Research Office
Legislative Council Secretariat

Information Note

Review of judicial appointment process in selected places

IN04/19-20

1. Introduction

1.1 Hong Kong is renowned for its rule of law and judicial independence, taking the eighth position amongst the 141 places included in a global ranking exercise on judicial independence in 2019.[1] Right now, there are 182 judges and judicial officers ("JJOs") in Hong Kong, of whom 24 are senior judges (comprising the Chief Justice ("CJ") of the Court of Final Appeal ("CFA"), seven local judges and 15 overseas judges of CFA and the Chief Judge of the High Court).[2] Under the Basic Law, these JJOs are appointed by the Chief Executive ("CE") on the advice of an "independent commission", namely the Judicial Officers Recommendation Commission ("JORC").[3] It is further stipulated in the JORC Ordinance (Cap. 92) that all nine JORC members (i.e. CJ, the Secretary for Justice ("SJ"), two judges, one barrister, one solicitor and three lay members) are appointed by CE.[4] For appointment of senior judges, it requires additional endorsement by the Legislative Council ("LegCo") under the Basic Law.

1.2 While JORC helps insulate the influence of the executive branch in judicial appointment, there are still occasional concerns over the appointment process. For instance, while some feel that SJ as a principal official should not sit in the JORC, others are concerned about the significant role played by CE in JORC membership. There are also questions on transparency, as the criteria for appointment of individual JORC members are not clearly set out in the Ordinance. On appointment of senior judges, there are suggestions of

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1 World Economic Forum (2019).

2 These are figures on 6 January 2020. "Judges" refer to judges of CFA, the High Court and the District Court, below whom are "judicial officers" such as members of the Lands Tribunal and magistrates. See the Judiciary (2020).

3 JORC makes recommendations on CFA judges, Recorders and full-time JJOs. While there are usually some 30 part-time deputy JJOs, they are appointed on a temporary basis by CJ direct and excluded from the above total number of JJOs. See Legislative Council Secretariat (2006).

4 JORC, formerly named as the Judicial Service Commission before July 1997, was established in 1976. Its functions stay the same after renaming. See Legislative Council Secretariat (2001a).

greater involvement of the LegCo, but this is countered by the concerns over the risks of politicizing the whole process.[5] Over the past two decades, LegCo Members have discussed these issues for at least 10 times, mostly during their scrutiny of appointments of senior judges proposed by the Government.[6]

1.3 At the request of Hon HUI Chi-fung, the Research Office has conducted a study on recent reforms undertaken in selected places to minimize the influence of the executive branch in judicial appointment. England and Wales ("England") as well as Canada are chosen for further study because (a) they are representative places adopting common law systems; (b) both are globally acclaimed to have a high degree of judicial independence; and (c) both have introduced measures to limit executive influence and enhance procedural transparency since the early 2000s.[7] This information note begins with a brief review on recent global trends in judicial appointment process, followed by discussion of the current practice in Hong Kong. It then switches to the review of the judicial appointment process undertaken in the two selected places, along with a table for easy reference (**Appendix**).

2. Recent global trends in judicial appointment process

2.1 Conceivably, ***a transparent and impartial judicial appointment system independent from other branches of government or partisan interests is vital for the rule of law***. It ensures that only competent judges with integrity and professional qualifications are appointed for conducting fair trials.[8] According to the United Nations ("UN") and other reputable global organizations, a good appointment system should have safeguards against

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5 Panel on Administration of Justice and Legal Services (2002) and Legislative Council Secretariat (2019).

6 During 2000-2019, LegCo Members have discussed the above issues on at least 10 occasions, mainly in the context of the Panel of Administration of Justice and Legal Services and Subcommittees on Proposed Senior Judicial Appointments. For a comprehensive summary, see Legislative Council Secretariat (2018 and 2019).

7 In the aforementioned ranking exercise conducted by World Economic Forum in 2019, the United Kingdom ("UK") and Canada took the 26th and 15th positions in "judicial independence", compared with the 8th position of Hong Kong. However, in another comparative study on judicial independence amongst 126 places conducted by the World Justice Project also in 2019, Canada took the 6th position, followed by UK (10th) and Hong Kong (23rd). See World Economic Forum (2019) and World Justice Project (2019).

8 Bingham Centre for Rule of Law (2015).

influences of "improper motives".[9] To this end, they call for setting up an independent selection body ("ISB") for selecting judges, with its membership composition based on certain principles to avoid political influence.[10]

2.2 ***Globally, many places have established such ISBs to select or shortlist judges over the past few decades***, replacing the previous practice of direct appointment by the executive branch. Taking the Commonwealth as an example, 39 or 81% of the surveyed member states had established such ISBs by constitution or statute in 2015. So did 26 or 93% of the 28 member states of the European Union ("EU") in 2017.[11] By and large, an ISB usually consists of judges, legal professionals and prominent public figures from other sectors, but it may also include representatives from the executive branch or legislative branch in some places.[12] That said, a few new members of EU from the Eastern Europe are trying to do the opposite by increasing the government influence in selection of judges, as manifested in Polish government's recent amendment to its judicial appointment method in December 2017. Yet this was strongly criticized by EU for violating judicial independence and its accession treaty to EU.[13]

2.3 ***Some governments have taken a couple of measures to reduce the influence of the executive branch on the membership of ISB, as a further safeguard.*** Taking France as an example, its ISB consists of 15 members. Within this total, eight are peer-elected judicial or legal practitioners

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[9] United Nations Office of the High Commissioner for Human Rights (1985), the International Association of Judicial Independence and World Peace (2018) and Olbourne (2003).

[10] UN recommends that "the judiciary and other parties directly linked with the justice system must have a substantial say with respect to selecting and appointing the members of such a body", while some organizations suggest judicial and legal members should constitute a majority of the members. See United Nations Office of the High Commissioner for Human Rights (2009), the International Bar Association (1982), International Association of Judges (1999) and Commonwealth Secretariat et al (2004).

[11] The figure does not include Canada, as the ISB there is established by executive orders only. See Bingham Centre for Rule of Law (2015) and European Commission (2018).

[12] These could be justice officials (as in Canada), legislators (as in South Africa), or public figures nominated by officials and legislators (as in France). See Office of the Commissioner for Federal Judicial Affairs Canada (2017), Bingham Centre for Rule of Law (2015) and Vie-publique.fr (2019).

[13] The ISB in Poland previously had a total of 25 members, including 15 peer-selected judges who formed the majority in ISB, eight executive or legislative representatives and two ex-officio top judges. However, a law was passed in December 2017 to let the parliament choose 15 judicial members instead, effectively giving the ruling party (i.e. Law and Justice Party) full control over the ISB. In the same month, EU proposed to sanction Poland by stripping its voting rights. The dispute between the Polish government and EU is still unresolved at this juncture. See European Commission (2017).

(i.e. seven judges and one lawyer), forming a majority and outweighing the other four nominated by the Parliament and three nominated by the executive branch.[14] Other safeguard measures include (a) forbidding ex-officio members from voting, as seen in Canada; (b) getting the judiciary involved in the selection of public representatives, as seen in England; and (c) getting the opposition parties involved in the ISB as a check and balance, as seen in South Africa.[15]

2.4 ***For appointment of senior judges to higher courts, a few places have a constitutional requirement to get parliamentary approval beforehand.*** Taking the United States ("US") as an example, all senior federal judges are appointed by the President and confirmed by a majority vote in the Senate, after public hearings conducted by the Senate Judiciary Committee.[16] More recently, Canada has conducted public hearings on appointments of senior judges occasionally, though it is not a statutory requirement. Yet UN warns that public hearings at the parliament may risk politicization of judicial appointment, though it may help enhance public confidence in the judicial candidates.[17]

3. Recent developments on judicial appointment in Hong Kong

3.1 Based on Articles 88 and 92 of the ***Basic Law***, judges in Hong Kong are appointed on the recommendations of the JORC and "on the basis of their judicial and professional qualities". As regards appointments of senior judges, Article 90 of the Basic Law also requires "endorsement of the LegCo".

3.2 Moreover, it is stipulated in the ***JORC Ordinance*** that all nine JORC members are appointed by CE, consisting of CJ of CFA as the Chairman, SJ, two judges, one barrister (nominated by Hong Kong Bar Association), one solicitor (nominated by Law Society of Hong Kong) and three eminent persons from other sectors (who cannot be LegCo members or persons holding

[14] Conseil supérieur de la magistrature (2019) and Vie-publique.fr (2019).

[15] In England, the Lord Chief Justice plays a key role in selection of lay members to the Judicial Appointments Commission, which will be further discussed in Section 4. In South Africa, the 23-member Judicial Service Commission includes six members from the National Assembly, at least three of whom are from opposition parties. See Bingham Centre for Rule of Law (2015).

[16] Legislative Council Secretariat (2000b).

[17] The Council of Europe also shared the concerns about the risk of politicization of judicial appointments by the legislature. See United Nations Office of the High Commissioner for Human Rights (2009) and European Commission for Democracy through Law (2007).

non-judicial pensionable offices).[18] For effective voting decision at a JORC meeting, it requires: (a) where seven members are present, at least five in favour; (b) where eight members are present, at least six in favour; and (c) where nine members are present, at least seven in favour.

3.3 ***The above constitutional and statutory requirements have been observed in all judicial appointments.*** As at 6 January 2020, there were 182 JJOs in Hong Kong, comprising 23 judges in CFA, 51 judges in the High Court (including the Chief Judge), 45 judges in the District Court and 63 judicial officers in Magistrates' Courts and Tribunals.[19] While JORC has been making recommendations to CE on judicial appointment at all court levels since 1976, all 39 senior judges in 12 appointment exercises are endorsed by LegCo over the past 22 years after 1 July 1997.[20]

3.4 The Panel on Administration of Justice and Legal Services ("Panel") of the LegCo conducted a ***comprehensive review on "Process of appointment of judges" in June 2001,*** after completion of two rounds of endorsement of senior judges during 2000.[21] This review straddled 16 months and included detailed consultation with the local legal profession, aiming to achieve "greater transparency and accountability while ensuring judicial independence" in the judicial appointment system.[22] The key concerns conveyed to the Panel included CE's appointment of SJ and three lay members, as only three dissenting votes were enough to block down a decision at the JORC meeting.[23] Moreover, it was felt that the criteria for appointment of JORC members were not clearly set out in the Ordinance, whereas some were worried about the risks of politicization when LegCo exercised its endorsement power in appointment of senior judges.[24]

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[18] While JORC Ordinance allows CE to appoint people other than those nominated by the two legal professional bodies, CE has followed their suggestions as a convention.

[19] The figures exclude deputy judges and judicial officers appointed by the Chief Justice from outside the Judiciary on a temporary basis. There were only 33 of them as at 31 March 2019, mostly working as magistrates. See Standing Committee on Judicial Salaries and Conditions of Service (2019) and the Judiciary (2020).

[20] Legislative Council Secretariat (2001a and 2019).

[21] LegCo endorsed seven CFA appointments in June 2000 and the appointment of the Chief Judge of the High Court in December 2000, but some Members considered that information provided to LegCo was "sketchy and inadequate". See Panel on Administration of Justice and Legal Services (2002).

[22] The Panel received views from the Judiciary Administration, the Law Society, the Bar Association and some legal professionals in the review. See Panel on Administration of Justice and Legal Services (2002).

[23] Panel on Administration of Justice and Legal Services (2002).

[24] Panel on Administration of Justice and Legal Services (2002).

3.5 In September 2002, ***the Panel published the review report***, ***making several JORC recommendations to the Government*****.** In short, they asked for (a) reviewing the membership of SJ in JORC; (b) considering proposals to review other members of JORC; and (c) publishing annual JORC reports for greater transparency. While JORC began releasing its annual report in 2003, the Government so far has not taken on board the suggestion of reviewing JORC membership. [25] ***On appointment of senior judges, the Panel recommended the House Committee to set up ad hoc subcommittees tasked with scrutinizing appointees proposed by JORC***, and this has been put into practice since the next endorsement exercise in May 2003.

3.6 After this review, LegCo scrutinized 31 senior judicial appointments proposed by JORC in 10 exercises during 2003-2019. While all these proposals were endorsed by LegCo, the subcommittees discussed the aforementioned issues on JORC membership and transparency time and again. By and large, Members were aware that they are the "final gatekeeper" in appointment of senior judges, holding "substantive" power. They nonetheless considered that it was their "constitutional convention" to accept nominations made by JORC, unless the appointment was "manifestly contrary to public interest".[26] Most of them thought that it was not desirable to hold public hearings to collect public views on judicial appointments so as to avoid unnecessary intervention and politicization.[27] Most recently in reply to a LegCo Question on judicial appointment on 18 December 2019, the Chief Secretary for the Administration reiterated that "JORC is the independent commission" and "the mechanism has been working satisfactorily". CJ also advised that "there is no need to review the existing mechanism".[28]

4. Review of judicial appointment process in England and Wales

4.1 The legal system of England is globally renowned for its long history of judicial independence, which can be traced back to the passing of the Act of Settlement in the Parliament of England in 1701 to protect senior judges from arbitrary removal by the monarch.[29] While judicial independence has then

[25] Panel on Administration of Justice and Legal Services (2002), Judicial Officers Recommendation Commission (2003) and Legislative Council Secretariat (2019).

[26] Legislative Council Secretariat (2019).

[27] Legislative Council Secretariat (2018 and 2019).

[28] GovHK (2019).

[29] UK Judiciary (2020) and Woodhouse (2007).

been practised through convention, ***the executive branch was responsible for appointment of judges for almost three centuries before a judicial reform was undertaken in 2005***.[30] Lord Chancellor, formerly both a cabinet minister and head of the judiciary at the same time, used to recommend all full-time judges for appointment by the monarch.[31] Notwithstanding his ministerial position, Lord Chancellor was publicly seen to be able to appoint judges in a largely unbiased manner throughout the last century, as he usually acted on the advice of the senior judiciary and selected judges on merit.[32]

4.2 However, ***there was emerging pressure to improve the transparency of the judicial appointment system,*** as first advocated by the legal profession in England in the early 1990s.[33] More importantly, the public was increasingly concerned about "the right to an independent and impartial tribunal" as from the late 1990s, after adaptation of the European Convention on Human Rights into local law (i.e. Human Rights Act) in the UK in 1998. The public doubted how far the Lord Chancellor could be sufficiently "independent and impartial" in judicial administration, given his executive role in the cabinet. This concern was further exacerbated by the alleged inability of the Lord Chancellor to defend the Judiciary when another ministers openly attacked court rulings in several immigration cases in 2003.[34] Against this backdrop, the UK government launched a public consultation on "Constitutional Reform: a new way of appointing judges" in July 2003.

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[30] Before 2005, legislation safeguarding judicial independence was largely limited to security of judicial tenure and remuneration. See Woodhouse (2007) and Lord Hodge (2018).

[31] For senior judges, they were appointed by the monarch on advice of the Prime Minister. However, the Prime Minister also relied on recommendations of the Lord Chancellor in practice. See the Legislative Council Secretariat (2000b) and Elliot et al (2017).

[32] Woodhouse (2007) and Elliot et al (2017).

[33] The legal profession had long expressed concerns that there were no open recruitment and publicly-known selection procedures in judicial appointment. In 1991, the Law Society of England and Wales criticized the judicial appointment process as too secretive, relying too much on personal networks and hence being biased towards social elites. See Banner (2013) and Walker et al (1999).

[34] In 2003, the High Court ruled against the UK government in six immigration cases, ruling the government's stripping of social benefits from refugees as unlawful. While the then Home Secretary David Blunkett repeatedly criticized the Judiciary of overriding public policy, Lord Chancellor Lord Irvine (as the Head of the Judiciary) did not offer any defence for the judges, allegedly due to his party affiliation. He was also questioned when he reportedly asked potential judicial candidates to make donations to his political party earlier in 2001. The Bar Council responded with a suggestion in 2003 that judges should not be chosen by the Lord Chancellor who was a political appointee. See The Guardian (2003), House of Lords Select Committee on Lord Chancellor's Department (2003) and Banner (2013).

4.3 Based on the feedback in the public consultation, ***the Constitutional Reform Act was passed in the UK Parliament in March 2005, followed by the Crime and Courts Act in April 2013,*** ushering in a series of judicial appointment reforms.[35] With effect from April 2006, the Lord Chancellor transferred the role of head of the Judiciary to the Lord Chief Justice ("Lord CJ"), retaining the cabinet minister position only. The key features of the new system of judicial appointments in England are summarized below:

(a) **Independent judicial selection commission:** A statutory Judicial Appointments Commission ("JAC") was set up to select judges at most levels in England.[36] Established since April 2006, JAC consists of 15 members, including seven judicial members, two legal professionals and six lay members (including the Chair).[37]

More importantly, appointment of JAC membership based on an elaborate rule-based procedure laid down in law, with Lord CJ having a dominant say for insulation of the executive influence. More specifically, while three judicial members are selected by peers through the Judge Councils, all the rest of 12 members are chosen by a 4-member panel mostly represented by nominees of Lord CJ.[38] For vacancies of lay members in JAC, they are even advertised for open application;

(b) **Setting up ad hoc committee for selection of senior judges:** For senior judicial vacancies, a 5-person selection committee will be formed under JAC, comprising at least two JAC lay members and two judges (who may not be JAC members).[39] For judicial

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35 UK.GOV (2012).

36 In England, JAC is not responsible for selecting magistrates, who are part-time unpaid judicial office holders dealing with less serious criminal cases. They are appointed by the Lord Chief Justice on advice of local advisory committees. See UK Judiciary (2020).

37 Composition of JAC is set out in The Crime and Courts Act 2013 and The JAC Regulations 2013, providing a statutory requirement that the number of judicial members must be fewer than other members. Also, lay members may not be Members of Parliament or civil servants. See Ministry of Justice (2013) and Bingham Centre for the Rule of Law (2015).

38 The JAC Regulations 2013 prescribes the composition of the 4-member panel. While the Chair is nominated by the Lord Chancellor, the Judiciary has a veto power. The other three members include (a) Lord Chief Justice or his nominee, (b) a nominee of the Chair and (c) Chair of JAC. As such, Lord CJ largely decides the membership composition of the panel. See van Zyl Smit (2017).

39 The senior judicial positions include the Lord CJ, Heads of Division, Senior President of Tribunals and Lords Justice of Appeal. See Ministry of Justice (2013).

appointments to the Supreme Court of the United Kingdom, a 5-person selection committee will likewise be formed on an ad hoc basis, with all representatives from the judiciary and JACs in England, Scotland and North Ireland;[40]

(c) **More structured and transparent selection processes:** Judge selection processes at all court levels are broadly similar, starting with public advertisement of vacancies and inviting application from eligible candidates.[41] The selection committees will then interview the shortlisted candidates and consult other judges (as well as the Lord Chancellor for senior judicial appointments). For transparency, JAC published the selection criteria;[42]

(d) **Limited role of the executive branch:** Before 2013, while the Lord Chancellor could reject recommendations made by JAC and the selection committees, he had to provide reasons for rejection in writing and could do so only once for each selection process.[43] Actually, he refused to accept only five recommendations during 2006-2012, relative to a total of some 3 000 judicial appointments during that period.[44] After 2013, the veto power in appointments below the High Court is transferred to the Lord CJ;[45]

(e) **Limited role of the Parliament:** Judicial appointments do not require any parliamentary confirmation or public hearings in England. Yet the Chair of JAC and the Lord Chancellor are invited to the UK Parliament to answer some broad questions on the appointment process for the sake of accountability, but only once a few years.[46] Although there are suggestions in England

[40] Composition of the ad hoc selection commission is set out in The Supreme Court (Judicial Appointments) Regulations 2013. See Ministry of Justice (2013).

[41] Open recruitment for lower judicial posts started in the early 1990s and extended to the High Court in 1997. See van Zyl Smit (2017) and Legislative Council Secretariat (2000a).

[42] Apart from professional qualification, JAC includes several core competencies in its selection criteria, such as exercising judgements, processing and building knowledge, assimilating and clarifying information, working and communicating with others. See van Zyl Smit (2017) and Judicial Appointments Commission (2020).

[43] Lord Chancellor may also ask JAC and the selection committees to reconsider their choices, but also only once in the whole process. See Elliot et al (2017).

[44] JAC received two rejections and three requests for reconsideration during 2006-2012. See House of Lords Select Committee on the Constitution. (2012a)

[45] GOV.UK (2012).

[46] House of Lords Select Committee on the Constitution (2012b) and van Zyl Smit (2017).

to appoint parliamentarians to judicial selection committees or to hold hearings in selection of senior judges, they were dismissed by the House of Lords in 2012 on the grounds of possible politicization of the process;[47] and

(f) **Complaint mechanism against JAC:** The Judicial Appointments and Conduct Ombudsman ("JACO") was set up in 2006 under the Constitutional Reform Act for investigation of complaints over judicial appointment decisions made by JAC.[48]

4.4 ***It appears that the reforms have effectively limited the government influence on the judicial appointment process in England*.** While JAC makes an average of some 500 recommendations each year since 2006, Lord Chancellor asked JAC to reconsider the choice of a senior judge only once in 2010, whom he eventually accepted the selection. Although he had blocked the other four appointments of lower-level judges during 2006-2012, the veto power of the Lord Chancellor in appointment at lower court was taken away in 2013, as discussed above.[49] Moreover, according to the annual reports of JACO during 2014-2019, while a total of 23 complaints on judicial appointments were received, none was upheld after investigation.[50] In addition, according to a survey conducted in 2018, 72% of English lawyers believed that the appointments to the Supreme Court were solely based on merits, more than twice the average figure of 33% in the EU.[51] Apparently, influence of the executive branch is not a major issue in judicial selection in England anymore. Most recently, discussion over judicial appointment in England is dominated by other concerns, such as a lack of diversity in terms of gender and race in the Judiciary.[52]

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47 House of Lords Select Committee on the Constitution (2012b).

48 Unsatisfied judicial applicants must make complaints to JAC first, before turning to the JACO. See Judicial Appointments Commission (2020).

49 The Guardian (2011), House of Lords Select Committee on the Constitution (2011 and 2012a) and van Zyl Smit (2017).

50 Judicial Appointments and Conduct Ombudsman (2019).

51 European Network of Councils for the Judiciary (2019).

52 In England, women and ethnic minorities were under-represented in the Judiciary, accounting for only 28% and 7% of court judges in 2017. This was just about half of the respective proportions of 51% and 14% in the total population in 2011. See House of Lords Select Committee on the Constitution (2017).

5. Review of judicial appointment process in Canada

5.1 In Canada, ***the power of selecting federal judges used to be solely vested with the executive branch before the late 1980s***, with (a) the Prime Minister responsible for appointing judges of the Supreme Court and senior judges of federal courts and (b) the Minister of Justice appointing the rest.[53] While appointment decisions were largely based on informal consultation with the legal community and on merit, there was no formal selection procedure. This led to public concerns and allegations over political patronage in the judicial appointment process.[54]

5.2 The ***pressure to reform the judicial appointment system intensified upon passing of the Constitution Act 1982***, which included the Charter of Rights and Freedoms in a written constitution for the first time in Canadian history. As the legal profession called for more judicial independence in the light of this Act, the government set up the Federal Judicial Advisory Committees ("FJACs") in 1988 to advise federal judicial appointments below the Supreme Court.[55] In 2003, the House of Commons unanimously voted for a review of the judicial appointment process, leading to an in-depth study by the Justice Committee completed in May 2004.[56] This paved way for similar ad hoc advisory committees set up starting 2006 to advise judicial appointments at Supreme Court.

5.3 Unlike England, ***the Canadian government reformed the system of judicial appointment largely through administrative measures,*** not legislation. Incremental improvements have been made by successive improvement measures:

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[53] Federal judges include judges of federal courts and upper courts in provinces. By law, they are appointed by the Governor General, but in practice the Governor General acts on the advice of Prime Minister and Minister of Justice. See House of Commons, Canada (2007).

[54] According to the renowned legal historian RCB Risk, most federal judges appointed in Canada during 1945-1965 were affiliated with the ruling party. Cited in Devlin (2017).

[55] Both the Canadian Bar Association and the Canadian Association of Law Teachers issued reports in 1986 recommending establishment of advisory committees on federal judicial appointments. See Ziegel (2006) and Canadian Bar Association (2005).

[56] The then Prime Minister Paul Martin also committed himself to reform, inviting the House of Commons Justice Committee to provide recommendations in 2004. See House of Commons, Canada (2004), Ziegel (2006) and House of Commons, Canada (2017).

(a) **Setting up appointment advisory committee in each Canadian province:** Created in October 1988**,** there are 17 FJACs in Canada.[57] Each FJAC comprises seven voting members, including one judicial member, three lawyers and three public representatives, with the Chair elected by the members.[58] A representative from the federal government also sits in the FJAC, but without voting power.

FJAC membership is largely rule-based, though still with visible influence of the executive branch. While the judicial member is chosen by the provincial Chief Justice, three lawyers are chosen by the Minister of Justice from three name lists respectively provided by the (i) provincial law society; (ii) Canadian Bar Association and (iii) provincial Attorney General. The three public representatives, who may or may not be lay persons, are also appointed by the Minister of Justice, through a public application process which was first launched in 2016;[59]

(b) **Ad hoc committees for appointments to Supreme Court:** As from March 2006, 8 out of 12 Supreme Court appointments have been based on shortlists provided by ad hoc committees, now named as Independent Advisory Boards for Supreme Court of Canada Judicial Appointments ("IAB").[60] However, membership of IAB is not laid down in law and can change from time to time. At present, it comprises of seven members, with one retired judge, two lawyers and one law scholar designated by their respective professional bodies. The Minister of Justice

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[57] While each province in general has one FJAC, there are two in Quebec and three in Ontario due to larger population. Besides, one of the FJACs is for the Tax Court of Canada and thus different in its composition. See Office of the Commissioner for Federal Judicial Affairs Canada (2017).

[58] In FJAC membership used to be skewed towards the executive branch in Canada. In 2006, Prime Minister Harper added a representative of law enforcement to each FJAC and took away the voting power of the Chair (except in a tied vote). As these changes rendered federal appointees a majority, they were widely criticized by the legal community. This was thus revoked by Prime Minister Trudeau in 2016. See Law Times (2007) and Department of Justice (2017).

[59] Department of Justice (2017) and Office of the Commissioner for Federal Judicial Affairs Canada (2017).

[60] For the rest of the 4 of the 12 appointments, Prime Minister Harper skipped the procedure of nomination by the ad hoc committees and made direct appointment once in 2008 in view of an imminent election, followed by three more skippings during 2014-2015 after the Supreme Court held that a newly appointed judge was ineligible in 2013. See Devlin (2017).

appoints the rest of three public representatives, including at least two lay members;[61]

(c) **More structured and transparent selection process:** For lower federal court appointments, applicants can express their interest any time. FJACs will consult both the legal and non-legal communities about each shortlisted applicant and meet regularly to compile a list of recommended candidates for consideration by the Minister of Justice.[62] On Supreme Court appointments, an IAB will be formed whenever a vacancy arises. Invitation is sent to legal professional bodies for application to fill the vacancy. IAB will shortlist candidates for personal interviews and then provide three to five names for the Prime Minister to choose from;[63]

(d) **Greater transparency:** Both FJACs and IABs have published their selection procedures, assessment criteria and demographic distribution of both successful and unsuccessful applicants. For Supreme Court appointments, the application forms of the final appointees are also published, covering their professional history, their explanation of key court judgments in the past and detailed views on the role of the Judiciary.[64] Nevertheless, details of unsuccessful applicants are not disclosed to protect their privacy.

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[61] For instance, in the first of such IAB formed in 2006, it included four members of the parliament, one provincial representative, one retired judge, one Law Society representative and two public members. The successive three IABs during 2008-2013 formed under Prime Minister Harper comprised five members of parliament, three of whom from the ruling party. In 2016, Prime Minister Trudeau introduced the current depoliticized composition, which varied slightly in 2019 for the appointment to the Quebec seat with additional provincial representatives. See Office of the Prime Minister of Canada (2016), Devlin (2017) and Department of Justice (2019).

[62] More specifically, FJACs grouped applicants into three categories, namely "highly recommended", "recommended", or "unable to recommend". If the committee cannot reach a consensus, a decision will be made by majority vote of the members present. See Office of the Commissioner for Federal Judicial Affairs Canada (2017).

[63] Department of Justice (2019).

[64] Department of Justice (2019).

(e) **Limited role of the executive branch:** While recommendations made by FJACs and IABs are not binding, it is the convention for both the Prime Minister and the Minister of Justice to follow them, after consultation with the legal community and the Parliament;[65] and

(f) **Limited role of the Parliament:** The Canadian Parliament has no veto power over judicial appointments. Nevertheless, there has been an informal practice for the Parliament to hold televised question-and-answer sessions with the Supreme Court nominees (in addition to hearings with the Minister of Justice) since 2006 for enhanced transparency.[66] Yet the question-and-answer sessions are moderated by scholars, mainly for introducing the nominees to the public rather than questioning their suitability.[67]

5.4 ***While the recent reforms in judicial appointment in Canada seem to be more incremental, they have contributed to a pool of politically neutral judges*.** As reported by the Supreme Court of Canada, "citizens are comforted by the fact that it is very difficult to identify judges by political ideology".[68] For instance, though seven out of nine judges in 2015 were appointed by the then Conservative prime minister, the Supreme Court ruled against the government in two out of three major court cases involving significant human rights issues.[69] That said, there are on-going concerns that both FJACs and IABs do not have statutory status and the executive branch could unilaterally break the convention of judicial appointment process if it wishes to.[70]

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[65] In making the final decision on Supreme Court appointments, the Minister of Justice will consult with the Chief Justice of Canada, relevant provincial and territorial attorneys general, relevant Cabinet ministers, opposition Justice Critics, as well as members of both the House of Commons Standing Committee on Justice and Human Rights and the Standing Senate Committee on Legal and Constitutional Affairs. See Department of Justice (2019).

[66] As mentioned in footnote 60, Harper skipped the procedure during 2008 and 2014-2015, but the practice has been restored since 2016 under Trudeau. See Ziegel (2006), Devlin (2017) and CBC (2019).

[67] Ziegel (2006), House of Commons, Canada (2017) and CBC (2019).

[68] Supreme Court of Canada (2011).

[69] National Post (2015).

[70] House of Commons, Canada (2017) and Devlin (2017).

6. Concluding remarks

6.1 In **Hong Kong**, all judicial appointment processes need to meet the constitutional requirements under the Basic Law and statutory requirements of the JORC Ordinance. Both have contributed to insulation of the influence of the executive branch in local judicial appointments and global recognition of Hong Kong in judicial independence. Yet there are still suggestions to improve further the appointment process, addressing the concerns over the significant role played by CE in JORC membership and a lack of transparent criteria in appointment of individual JORC members under the JORC Ordinance.

6.2 In **England**, JAC set up under the Constitutional Reform Act in 2005 is highly independent, with JAC membership based on rule-based procedure laid down in law on the one hand, and with Lord CJ having a dominant say in its membership on the other. These reforms seem to have effectively limited the government influence on the judicial appointment process in England. To enhance transparency, a dedicated Ombudsman is set up to investigate complaints over judicial appointment decisions made by JAC.

6.3 In **Canada**, the reforms in judicial appointment system are more incremental, mainly through administrative measures, instead of legislation in England. While its FJAC membership is largely rule-based, it is not a statutory body and still sees visible influence of the executive branch in its membership composition. To enhance transparency, parliamentary hearings over nominees of senior judges are held on an informal basis, although they aim at introducing the nominees to the public rather than questioning their suitability.

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Judicial appointment systems in selected places

	Hong Kong		England and Wales		Canada (Federal level)	
	Ordinary posts	**Senior posts**	**Ordinary posts**	**Senior posts**	**Ordinary posts**	**Senior posts**
1. Number of judges concerned	158 (as at 6 January 2020)	24[1] (as at 6 January 2020)	5 027[2] (as at 1 April 2019)	12[4] (as at 7 February 2020)	1 185 (as at 5 February 2020)	9[5] (as at 5 February 2020)
2. Recommending body	Judicial Officers Recommendation Commission ("JORC")		Judicial Appointments Commission[3]	Selection commission (ad hoc)	Judicial Advisory Committees	Independent Advisory Board for Supreme Court of Canada Judicial Appointment (ad hoc)
(a) Chairman	Chief Justice of Court of Final Appeal		A lay member	President of Supreme Court	A peer-elected member	Nominee of Minister of Justice
(b) Total number of members	9		15[3]	5	8	7
(c) Composition						
- **Government official**	1		0	0	1 (non-voting)	0
- **Judicial members**	3		7	2	1	1
- **Legal professionals**	2		2	0-1	3	3
- **Public representatives**	3		6	2-3	3	3
(d) Voting method	No more than 2 dissenting votes		Not specified	Not specified	Simple majority	Not specified
(e) Statutory status	✓		✓	✓	×	×
(f) Criteria of member appointment laid down clearly in law	×		✓	✓	×	×
(g) Majority of members chosen by the executive branch	✓		×	×	✓	×
3. Power of the executive branch	Right to vote in JORC		Right to veto once		Right to choose from shortlists of candidates	
4. Confirmation by the legislature	×	✓	×	×	×	×
5. Public hearings with nominees	×	×	×	×	×	✓
6. Open recruitment	✓	×	✓	✓	✓	✓
7. Disclosure of appointees' resumes	×	✓	×	✓	×	✓
8. Complaint mechanism	×	×	✓	×	×	×

Notes: (1) Including Chief Justice, Permanent Judges and Non-permanent Judges of the Court of Final Appeal and the Chief Judge of the High Court.
(2) Including court and tribunal judges at all levels in England and Wales.
(3) A smaller selection panel of five members will be formed by Judicial Appointments Commission for appointment of high-level posts including Lord Chief Justice.
(4) Referring to Justices of Supreme Court of the United Kingdom.
(5) Referring to Judges of Supreme Court of Canada.

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