

**Legislative Council Panel on
Administration of Justice and Legal Services (“AJLS Panel”)**

Political Affiliation of Judges

Purpose

In response to the request by the AJLS Panel, this paper sets out –

- (a) the different categories of judges in the Judiciary, their duties and responsibilities;
- (b) the applicability of the Guide to Judicial Conduct concerning political affiliation to these judges; and
- (c) the relevant information in some overseas jurisdictions.

Categories of Judges in the Judiciary

2. There are two broad categories of Judges¹ in the Judiciary – (i) full-time Judges and (ii) part-time Judges. The duty of Judges is to exercise civil and criminal jurisdictions as conferred by law.

3. Full-time Judges are on the Judiciary’s establishment and are appointed by the Chief Executive on the recommendation of the Judicial Officers Recommendation Commission (“JORC”).

4. Part-time Judges are not on the Judiciary’s establishment. They sit for only limited periods and are either (i) in full-time practice in the legal profession, or (ii) retired Judges. Further, part-time Judges can be divided into two broad categories -

(a) Recorders of the High Court

5. Recorders of the High Court are appointed by the Chief Executive pursuant to section 6A of the High Court Ordinance (Cap. 4), and on the recommendation of JORC. Pursuant to section 6A(3) of the

¹ The reference to “Judges” includes Judicial Officers.

High Court Ordinance, a recorder shall have and may exercise all the jurisdiction, powers and privileges and shall have and perform all the duties of a judge of the Court of First Instance. Recorders are appointed for a term of 3 years and normally sit for a period of 4 weeks a year and may be re-appointed.

(b) External Deputy Judges at various levels of Court

6. External Deputy Judges are appointed by the Chief Justice pursuant to the relevant statutory provisions, viz. section 10 of the High Court Ordinance (Cap. 4), section 7 of the District Court Ordinance (Cap. 336) and section 5A of the Magistrates Ordinance (Cap. 227). A Deputy Judge appointed pursuant to any of the above-mentioned sections shall have and may exercise all the jurisdiction, powers and privileges and shall have and perform all the duties of a judge of the Court of First Instance, District Court and Magistrates' Court respectively.

Guide to Judicial Conduct Concerning Political Affiliation

7. The Guide to Judicial Conduct providing that a judge should refrain from membership in or association with political organizations applies to full-time Judges.

8. Having regard to the fact that part-time judges are either in the full-time practice in the legal profession or retired Judges, the guidance in the Guide to Judicial Conduct concerning political affiliation does not apply to part-time Judges. They are subject to the "Guideline in relation to part-time Judges and participation in political activities" issued by the Chief Justice on 16 June 2006. A copy of the Guideline is at **Annex A**.

Annex A

Relevant Information in Overseas Jurisdictions

9. The Judiciary's understanding of the relevant information in a number of overseas jurisdictions in relation to judges and participation in political activities is set out in **Annex B**.

Annex B

**Guideline in relation to
part-time Judges and participation
in political activities**

After consultation with the Chief Judge of the High Court, the Chief District Judge and the Chief Magistrate, the Chief Justice has issued the following guideline in relation to part-time Judges¹ and participation in political activities.

1. It is of fundamental importance that judicial independence and impartiality be maintained and be seen to be maintained. This is vital to ensuring public confidence in the Judiciary and the administration of justice.
2. The appropriate standard is whether a reasonable, fair-minded and well-informed member of the community would consider that participation in the political activities in question would be likely to undermine judicial independence or impartiality (“the appropriate standard”). This standard must be applied in the context of the prevailing circumstances of Hong Kong.
3. The following considerations should be borne in mind:
 - (a) Judges, both full-time and part-time, as citizens, enjoy rights and freedoms, including the freedom of association. However, it must be recognised that certain restrictions on those freedoms are required to ensure that judicial independence and impartiality are maintained and seen to be maintained. The extent of such restrictions should be guided by the principle of proportionality.
 - (b) The common law principles as to when a Judge should disqualify himself or herself from sitting in a particular case of course apply to both full-time and part-time Judges. The circumstances include those giving rise to apparent bias. The test is whether the circumstances are such as would lead a reasonable, fair-minded and well-informed observer to conclude that there is a real possibility that the Judge would be biased.
 - (c) Judicial review cases are not listed before part-time Judges.

¹ The reference to “Judges” includes Judicial Officers.

- (d) Part-time Judges sit for only limited periods and are in full-time practice in the legal profession.
4. The Guide to Judicial Conduct in providing that Judges should refrain from membership in or association with political organizations or activities applies to full-time Judges. However, applying the appropriate standard, it is not considered objectionable for a part-time Judge simply to be a member of a political party. But different considerations apply to more active participation by a part-time Judge in political activities. Applying the appropriate standard, such active participation beyond mere membership, depending on its nature and extent, may well not be acceptable.
 5. In particular, the following political activities are considered to be unacceptable for a part-time Judge:
 - (a) Active participation in the activities of a political party. Examples include holding office in the party, membership of its committees, acting as spokesman, participating in fund raising and recruitment of members for the party.
 - (b) Standing as a candidate or nominating or campaigning for candidates (in either case whether the candidature is sponsored by a political party or otherwise) for elections to the District Council, the Legislative Council, the Election Committee constituted under the Chief Executive Election Ordinance and the office of Chief Executive. In this connection, it must be noted that:
 - (i) Voters in the legal functional constituency for the Legislative Council and for the Election Committee include barristers and solicitors who may have appeared and who may appear before part-time Judges.
 - (ii) Part-time Judges may of course exercise such rights as they may have to vote in the elections referred to above.
 6. Part-time Judges as practising barristers and solicitors may of course hold office in and actively participate in the affairs of their professional bodies. They are also entitled to express views and participate in public debate and activities focusing on legal issues, including those relating to the rule of law and the administration of justice.

7. This Guideline is not intended to be comprehensive. It is not practically possible to draw up a comprehensive list of political activities considered acceptable or unacceptable. There are likely to be grey areas which call for the exercise of commonsense judgment having regard to the appropriate standard. Where a part-time Judge or a practitioner considering part-time judicial office wishes to seek guidance as to whether a form of participation in a political activity is considered to be inconsistent with part-time judicial office, he or she should discuss the matter with the relevant Court Leader who will consult the Chief Justice as appropriate.

8. The Judiciary greatly values the contribution of part-time Judges rendered as an important public service. It is also recognized that a part-time Judge or a practitioner considering part-time judicial office may choose to pursue public service in the form of active participation in political activities rather than holding part-time judicial office.

Andrew Li
Chief Justice
16 June 2006

Relevant Information in Overseas Jurisdictions in relation to Judges and Participation in Political Activities

A. England and Wales

1. In relation to full-time judges, the Guide to Judicial Conduct (2004) identifies the principle that a judge's conduct in and out of court should maintain public confidence in the impartiality of the judge and the judiciary; and the requirement to refrain from sitting in cases where a reasonable apprehension of bias may arise. Paragraph 3.3 then provides:

“3.3 A specific application of that principle is that a judge must forego any kind of political activity and on appointment sever all ties with political parties. An appearance of continuing ties such as might occur by attendance at political gatherings, political fundraising events or through contribution to a political party, should be avoided. The need for abstinence also involves not participating in public demonstrations which, by associating the judge with a political viewpoint or cause, may diminish his authority as a judge and create in subsequent cases a perception of bias. Where a close member of a judge's family is politically active, the judge needs to bear in mind the possibility that, in some proceedings, that political activity might raise concerns about the judge's own impartiality and detachment from the political process. “

2. This does not apply to part-time judges (referred to in the Guide as “fee-paid judges”). In relation to them, the Guide provides as follows:

“3.15 As their terms of appointment provide, fee-paid judges are expected to refrain from any activity, political or otherwise, which could conflict with their judicial office or be seen to compromise their impartiality.

3.16 A fee-paid judge has the same general obligation to maintain the status and dignity of the office of judge and to be alert to the possibility that outside activities, including political activities, may create a perception of bias when dealing with particular cases. Judgment is required in striking a balance between maintaining that status and dignity and the reasonable requirements of a legal practice or, in the case of lay fee-paid judges, the reasonable requirements of other employment and activities.

3.17 The fee-paid judge has additional factors to consider when making a decision as to recusal. The ban on party political activity does not apply to that judge who must therefore consider whether the nature and extent of the political activity would create a perception of unfairness in the particular case.....”

B. Australia

3. The Guide to Judicial Conduct (2002) provides in relation to full-time judges as follows:

“3.2 There are some well-established limitations and principles for a judge to consider in relation to extra-judicial activities:

- Although active participation in or membership of a political party before appointment would not of itself justify allegations of judicial bias or an appearance of bias, it is expected that a judge on appointment will sever all ties with political parties. An appearance of continuing ties such as might occur by attendance at political gatherings, political fundraising events or through contribution to a political party, should be avoided. ”

4. The Guide recognizes differences between a full-time judge and a part-time judge. Thus, it provides:

“7.2.4 Appointment as an acting or auxiliary judge

- Many States make provision for a retired judge to return to the court, for temporary or intermittent periods, as an acting judge. A retired judge who sits from time to time as an acting or auxiliary judge should consider carefully the appropriateness of other activities that the retired judge might be undertaking. The exercise of the judicial office on a part-time basis may require the observance of, or at least consideration of, some of the restrictions identified in this publication. Particular care should be exercised in relation to activities undertaken concurrently with part-time judicial work.

7.4 Political activity

- The restraints that prevent a serving judge from having any involvement in politics cease to apply on retirement but, as with commercial activity, the retired judge should consider whether the particular activity undertaken might reflect adversely on the judiciary, because the public might continue to associate the retired judge with that institution.”

C. Canada

5. The Canadian “Ethical Principles for Judges” (2004), prepared “to provide ethical guidance for federally appointed judges” provide as follows:

“D. Political Activity

1. Judges should refrain from conduct such as membership in groups or organizations or participation in public discussion which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in a judge’s impartiality with respect to issues that could come before the courts.
 2. All partisan political activity must cease upon appointment. Judges should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the judge is engaged in political activity.
 3. Judges should refrain from:
 - (a) membership in political parties and political fund raising;
 - (b) attendance at political gatherings and political fund raising events;
 - (c) contributing to political parties or campaigns;
 - (d) taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice;
 - (e) signing petitions to influence a political decision.”
6. These principles do not expressly address the position of part-time judges.
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