJs") may be invited to sit. There are two lists of NPJs, namely, the list of non-permanent Hong Kong judges ("HKNPJs"), and the list of CLNPJs. Under section 10 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) ("the HKCFA Ordinance"), the maximum number of non-permanent judges is 30. At present, there are 18 NPJs comprising four HKNPJs and 14 CLNPJs.

7. When hearing and determining appeals, CFA is constituted by five judges, namely, CJ (where he is not available to sit, he designates a PJ to preside), three PJs (where a PJ is not available, CJ nominates a HKNPJ to sit in his place), and one HKNPJ or one CLNPJ. A CLNPJ is normally required to come to Hong Kong for a period of four weeks at a time to sit on CFA.

8. Section 12(4) of the HKCFA Ordinance provides that a person shall be eligible to be appointed as a CLNPJ if he is -

- (a) a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in another common law jurisdiction;

- (b) a person who is ordinarily resident outside Hong Kong; and
- (c) a person who has never been a judge of the High Court, a District Judge or a permanent magistrate, in Hong Kong.

9. JORC notes that the availability of the 14 incumbent CLNPs to come to Hong Kong for four weeks to sit on CFA is somewhat limited as all of them have extensive professional commitments including judicial duties, arbitration, mediation and/or lecturing work, as well as personal and family commitments. In addition, most of the judges have particular expertise in certain areas. When a judge who has an expertise in a particular area of law is not available to sit on CFA, the listing of the case may have to be delayed.

10. JORC notes that it is important that substantive appeals are heard within a reasonable time. To give greater flexibility for dealing with the CFA caseload and to ensure its effective operation, JORC agrees that the number of CLNPs should be increased. Against this background, JORC recommends that Lord SUMPTION should be appointed as a CLNP of CFA for a term of three years.¹ Lord SUMPTION had been a Justice of the Supreme Court of the United Kingdom ("UK") since January 2012 until he retired from the office in December 2018. JORC considers that Lord SUMPTION is a judge of eminent standing and reputation and that his appointment will be a great asset to CFA. If appointed, the total number of CLNPs will increase to 15.

Appointment of CJHC

11. CJHC is the Court Leader of the High Court comprising the Court of Appeal ("CA") and the Court of First Instance. Under section 5(3) of the High Court Ordinance (Cap. 4), CJHC is also the President of CA. CJHC will preside in CA in the most important appeals. As the Court Leader of the High Court, CJHC has to lead the High Court administratively.

12. The professional qualifications for CJHC are the same as those for a judge of the High Court, which are stipulated in section 9 of the High Court Ordinance. In addition, BL 90 requires that CJHC shall be a Chinese citizen who is a permanent resident of the Hong Kong Special Administrative Region with no right of abode in any foreign country.

13. The office of CJHC became vacant on 25 October 2018 when the Honourable Mr Justice Andrew CHEUNG Kui-nung, who had been the

¹ Under section 14(4) of the HKCFA Ordinance, an NPJ shall hold office for a term of three years but that term may be extended for one or more periods of three years by CE acting in accordance with the recommendation of CJ.

CJHC immediately prior to that date, assumed office as PJ of CFA and vacated the office of CJHC on the same date. The Honourable Mr Justice Wally YEUNG Chun-kuen, Vice President and Justice of Appeal of CA of the High Court, has been acting as CJHC from 25 October 2018 until the CJHC vacancy is substantively filled.

14. In recommending the appointment of Mr Justice POON as CJHC, JORC considers him the most suitable candidate having regard to his:

- (a) high integrity as a judge and ability to command respect within the Judiciary and from the legal professions;
- (b) high competence as a judge, exemplary judicial temperament and experience in both civil and criminal appeals, having written many important judgments on major and high-profile cases which have commanded respect from the legal professions;
- (c) rich administrative experience and being highly commended by other High Court judges; and
- (d) comprehensive and good understanding of the Judiciary.

The Subcommittee

15. In accordance with the LegCo procedure endorsed by the House Committee in May 2003 for endorsement of judicial appointments under BL 73(7), the House Committee formed a subcommittee at its meeting held on 24 May 2019 to consider the proposed senior judicial appointments.

16. Under the chairmanship of Dr Hon Priscilla LEUNG Mei-fun, the Subcommittee held one meeting on 11 June 2019 with the Administration and the Judiciary Administrator ("JA") (also in her capacity as Secretary to JORC) to discuss the proposed senior judicial appointments and related issues. The membership list of the Subcommittee is in **Appendix**.

Deliberations of the Subcommittee

Political neutrality of judges

17. While supporting the proposed senior judicial appointments, Mr Steven HO and the Chairman are concerned about the political neutrality of some incumbent judges who were recently alleged to have expressed views against the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters

Legislation (Amendment) Bill 2019 ("the Bill"). To ensure judicial independence and fairness, they urge the Judiciary to look into this matter, and devise a proper mechanism to handle such incidents, including imposing sanctions to avoid or deter recurrence and identifying those judges involved so as to disqualify or recuse them from sitting in courts to rule on cases related to the Bill in future.

18. JA advises that CJ made a statement on 29 May 2019 that having regard to the independence and impartiality of the Judiciary, judges should refrain from expressing comments on political and other controversial issues, and particularly on legal issues which might come before the courts. CJ has since reminded all the judges of the importance of this. JA adds that, as stipulated in the Guide to Judicial Conduct, there are established common law principles and practices for dealing with actual, presumed or apparent bias in judicial proceedings. For example, a particular judge may recuse himself from sitting where the circumstances give rise to apparent bias contrary to the fundamental principle requiring the court to be, and to be seen to be, impartial.

Expanding the pool of CLNPJs

19. Noting that CLNPJ recommendations made by JORC in the past only included judges from four common law jurisdictions, namely UK, Australia, New Zealand and Canada ("the four jurisdictions"), the Chairman and Dr Junius HO consider that suitable candidates from Singapore could also be considered by JORC for appointment as CLNPJs of CFA in Hong Kong, given that Singapore is a common law jurisdiction with a sound legal system and that the two cities have a lot of similarities in that both places are predominantly Chinese societies where eastern cultures meet western ones. They urge the Judiciary to make an effort to consider appointing CLNPJs from Singapore. Dr HO takes the view that in addition to Singapore and the four jurisdictions, suitable candidates from other common law jurisdictions could also be considered for appointment as CLNPJs of CFA.

20. JA stresses that JORC has made recommendations on judicial appointments strictly based on candidates' judicial and professional qualities in accordance with BL 92. Candidates who are considered suitable for appointment as CLNPJ by CJ will be put forward to JORC for consideration. JORC's deliberations are confidential and not open to the public.² As a matter of fact, since 1997, CLNPJs have been appointed from UK, Australia

² Under section 9 of the JORC Ordinance, any report, statement or other communication made by JORC to CE or to CJ is privileged from compulsory production in legal proceedings. By virtue of section 11, any unauthorized publication or disclosure of information relating to JORC constitutes an offence punishable by a level 1 fine and one year's imprisonment.

and New Zealand where the legal systems have the closest affinity to that in Hong Kong. In 2018, a retired judge was appointed from Canada where the legal system is similar to Hong Kong in many aspects. The Judiciary will continue to look for suitable judges and retired judges from other common law jurisdictions for CLNPJ appointment as appropriate. She also informs the Subcommittee that while vacancies of judges at the lower level of courts are normally appointed through an open recruitment process, such procedure is not suitable for the senior judicial appointments of the appellate courts given that the reputations of experienced judges are widely known in the legal profession.

21. Pointing out that it has been two decades after Hong Kong's reunification with the Mainland and that BL does not specify any common law jurisdictions from which CLNPJs should be appointed, Dr Junius HO remains of the view that the convention of appointing CLNPJs only from the four jurisdictions is rather unsatisfactory. Since JORC has not considered candidates from Singapore or other common law jurisdictions in appointing CLNPJs, as a matter of principle, Dr HO cannot agree with the appointment of Lord SUMPTION as a CLNPJ of CFA although he has no question on Lord SUMPTION's suitability for the appointment.

22. Mr Alvin YEUNG and Mr Dennis KWOK consider it appropriate for JORC to recommend the appointment of candidates from the four jurisdictions as CLNPJs in the past because the case law of the four jurisdictions is frequently cited in the courts of Hong Kong. They also render full support to the two proposed senior judicial appointments and inform the Subcommittee that the legal profession holds a very positive view on the two proposed appointees who are judges with eminent reputation and profound judicial experience. Mr YEUNG suggests that issues relating to appointment of CLNPJs from other common law jurisdictions in addition to the four jurisdictions could be followed up by the Panel on Administration of Justice and Legal Services in future.

23. JA reiterates that as the Secretary to JORC, she attends the meeting primarily to answer questions relating to the specific recommended appointments.

Membership of JORC

24. Given the wide public concerns about the background and impartiality of judges, the Chairman suggests that LegCo Members or former ones representing different political groups could be appointed as members of JORC so that JORC could have more diverse views in considering senior judicial appointments. She also suggests that the Judiciary should conduct a due diligence process on the recommended appointees and provide more

information, including major publications and judgments written by them, in future judicial appointments to facilitate LegCo's consideration.

25. JA explains that JORC is an independent commission consisting of CJ as the Chairman, SJ and seven other members appointed by CE of whom three should be persons who are not connected with the practice of law. The Administration adds that according to section 4(1)(a) of the JORC Ordinance, a person shall not be appointed to be a member of JORC if he is a LegCo Member because any such appointment would conflict with his role in the endorsement of senior judicial appointments under BL 73(7). In considering whether any individual is suitable for appointment to JORC, it is also important not to politicize any matters relating to judicial appointments.

The proposed senior judicial appointments

26. As members have divergent views on the proposed appointment of Lord SUMPTION as a CLNPJ of CFA, at the request of a member, the Chairman puts the motions of endorsing the two proposed senior judicial appointments to vote separately. Regarding the proposed appointment of Lord SUMPTION as a CLNPJ of CFA, five members (Ms Starry LEE, Mr Dennis Kwok, Dr Fernando CHEUNG, Mr Alvin YEUNG, and Mr Holden CHOW) vote for the motion and one member (Dr Junius HO) votes against. The motion is carried. Regarding the proposed appointment of Mr Justice POON as CHJC, all members (Ms Starry LEE, Mr Dennis Kwok, Dr Fernando CHEUNG, Mr Alvin YEUNG, Dr Junius HO and Mr Holden CHOW) vote for the motion and the motion is carried. The Chairman declares that the Subcommittee supports the two proposed senior judicial appointments.

27. The Chairman concludes that the Subcommittee has completed deliberation on the proposed senior judicial appointments and will report its deliberations to the House Committee at its meeting on 21 June 2019. Members also note that the Administration intends to move two resolutions to seek the Council's endorsement of the proposed appointments in accordance with BL 73(7) at the Council meeting of 10 July 2019.

Advice sought

28. Members are invited to note the deliberations of the Subcommittee.

Subcommittee on Proposed Senior Judicial Appointments

Membership list

Chairman Dr Hon Priscilla LEUNG Mei-fun, SBS, JP

Members Hon Starry LEE Wai-king, SBS, JP
Hon Paul TSE Wai-chun, JP
Hon Steven HO Chun-yin, BBS
Hon Frankie YICK Chi-ming, SBS, JP
Hon Alice MAK Mei-kuen, BBS, JP
Hon Dennis KWOK Wing-hang
Dr Hon Fernando CHEUNG Chiu-hung
Hon Alvin YEUNG
Hon Jimmy NG Wing-ka, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon YUNG Hoi-yan
Hon CHAN Chun-ying, JP
Hon CHEUNG Kwok-kwan, JP
Hon HUI Chi-fung

(Total : 16 members)

Clerk Ms Shirley CHAN

Legal adviser Mr Bonny LOO