

立法會
Legislative Council

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by the Administration and
cleared with the Chairman)

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Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of special meeting
held on Saturday, 3 June 2000 at 11:00 am
in the Chamber of the Legislative Council Building

Members Present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon Mr Ambrose LAU Hon-chuen, JP
Hon Emily LAU Wai-hing, JP

Member Attending : Hon Ronald ARCULLI, JP

Members Absent : Hon James TO Kun-sun
Hon Mrs Miriam LAU Kin-ye, JP

Public Officers Attending : Ms Miranda CHIU
Deputy Director of Administration

Mr Jonathan DAW
Legal Adviser/Legislative Affairs,
Department of Justice

Mr Peter WONG
Senior Assistant Solicitor General
Department of Justice

Mr James CHAN
Assistant Director of Administration

Attendance by : Hong Kong Bar Association
Invitation

Mr Philip DYKES, SC

City University of Hong Kong

Mr Rajesh SHARMA
School of Law

Clerk in : Mrs Percy MA
Attendance Chief Assistant Secretary (2)3

Staff in : Mr Jimmy MA, JP
Attendance Legal Adviser

Miss Mary SO
Senior Assistant Secretary (2)8

Action
Column

I. Legal and administrative matters relating to the appointment of judges of the Court of Final Appeal

(LC Paper No. CB(2) 2176/99-00 (01) - paper provided by the Administration
LC Paper No. CB(2) 2176/99-00 (02) - an extract of Chapter 10 of American Government (1977 Edition) concerning appointment of judges in the United States

LC Paper No. CB(2) 2176/99-00 (03) - an extract of the Lord Chancellor's Department 1998-1999 Annual Report on Judicial Appointments presented to Parliament in October 1999)

The Chairman welcomed representatives of the Hong Kong Bar Association, the School of Law of the City University of Hong Kong and the Administration to the meeting.

2. The Chairman said that the Chief Secretary for Administration (CS) gave notice on 10 May 2000 to move a motion at the Council meeting on 31 May 2000 to seek the Council's endorsement of the appointment of seven judges of the Court of Final

Appeal (CFA). In order to assist Members to consider the motion, the Panel agreed at its meeting on 16 May 2000 that the Administration should be invited to brief the Panel on legal and administrative matters relating to the appointment of CFA judges at a special Panel meeting to be held on 3 June 2000. Members further agreed that representatives of the two legal professional bodies and academia should also be invited to give views on the power conferred on the Legislative Council (LegCo) to endorse the appointment of judges of the CFA and the Chief Judge of the High Court under Article 73(7) of the Basic Law. The Chairman thanked the Administration for acceding to members' request to withdraw the notice to allow more time for Members to consider the motion.

3. At the invitation of the Chairman, Deputy Director of Administration (DD of Adm) introduced the Administration's paper which set out the comments of the Administration on a number of issues in connection with the appointment of judges of the CFA.

Role of the Secretary for Justice in appointment of judges of the CFA

4. Referring to the attendance of representatives of the Department of Justice (D of J) at the meeting, the Chairman enquired about the role of the Secretary for Justice (SJ) in the appointment of judges of the CFA. Legal Adviser/Legislative Affairs (LA/LA) replied that SJ was an ex-officio member of JORC as prescribed by the Judicial Officers Recommendation Commission (JORC) Ordinance (Cap. 92). As to her specific role on JORC, LA/LA said that obviously SJ brought to JORC her experience that went with her position in advising or making recommendations to the Chief Executive (CE) regarding the filling of vacancies in judicial offices. LA/LA however pointed out that SJ's membership on JORC was of a personal nature. To his knowledge, SJ had never consulted the D of J on matters pertaining to JORC.

5. The Chairman considered SJ's membership on JORC peculiar, having regard to the fact that SJ was responsible for all criminal prosecutions in Hong Kong and for defending the Government in all civil suits. She further said that a review of SJ's membership on JORC would be called for if the role of SJ on the JORC should deviate from that of a personal nature.

6. Ms Emily LAU expressed surprise at the presence of the representatives of the D of J at the meeting, and wondered whether the D of J also played the role of the Lord Chancellor's Department in the United Kingdom (UK) which was responsible for assisting the Lord Chancellor in the administration of the judicial appointments system.

7. Legal Adviser said that this was not the case. He explained that judges of the courts of Hong Kong were appointed by CE on the recommendation of JORC,

whereas certain judges of the courts of UK were appointed by the Lord Chancellor with the most senior ones appointed by the Queen on the recommendation of the Prime Minister. Legal Adviser further said that the existing procedure for the appointment of judges in Hong Kong hailed from the pre-reunification days when the appointment of judges was decided by the Governor on the recommendation of the Judicial Service Commission (JSC), the predecessor of JORC. He added that by virtue of item 10(a) of the Schedule to the Hong Kong Court of Final Appeal Ordinance (Cap. 484), JSC was re-titled JORC on 1 July 1997. Apart from changing the name of the Commission and enlarging the scope of judicial offices under its purview to include the Chief Justice and Judges of the CFA and the Chief Judge of the High Court, the function and composition of JORC were identical to that of JSC.

8. The Chairman said that as the Panel's invitation to the special meeting was addressed to CS, it was therefore up to CS to decide who to represent her at the meeting. Given that the subject matter involved legal issues, she took the view that CS considered it better to have the representatives of the D of J acting as the Administration's legal adviser at the meeting so as to assist Members to understand more fully LegCo's powers, function and constitutional duty under Article 73(7) of the Basic Law. LA/LA said that this was precisely the position of the Administration.

9. Mr Martin LEE queried why was the D of J indicated as one of the parties which had prepared the Administration's paper. LA/LA responded that this was because the Panel had specifically asked to be briefed by the Administration on legal and administrative matters relating to the appointment of judges of the CFA.

Power of LegCo under Article 73(7) of the Basic Law

10. Referring to paragraph 14 of the Administration's paper which stated that "the Administration therefore considers that the Council should endorse a judicial appointment if there has indeed been a recommendation of JORC for the appointment and that CE has accepted the recommendation. The Council's endorsement should only be withheld where it is satisfied that the requirements set out in the Basic Law regarding judicial appointments have not been followed", the Chairman said that the paragraph appeared to suggest that LegCo should only withhold the endorsement of the appointment of judges of the CFA and the Chief Judge of the High Court unless there was procedural impropriety. In view of the significance of paragraph 14 on the power of LegCo under Article 73(7) of the Basic Law, the Chairman invited the Administration to explain the meaning of the paragraph, and the deputations to give their views on the extent of LegCo's power in endorsement of the appointment and removal of judges of the CFA and the Chief Judge of the High Court.

Views of the Administration

11. LA/LA said that paragraph 14 should be read in tandem with paragraph 13. Paragraph 14 was premised on the fact that JORC was entrusted with the function to advise or make recommendations to CE regarding the filling of judicial offices under the JORC Ordinance. If CE had accepted the recommendations from JORC, it followed that LegCo should endorse the appointment of judges unless there was a procedural flaw. LA/LA added that paragraph 14 was merely a recommendation of the Administration to LegCo and was by no means intended to be the last word.

12. LA/LA stressed that the presence of the representatives of D of J at the meeting was to assist Members in considering the motion on the appointment of CFA judges and under no circumstances would they attempt to dictate to Members the full legal extent of LegCo's power under Article 73(7) of the Basic Law, nor would they attempt to inhibit or impinge in any way on the independence of the judiciary.

Views of the deputations

13. Mr Philip DYKES of the Hong Kong Bar Association said that the crux of the matter was whether the Administration's view as presented in paragraph 14 was a formed legal view or merely a statement of the policy or a convention that LegCo should follow. This was particularly important given that LegCo's endorsement was required in both appointment and removal of judges of the CFA and the Chief Judge of the High Court. If it was accepted that LegCo should endorse the appointment of the judges of the CFA and the Chief Judge of the High Court where the requisite procedures had been followed, the same should apply to removal of the judges. Such uniformed approach might not be desirable, as removal arose from a slightly different context than appointment. Mr DYKES further said that so far as ensuring that all requisite procedures had been complied with, the responsibility should rest with LegCo. In his view, it was not a matter for courts as it was unlikely that a court would intervene in the appointment or removal procedures of judges when the power of appointing and removing of judges had been so clearly distributed between the executive authorities and the legislature.

14. Mr DYKES further said that on balance, he regarded LegCo's power to endorse the appointment and removal of judges under Article 73(7) of the Basic Law as a substantive power. Hence, in considering whether a judicial appointment was worthy of endorsement, LegCo should have the power to call upon the appointees to ascertain their suitability for the jobs or to call upon members of JORC to explain how they had arrived at its recommendations. He pointed out that it was unclear as to what extent the set up of JORC would prohibit it from disclosing information pertaining to the appointment exercise, including policy considerations. In respect of the latter point, Mr DYKES said that the Lord Chancellor in the UK was in a position to set down policies such as whether there should be more women and ethnic minority judges and younger judges, etc. Members might wish to pursue this with JORC, given that policy

consideration was certainly one aspect in judicial recruitment. He hoped that the Chief Justice (CJ), being the Chairman of JORC, would have some say in this regard as he was in the best position to know whether there was enough or too many women judges, or whether the judiciary was too old or too young.

15. Mr Rajesh SHARMA of the City University of Hong Kong said that although JORC had stringent procedures governing its decision-making process, i.e. a resolution would not be effective if there were two votes not in favour, he nevertheless could not agree with the Administration's recommendation that the Council should endorse the appointment of judges of the CFA and the Chief Judge of the High Court if the requirements set out in the Basic Law regarding judicial appointments had been followed. In his view, there was no doubt that the power conferred on LegCo under Article 73(7) of the Basic Law was a substantive power. To this end, LegCo should have the power to request for more details about the appointments, say, how the list of judges was arrived at, before deciding on whether the appointments should be endorsed. Mr SHARMA further said that endorsement of judicial appointments which were in effect an internal promotion exercise should be straightforward. It was only in the case where an appointee was a practising barrister or solicitor joining the bench for the first time that close scrutiny of the Council was required.

Discussion

16. Mr Ronald ARCULLI said that there was no question in his mind that the power conferred on LegCo to endorse the appointment and removal of judges under Article 73(7) of the Basic Law was a substantive power. Otherwise, there would be no need for Article 90 in the Basic Law which stipulated that CE had to obtain the endorsement of LegCo on the appointment and removal of the judges of the CFA and the Chief Judge of the High Court. Mr ARCULLI pointed out that if it was an obvious case that a person did not deserve to be a judge, say, an appointee had a doubtful integrity despite being a brilliant lawyer, he was confident that the Council in its wisdom and good judgment would make the right decision of refusing to endorse the appointment of such a person regardless of whether proper procedures had been followed. Likewise, the Council would not endorse the removal of a judge, say, on political ground simply because proper procedures had or had not been followed. As to whether the Council should adopt the American-type of inquiry into the suitability of an appointee, this would be a matter for the Council to decide. He however pointed out that such a system had received much criticisms for deterring the best minds from joining the bench.

17. On the comments made by Mr Philip DYKES in paragraph 13 above concerning the removal of judges of the CFA and the Chief Judge of the High Court, Mr ARCULLI said that while the appointment and removal of these judges required the endorsement of LegCo, the procedures governing the appointment and removal of

these judges were different. In respect of the former, CE was required to appoint judges on the recommendation of JORC under Article 88 of the Basic Law. As regards the latter, CE could only remove judges on the recommendation of a tribunal consisting of not fewer than five local judges in accordance with Article 89 of the Basic Law.

18. Mr Martin LEE expressed dissatisfaction that the Administration had once again attempted to take away the power conferred on LegCo by the Basic Law. In his view, if the power conferred on LegCo under Article 73(7) of the Basic Law was a restrictive one as the Administration had interpreted, the Article would not be drafted in a general term without any qualifier. If the power of LegCo was not a substantive power, LegCo would be failing its constitutional duty to act as the final safeguard of upholding the independence of the judiciary.

19. Mr LEE further said that he could not agree with the comments made by Mr Philip DYKES in paragraph 13 above that the courts would not get involved in judicial appointments under challenge. He pointed out that if a particular judicial appointment had not complied with the proper procedures, the only way to settle the matter might well be judicial review, instead of putting the matter before LegCo. Mr LEE pointed out that there was a precedent for judicial appointments under challenge to be heard in courts in Hong Kong. He cited a case concerning the appointment of a magistrate which had gone all the way to the Privy Council. In the end, the Letters Patent had to be amended. The Chairman concurred with Mr LEE and added that if there was a procedural flaw in the appointment of judges thereby rendering it unconstitutional, the Council's endorsement would not matter one bit as to its lawfulness.

20. Mr Philip DYKES clarified that what he meant was that the courts might refrain from intervening in an judicial appointment which had already been put before LegCo for endorsement. However, the court would intercede in the event that an appointee was subsequently found to be ineligible for the appointment. There was also no question that the court could get involved in the judicial appointment if there was an obvious defect in the decision-making process of JORC, such as, the absence of a quorum at the meeting when a decision was taken.

21. Ms Emily LAU echoed the view that the power conferred on LegCo under Article 73(7) of the Basic Law was a substantive power. In order to enable Members to exercise the power under Article 73(7) in respect of the appointment of the seven CFA judges, Ms LAU considered it imperative to know the process for JORC to come up with its recommendations, in particular, whether the applications were by invitation or nomination, the criteria for selecting the candidates, the process of shortlisting, if any, etc. Ms LAU further expressed concern that although JORC was an independent body established by statute, its members were nevertheless all appointed by CE and its workings were never made known to the public. Mr Martin LEE shared Ms LAU's

concern. He said that as the JORC Ordinance, previously known as JSC Ordinance, was enacted long time ago, many of its provisions no longer suited the present day requirements. He was of the view that the JORC Ordinance should be revamped so as to improve the transparency of JORC. The Chairman concurred with Mr LEE and added that the matter should be followed up by the Panel in the next legislative session.

22. In reply to the Chairman's enquiry about the workings of JORC relating to the appointment of the seven CFA judges, DD of Adm said that the Administration had no information in this regard. To guarantee the independence of the Judiciary, JORC operated independently in accordance with the JORC Ordinance and the Administration was not in any way involved in the exercise. Responding to members' concern about the judicial appointments system under JORC, DD of Adm said that in considering whether a person should be recommended for appointment by CE, a resolution of JORC would not be effective if there were more than two votes not in favour. In relation to the appointment of judges, JORC would base the criteria of selection of eligible persons on Article 92 of the Basic Law which required judges to be chosen on the basis of their judicial and professional qualities. DD of Adm further said that although members of JORC were appointed by CE, two of its members, i.e. a barrister and a solicitor were appointed in consultation with the two legal professional bodies.

23. Legal Adviser said that JORC might have difficulty in disclosing information pertaining to the appointment of judges, as section 11 of the JORC Ordinance prohibited with a criminal sanction the disclosure of information without the permission of CE by any member of JORC or other person who had knowledge about the information in the course of duties under the Ordinance. Legal Adviser further said that although the JORC Ordinance was silent on the procedures regarding application, it nevertheless contained a provision, i.e. section 13, which allowed CE in Council to make regulation to prescribe forms and fees in connexion with applications to the Commission, reports or communications from the Commission or any other matter required by or under the Ordinance.

24. Mr Ronald ARCULLI said that during his tenure as a member of JSC, 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.

25. Mr Albert HO said that it was imperative that Members should view the power conferred on LegCo under Article 73(7) of the Basic Law as a substantive power. To this end, Mr HO suggested that the Panel should form a working group to study how LegCo should exercise its power under Article 73(7). Ms Emily LAU expressed support for Mr HO's suggestion. She further said that procedures regarding the exercising of power under Article 73(7) should be laid down in the Rules of Procedures of LegCo.

26. The Chairman concluded that members were of the unanimous view that the power conferred on LegCo to endorse the appointment of the judges of the CFA and the Chief Judge of the High Court under Article 73(7) of the Basic Law was a substantive power to be exercised responsibly and with due regard for the independence of the judiciary. In the circumstances, LegCo should have the power to probe into the appointments if considered necessary to do so.

27. LA/LA said that he would like to add for the record on behalf of Department of Justice that in its view the power conferred on LegCo under Article 73(7) of the Basic Law was a substantive power. As to how LegCo would exercise such a power was entirely a matter of good judgement for Members.

The way forward

28. The Panel discussed whether members of JORC should be invited to attend a Panel meeting to provide information on the general procedures adopted by JORC in judicial appointment and the procedures which had been followed in the current exercise, in order to assist Members to consider the motion relating to the appointment of the seven CFA judges. With reference to Mr Philip DYKES's comments in paragraph 14 above, Ms Emily LAU suggested that members of JORC should also be invited to brief the Panel on the policy considerations in selecting CFA judges generally and in the current exercise.

29. Legal Adviser advised that when the issue of the operation of JSC was brought up for discussion by the same Panel prior to 1997, the Judiciary Administrator, instead of members of JSC, was requested to provide information and to attend the meeting. Legal Adviser also raised the question of whether JORC could provide information on policy considerations as suggested by Ms LAU, having regard to the fact that JORC's functions were to advise or make recommendations to the CE on the filling of vacancies in the judicial offices and handle related matters such as dealing with representation from a judicial officer concerning conditions of service as might be referred to it by CE and any matter affecting judicial offices which might be prescribed or which CE might refer to JORC.

30. Mr Ronald ARCULLI concurred with the views of the Legal Adviser. The Chairman said that although members of JORC might not be able to give a response on the aspect of policy considerations in judicial appointments, there was no harm in asking JORC having regard to the fact that CJ was the Chairman of JORC.

31. After discussion, members agreed that a letter should be sent to the Secretary of JORC inviting members of JORC to attend a special meeting of the Panel on 13 June 2000 and to provide the following information regarding appointment of CFA judges -

- a) the general procedures adopted regarding nomination/application and selection;
- b) the criteria of selection for recommendation including any provisions under the Hong Kong Court of Final Appeal Ordinance and/or other policy considerations; and
- c) any other consideration or procedure pertaining to the appointment of judges of the CFA or the current exercise.

As to what extent members of JORC could disclose information regarding judicial appointments having regard to the constraint of confidentiality under which JORC operated, members reckoned that it was a matter for JORC to decide. Members agreed that representatives of the Administration and non-Panel Members should also be invited to the meeting.

32. Members also agreed that the Chairman should make a progress report to the House Committee on 9 June 2000 on the matter including the following -

- a) the Panel disagreed with the Administration's view that LegCo's endorsement should only be withheld where it was satisfied that the requirements set out in the Basic Law regarding judicial appointments had not been followed; and
- b) the Panel considered that the power conferred on LegCo to endorse the appointment of the judges of the CFA and the Chief Judge of the High Court under Article 73(7) of the Basic Law was a substantive power to be exercised responsibly and with due regard for the independence of the judiciary.

Motion to seek LegCo's endorsement of the appointment of the seven judges of the CFA

33. DD of Adm said that as the term of the Council would expire on 30 June 2000 and the two incumbent permanent judges of the CFA would resign or retire in September and October 2000 respectively, it was imperative that the motion to seek the Council's endorsement of the appointment of the seven CFA judges be moved within the current legislative session. As the Panel would hold another special meeting on 13 June 2000 to continue discussion on the judicial appointment process relating to the current exercise, she hoped that members would support the Administration's request to seek the President's leave to dispense with the notice requirement if necessary.

34. After discussion, members had no objection to the Administration giving notice on 5 June 2000 to move the motion at the Council meeting on 21 June 2000.

35. In reply to Mr Martin LEE's enquiry, DD of Adm said that the curriculum vitae of the seven appointees in the current exercise had been issued to Members. Legal Adviser said that the Administration was in fact referring to a press statement which was issued to members of the public including legislators. For the motion originally scheduled to be moved at the Council meeting on 31 May 2000, the Administration had neither provided a LegCo Brief nor a draft speech of the mover of the motion. This was contrary to the usual practice. At the request of the Chairman, DD of Adm undertook to provide the curriculum vitae of the appointees to Members.

(Post-meeting note : The Administration gave notice on 5 June 2000 to move the motion concerning the appointment of seven CFA judges at the Council meeting on 21 June 2000. The curriculum vitae of the appointees (English version) were appended to the motion which had been circulated to Members vide LC Paper No. CB(3) 998/99-00 on 8 June 2000. Chinese version of the curriculum vitae of the appointees had also been circulated to Members vide LC Paper No. CB(3) 1033/99-00 on 13 June 2000).

36. There being no other business, the meeting ended at 12:48 pm.