

立法會 *Legislative Council*

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Paper for the House Committee meeting on 13 June 2003

Report of the Subcommittee on proposed senior judicial appointments

Purpose

1. This paper reports on the deliberations of the Subcommittee on proposed senior judicial appointments.

Background

2. Article 48(6) of the Basic Law (BL) confers on the Chief Executive (CE) the power and function to appoint judges in accordance with legal procedures. BL 88 provides that judges shall be appointed by CE on the recommendation of the Judicial Officers Recommendation Commission (JORC). In the case of the appointment of judges of the Court of Final Appeal (CFA) and the Chief Judge of the High Court, BL 90 provides that CE shall, in addition to following the procedures prescribed in BL 88, obtain the endorsement of the Legislative Council (LegCo). The power and function of LegCo to endorse the appointment of CFA judges and the Chief Judge of the High Court are conferred by BL73(7).

3. Since 1 July 1997, LegCo has exercised its power to endorse the appointment of judges under BL73(7) on two occasions. In June 2000, LegCo endorsed seven CFA appointments. In December 2000, LegCo endorsed the appointment of the Chief Judge of the High Court.

The current appointment exercise

4. In his letter dated 2 May 2003, the Director of Administration advised Members that CE has accepted the recommendations of JORC on the following appointments -

- (a) The Right Honourable The Lord Woolf of Barnes, The Right Honourable The Lord Scott of Foscote and The Right Honourable Sir Ivor Richardson be appointed as non-permanent judges from other common law jurisdictions to CFA; and
- (b) Mr Justice Geoffrey Ma be appointed as the Chief Judge of the High Court.

Subject to the endorsement of LegCo, CE will make the above appointments under BL88.

5. According to the Director of Administration, the three recommended appointees to CFA would be ready to take up appointment in July 2003. The recommended appointment of Mr Justice Ma as Chief Judge of the High Court might take effect from 14 July 2003, upon expiry of the term of Mr Justice LEONG, the current Chief Judge of the High Court, on 13 July 2003.

The Subcommittee

6. In accordance with the procedure for LegCo to endorse judicial appointments under BL73(7), which was endorsed by the House Committee on 16 May 2003, the House Committee, at the same meeting, referred the proposed judicial appointments to a subcommittee for consideration.

7. Under the chairmanship of Hon Martin LEE Chu-ming, the Subcommittee has held one meeting with the Administration and the Judiciary Administration to discuss the proposed judicial appointments and related issues. The membership list of the Subcommittee is in **Appendix I**. The deliberations of the Subcommittee are summarized below.

Appointment of non-permanent judges to CFA

The CFA

8. The CFA is the final appellate court in Hong Kong hearing both civil and criminal appeals. It consists of the Chief Justice (CJ) and the permanent judges. Non-permanent judges may be invited to sit. There are two lists of non-permanent judges, namely, the list of non-permanent Hong Kong judges, and the list of judges from other common law jurisdictions. The maximum number of non-permanent judges is 30. At present, there are 20 non-permanent judges comprising 12 non-permanent Hong Kong judges and eight non-permanent common law judges.

9. When hearing and determining appeals, CFA is constituted by five judges, namely, CJ, (where he is not available to sit, he designates a permanent

judge to preside), three permanent judges (where a permanent judge is not available, CJ nominates a non-permanent Hong Kong judge to sit in his place), and one non-permanent Hong Kong judge or one non-permanent common law judge. Apart from a few appeals, CJ has so far drawn the "fifth judge" from the list of non-permanent judges from other common law jurisdictions.

10. Under section 12(4) of the Hong Kong CFA Ordinance, a person shall be eligible to be appointed as a non-permanent judge from another common law jurisdiction 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 Court or a permanent magistrate in Hong Kong.

The current appointment exercise

11. The Administration has explained, in its paper to Members, that CJ intends to continue to draw a non-permanent judge from other common law jurisdictions in each appeal. The retired non-permanent judges from other common law jurisdictions are sometimes tied up in various commitments. As to serving Law Lords, they have full time judicial commitments in England. In the circumstances, CJ invited JORC to consider the appointment of the following eligible judges from other common law jurisdictions as non-permanent judges of CFA -

- (a) The Right Honourable The Lord Woolf of Barnes, the Lord Chief Justice of England and Wales;
- (b) The Right Honourable The Lord Scott of Foscote, a Lord of Appeal in Ordinary from England; and
- (c) The Right Honourable Sir Ivor Richardson, the immediate past President of the Court of Appeal of New Zealand.

The appointments were recommended by JORC and accepted by CE.

12. Members have noted the curriculum vitae of the three judges recommended for appointment and agree that they have extensive legal and judicial experience and eminent standing. Members support the proposed appointments.

Appointment of Chief Judge of the High Court

Chief Judge of the High Court

13. The Chief Judge of the High Court is the court leader of the High Court as well as the President of the Court of Appeal. The professional qualifications for the Chief Judge of the High Court 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, BL90 requires that the Chief Judge of the High Court shall be a Chinese citizen who is a permanent resident of Hong Kong with no right of abode in any foreign country.

The current appointment exercise

14. The Administration has explained, in its paper to Members, that JORC had held three meetings to deal with the appointment of the Chief Judge of the High Court. Although six JORC members are eligible to be appointed as the Chief Judge of the High Court, they all declared that if selected they would not be willing to accept appointment. In consultation with the Chairman of JORC, the Secretary to JORC put forward a list of 103 persons comprising serving judges, practising barristers, practising solicitors and public officials with legal experience to JORC for consideration. JORC came up with a shortlist of six candidates for detailed consideration, having regard to the responsibilities of the Chief Judge of the High Court and the qualities required of the office holder. Three candidates indicated that they are not willing to be considered for appointments, leaving three candidates on the shortlist. CE was informed of the considerations leading to JORC's recommendation of the appointment of Mr Justice Ma as the Chief Judge of the High Court.

15. Members support the recommended appointment. Hon Margaret NG has also pointed out that the legal profession supports the appointment of Mr Justice Ma as the Chief Judge of the High Court.

16. Hon Jasper TSANG Yok-shing has noted that Mr Justice Ma is recommended for the appointment as the Chief Judge of the High Court, not long after he was appointed a Judge of the Court of First Instance in December 2001 and a Justice of Appeal in November 2002. He has asked whether this "fast-track" career path is a common phenomenon in judicial appointments. The Administration has explained that in assessing the suitability of eligible persons for appointment as the Chief Judge of the High Court, JORC takes into consideration a number of factors. These include the statutory requirements, professional qualifications, experience, knowledge, integrity and judicial temperament of the person, and the responsibilities of the post.

Listing and administrative arrangements in the Court of Appeal

17. Members have noted that Mr Justice Ma is the spouse of Madam Justice Yuen, Justice of Appeal. They have requested the Judiciary to explain the listing and other administrative arrangements to be adopted if the recommended appointment of Mr Justice Ma is to take effect, in order to maintain the principle of judicial independence and to avoid any conflict of interest.

18. The Judiciary Administration has advised that the Court of Appeal is a collegiate court, and usually comprises three judges when hearing an appeal. A majority of two judges will decide the appeal.

19. While the Chief Judge of the High Court assumes ultimate responsibility for the listing of cases in the Court of Appeal, the Clerk of Court deals with the listing arrangements on a day to day basis. In addition to the Chief Judge, there are nine Justices of Appeal in the Court of Appeal. Under section 5(1A) of the High Court Ordinance, the Chief Judge may appoint one or more Justices of Appeal as Vice Presidents (VPs) of the Court of Appeal. With three divisions in the Court of Appeal, there are usually three VPs. Each VP presides in one division. When the Chief Judge sits, he would preside. At present, there are two VPs of the Court of Appeal. No new appointment of VP has yet been made after the recent retirement of Mr Justice Mayo.

20. For appeals requiring three Justices of Appeal, the Court of Appeal is organized into the following divisions -

- (a) a criminal division consisting of three Justices of Appeal presided over by Mr Justice Stuart-Moore, VP to deal with criminal appeals;
- (b) a civil division consisting of three Justices of Appeal presided over by Mr Justice Rogers, VP to deal with civil appeals; and
- (c) a "mixed" division consisting of three Justices of Appeal to deal with criminal and civil cases. This division was presided over by Mr Justice Mayo, former VP. As no VP has yet been appointed following his retirement, the most senior among the three judges would preside.

21. The Judiciary Administration has explained that the principle of judicial independence involves the independence of each judge to adjudicate according to law without any interference. In order to maintain the principle of judicial independence and the perception of such independence, CJ has decided that Mr Justice Ma and Madam Justice Yuen, who are husband and wife, should not sit together in the same division in the Court of Appeal. This decision was made

in November 2002 when Mr Justice Ma was appointed a Justice of Appeal and was publicly announced at that time.

22. The Judiciary Administration has further explained that that if the recommended appointment of Mr Justice Ma as the Chief Judge of the High Court takes effect, he will become the Court Leader of the High Court. His responsibilities will include handling personnel matters relating to the High Court Judges and complaints against their conduct. In order to avoid any possible conflict of interest and any perception of such conflict, CJ takes the view that any matters concerning Madam Justice Yuen should not be dealt with by Mr Justice Ma. Such matters would be dealt with by CJ himself.

Provision of information on recommended appointees

23. In connection with the current appointment exercise, the curriculum vitae of the recommended appointees provided by the Administration has covered the various aspects, including personal background, education, legal experience, judicial experience, services and activities, awards, and publications.

24. Members have agreed that as compared with the last two appointment exercises in June and December 2000, the information provided in the curriculum vitae of the recommended appointees in the current appointment exercise is more comprehensive and has much improved. Nevertheless, the Subcommittee has requested the Administration to provide the following additional information for members' reference -

- (a) copies of major publications of the recommended appointees;
- (b) important citations, speeches and opinions of the recommended appointees on issues of public interest; and
- (c) major litigation cases previously represented or tried by the recommended appointees.

25. A list of the cases, judgments and publications provided by the Judiciary Administration is in **Appendix II**.

Recommendation

26. The Subcommittee supports the recommended judicial appointments. The Subcommittee has no objection to the Administration giving notice of a motion to seek the endorsement of LegCo on the recommended appointments under BL73(7) at the Council meeting on 2 July 2003.

Advice sought

27. Members are invited to note the recommendation of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
12 June 2003

Appendix I

Subcommittee on proposed senior judicial appointments

Membership list

Chairman	Hon Martin LEE Chu-ming, SC, JP
Members	Hon Margaret NG Hon Jasper TSANG Yok-sing, GBS, JP Hon Emily LAU Wai-hing, JP (Total : 4 Members)
Clerk	Mrs Percy MA
Legal Adviser	Mr Arthur CHEUNG
Date	21 May 2003

List of cases and publications

Cases represented and tried by Mr Justice Geoffrey MA

- (a) Reported cases represented by Mr Geoffrey Ma SC (from 1999)
- (b) Reported cases of the Hon Mr Justice Ma, JA

Publication of Mr Justice Geoffrey MA

- (c) "Law Lectures for Practitioners 2002" containing the lecture on "Litigation in the Commercial List"

Judgments of Lord Woolf, Lord Scott of Foscote and Sir Ivor Richardson

- (d) A Selection of Judgments of Lord Woolf, Lord Scott of Foscote and Sir Ivor Richardson

Major publications of Lord Woolf

- (e) "Protection of the Public - A New Challenge" (The Hamlyn Lectures in 1990)
- (f) "The Declaratory Judgment" in 1993 with Mr J. Woolf
- (g) 5th edition of "De Smith, Woolf and Jowell : Judicial Review of Administrative Action" in 1995
- (h) The first cumulative supplement to the 5th edition of "De Smith, Woolf and Jowell : Judicial Review of Administrative Action" in 1998

Note : Copies of the above cases, judgments and publications are at present kept in the LegCo Library. The publications listed in (e) - (h) are on loan from the Judiciary Library and will be returned to the Judiciary after 9 July 2003.