

立法會
Legislative Council

LC Paper No. CB(4)642/12-13
(These minutes have been seen
by the Administration)

Ref : CB4/HS/1/12

Subcommittee on Proposed Senior Judicial Appointments

Minutes of meeting
held on Tuesday, 23 April 2013, at 8:30 am
in Conference Room 2A of the Legislative Council Complex

Members present : Hon Dennis KWOK (Chairman)
Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP
Hon Cyd HO Sau-lan
Dr Hon Priscilla LEUNG Mei-fun, JP
Hon Paul TSE Wai-chun, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon Martin LIAO Cheung-kong, JP

Member absent : Hon WONG Yuk-man

Public Officers attending : Item II

The Administration

Ms Kitty CHOI
Director of Administration

Mrs DO PANG Wai-yee
Deputy Director of Administration

Judiciary Administration

Miss Emma LAU, JP
Secretary
Judicial Officers Recommendation Commission

Mrs Angela LO
Assistant Judiciary Administrator (Corporate Services)

Clerk in attendance : Miss Mary SO
Chief Council Secretary (4)2

Staff in attendance : Mr Timothy TSO
Assistant Legal Adviser 2

Ms Cindy CHAN
Senior Council Secretary (4)2

Ms Mandy WAN
Administrative Assistant (4)1

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I. Election of Chairman

Mr James TO, the Member who had the highest precedence in the Council among those who were present at the meeting, presided over the election of the Chairman.

2. Mr James TO invited nominations for the chairmanship of the Subcommittee. Mr Dennis KWOK was nominated by Mr Alan LEONG and the nomination was seconded by Ms Emily LAU. Mr KWOK accepted the nomination. As there was no other nomination, Mr Dennis KWOK was elected Chairman of the Subcommittee.

II. Meeting with the Administration

(LC Paper Nos. CB(2)1894/11-12(01) and CB(2)1544/11-12)

3. The Subcommittee deliberated (index of proceedings attached at **Annex**).

Letter from a member of the public requesting the Subcommittee to hold a public hearing on the appointment of the Honourable Mr Justice Joseph Paul FOK ("Mr Justice FOK") as a Permanent Judge ("PJ") of the Court of Final Appeal ("CFA")

4. The Chairman said that in the discussions of the senior judicial appointments in 2011, the then Subcommittee on Proposed Senior Judicial Appointments had considered the procedure for considering judicial

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appointments. According to paragraph 7 of the minutes of meeting of the Subcommittee held on 21 April 2011, it was mentioned by the then Chairman that "the fundamental principles of separation of powers and judicial independence should be respected in considering judicial appointments and it was vital that the appointment process should not be politicized. The Legislative Council's role was to act as the final gatekeeper not to endorse a judicial appointment which was manifestly contrary to public interest. However, such power should only be exercised in exceptional circumstances".

5. Ms Emily LAU said that she would not insist on inviting judicial appointees to come before the Subcommittee to answer questions from members, before recommending the appointments to the House Committee for endorsement by the Legislative Council ("LegCo"), having regard to the fact that the practice of appointment of senior judges in Hong Kong was different from that of other places such as the United States of America ("US") whereby senior judicial appointments made by the President were referred to the Senate Judiciary Committee which would typically conduct a confirmation hearing for each nominee. Ms LAU was however of the view that the judicial appointment process of Hong Kong should be made more transparent for better public scrutiny. For instance, more information should be disclosed on the considerations which had been given by the Judicial Officers Recommendation Commission ("JORC") for proposing the appointments; and whether the JORC had consulted any outside bodies/individuals on the proposed appointments, and if so, which/who these bodies/individuals were and the views given.

6. Dr Priscilla LEUNG echoed the view that inviting judicial appointees to come before a committee of LegCo to answer questions from Members might not be appropriate, having regard to the fact that the practice of appointing senior judges in Hong Kong was different from that of the US whose judicial nominees could canvass votes for their confirmation by the Senate. Dr LEUNG however agreed that there was room to improve the transparency of senior judicial appointments by, say, making the criteria for appointment clearer.

7. Mr Paul TSE said that he did not see the justification for inviting Mr Justice FOK to come before the Subcommittee to answer questions from members, unless there was reasonable ground to believe that Mr Justice FOK was not an appropriate candidate for appointment.

8. Mr Martin LIAO said that he had strong reservation about deviating from the established practice of senior judicial appointments. Mr LIAO shared the view that the judicial appointment process of Hong Kong should be made more transparent for better public scrutiny.

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9. Mr James TO said that as the letter from a member of the public requesting the Subcommittee to hold a public hearing on the appointment of Mr Justice FOK as a PJ of the CFA did not provide any information or explanation on which the Subcommittee could base to decide whether or not to hold a hearing, he would not consider holding such a hearing at this stage. Mr TO further said that as the meetings of the Subcommittee were open to the public, members of the public could monitor whether the proposed senior judicial appointments were appropriate or otherwise.

10. Mr LEUNG Kwok-hung said that he supported making the judicial appointment process more transparent by inviting the appointees to come before a committee of LegCo to answer questions from members. Mr LEUNG however agreed that the appointment process of judges should not be politicized as it would violate the fundamental principle of separation of powers.

Appointment of PJ of the CFA

11. Mr Martin LIAO expressed support for the appointment of Mr Justice FOK as PJ of the CFA.

12. In view of the fact that Mr Justice FOK was only appointed Justice of Appeal ("JA") of the Court of Appeal of the High Court ("HC") on 1 February 2011, Mr James TO and Mr Paul TSE enquired about the criteria adopted by the JORC for recommending Mr Justice FOK as PJ of the CFA.

13. Judiciary Administrator ("JA") advised that the JORC made recommendations on judicial appointments in accordance with Article 92 of the Basic Law which stipulated that judges of the Hong Kong Special Administrative Region must be chosen on the basis of their judicial and professional qualities. Deliberations of the JORC were strictly confidential and it would not be appropriate to disclose further details. A summary of the JORC's deliberations on the appointment of judges to the CFA was set out in Annexes D to F to the letter dated 8 April 2013 from the Director of Administration ("D of Admin") to the Chairman of the House Committee of LegCo and copied to all other LegCo Members.

14. Mr James TO requested JA to provide information on the number and type of cases heard as well as the judgements made by Mr Justice FOK during his tenure as a Recorder of the Court of First Instance ("CFI") of the HC, a Judge of the CFI of the HC and a Justice of Appeal of the Court of Appeal of the HC respectively. JA agreed. JA further said that all judgements by judges of the District Court and above were uploaded onto the website of the Judiciary.

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15. In response to Mr James TO's enquiry as to whether the information he requested in paragraph 14 above had been provided to the JORC, JA said that all information which would help the JORC to consider the appointments to the CFA had been provided to the JORC.

16. Ms Emily LAU requested JA to also provide information on the length of judicial experience as well as age of the judges appointed as PJs of the CFA since 1997. JA agreed.

Appointment of non-permanent judges from other common law jurisdictions ("CLNPJs") of the CFA

17. Whilst noting that the Honourable James SPIGELMAN ("Mr SPIGELMAN") and the Honourable William GUMMOW ("Mr GUMMOW") recommended by the JORC as CLNPJs of the CFA were judges of considerable eminent standing and reputation, Mr Martin LIAO asked whether the JORC had taken into consideration of the fact that Mr SPIGELMAN and Mr GUMMOW were aged 67 and 70 respectively.

18. JA responded that there was no retirement age for CLNPJs of the CFA under the Court of Final Appeal Ordinance (Cap. 484). The JORC was fully aware of the age of Mr SPIGELMAN and Mr GUMMOW. JA further said that the reason why many CLNPJs of the CFA were persons of advanced age was because CLNPJs of the CFA were from such common law jurisdictions as the United Kingdom ("UK"), Australia and New Zealand ("NZ") and judges from Australia and NZ were allowed to take up judicial posts in other jurisdictions after they had retired.

19. Mr Paul TSE said that judges from the UK were generally more conservative than those from Australia. Mr TSE hoped that CLNPJs of the CFA comprised a balanced mix of judges of conservative and liberal beliefs, having regard to the fact that both Mr SPIGELMAN and Mr GUMMOW were Australian.

20. JA said that CLNPJs of the CFA were judges from the UK, Australia and NZ. Information on the respective jurisdictions of judges currently serving as CLNPJs of the CFA would be provided to members after the meeting.

21. Dr Priscilla LEUNG expressed concern that as CLNPJs of the CFA did not ordinarily reside in Hong Kong, their consideration of cases might be compromised due to their lack of understanding of the local context.

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22. JA responded that there was no cause for such concern as the CFA, being the final appellate court in Hong Kong, dealt with points of law. Sufficient information would be provided to CLNPIs to help them understand relevant facts and the actual situation in Hong Kong where necessary.

Mechanism for handling complaints against judges

23. Dr Priscilla LEUNG said that she had from time to time received complaints from members of the public who were aggrieved by the decisions of the Judiciary concerning their complaints against judicial conduct. Dr LEUNG urged the Judiciary to review its existing mechanism for handling complaints against judges.

24. JA responded that all complaints against judicial conduct were handled by the CJ and/or the relevant Court Leaders as appropriate, and the mechanism was made known to the public on the website of the Judiciary and in the information leaflets placed at all Judiciary premises for public collection. If the complaints were against judicial decisions made by judges, the complainants would be advised to pursue his case by appeal through the existing legal procedures.

Membership of the Secretary for Justice ("SJ") in the JORC

25. The Chairman questioned the appropriateness of SJ, being one of the Principal Officials under the Political Appointment System, to be a member of the JORC.

26. D of Admin responded that the Administration considered it appropriate and necessary for SJ to serve on the JORC. Such a view was also shared by the Judiciary. D of Admin further said that the membership of SJ in the JORC had been previously discussed by the Panel on Administration of Justice and Legal Services ("the Panel"). D of Admin reiterated the Administration's position that the membership of SJ in the JORC would not undermine the independence of the JORC. The Administration considered it appropriate for SJ to be involved, as one of the nine members of the JORC, in judicial appointments. SJ was the guardian of public interest in the administration of justice and upholder of the rule of law. SJ, being the principal adviser on legal matters to the Chief Executive and the head of the Department of Justice, a major user of the court, was in a unique position and had considerable knowledge to contribute to the JORC's deliberations in respect of judicial appointments. Justifications for SJ to serve on the JORC were spelt out in the Administration's paper for the Panel meeting held on 28 February 2011 [LC Paper No. CB(2)1129/10-11(02)] and summarized in paragraph 17 of the background brief for the Subcommittee prepared by the LegCo Secretariat [LC Paper No. CB(4)590/12-13(01)].

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Way forward

27. The Chairman suggested and members agreed that subject to the Judiciary's responses to issues mentioned in paragraphs 14, 16 and 20 above, a further meeting might be held.

28. There being no other business, the meeting ended at 9:55 am.

Council Business Division 4
Legislative Council Secretariat
10 May 2013

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**Proceedings of meeting of the
Subcommittee on Proposed Senior Judicial Appointments
held on Tuesday, 23 April 2013, at 8:30 am
in Conference Room 2A of the Legislative Council Complex**

Time marker	Speaker(s)	Subject(s)	Action Required
000500 - 000630	Mr James TO Mr Alan LEONG Mr Dennis KWOK Ms Emily LAU	Election of Chairman.	
000631 – 002700	Chairman Ms Emily LAU Dr Priscilla LEUNG Mr Paul TSE Mr Martin LIAO Mr James TO Mr LEUNG Kwok-hung Legal Adviser	<p>The Chairman drew members' attention to the letter from a member of the public tabled at the meeting requesting the Subcommittee to hold a public hearing on the appointment of the Honourable Mr Justice Joseph Paul FOK as a Permanent Judge ("PJ") of the Court of Final Appeal ("CFA").</p> <p>Ms Emily LAU and Dr Priscilla LEUNG pointed out that the practice of appointment of senior judges in Hong Kong was different from that of other places such as the United States of America whereby senior judicial appointments made by the President were referred to the Senate Judiciary Committee which would typically conduct a confirmation hearing for each nominee. However, they were of the view that there was room to improve the transparency of senior judicial appointments for better public scrutiny. For instance, more information should be disclosed on the considerations which had been given by the Judicial Officers Recommendation Commission ("JORC") for proposing the appointments; and whether the JORC had consulted any outside bodies/individuals on the proposed appointments, and if so, which/who these bodies/individuals were and the views given. Mr Paul TSE and Mr Martin LIAO shared similar views.</p> <p>The Chairman opined that the appointment process of judges should not be politicized as it would violate the fundamental principle of separation of powers. Mr LEUNG Kwok-hung and Mr James TO shared the same view.</p>	

Time marker	Speaker(s)	Subject(s)	Action Required
		<p>Mr LEUNG Kwok-hung however supported making the judicial appointment process more transparency by inviting the appointees to come before a committee of Legislative Council ("LegCo") to answer questions from members.</p> <p>At the request of the Chairman, the legal adviser to the Subcommittee drew members' attention to the established procedure for LegCo's endorsement of appointment of judges of the CFA agreed by the House Committee.</p> <p>The Chairman concluded that there was no need to hold a public hearing on the proposed senior judicial appointments.</p>	
002701 - 003718	<p>Chairman Director of Administration ("D of Admin") Mr Martin LIAO Mr James TO Mr Paul TSE Judiciary Administrator ("JA") Ms Emily LAU</p>	<p>Briefing by the Administration on the proposed senior judicial appointments.</p> <p>Mr Martin LIAO expressed support for the recommendations of the JORC.</p> <p>Mr James TO and Mr Paul TSE sought elaboration about the criteria adopted by the JORC for recommending the nominee of the PJ of the CFA.</p> <p>JA advised that the JORC made recommendations on judicial appointments in accordance with Article 92 of the Basic Law which stipulated that judges of the Hong Kong Special Administrative Region must be chosen on the basis of their judicial and professional qualities. Deliberations of the JORC were strictly confidential and it would not be appropriate to disclose further details.</p> <p>At the request of Mr James TO, JA agreed to provide information on the number and type of cases heard as well as the judgements made by Mr Justice FOK during his tenure as a Recorder of the Court of First Instance ("CFI") of the High Court ("HC"), a Judge of the CFI of the HC and a Justice of Appeal of the Court of Appeal of the HC respectively.</p>	<p>JA to provide supplementary information (para 14 of the minutes refers)</p>

Time marker	Speaker(s)	Subject(s)	Action Required
		<p>Ms Emily LAU requested JA to also provide information on the length of judicial experience as well as age of the judges appointed as PJs of the CFA since 1997.</p>	<p>JA to provide supplementary information (para 16 of the minutes refers)</p>
<p>003719 - 011429</p>	<p>Mr Martin LIAO JA Mr Paul TSE Dr Priscilla LEUNG Mr LEUNG Kwok-hung</p>	<p>Mr Martin LIAO expressed concern about the arrangements of appointing persons of advanced age as non-permanent judges from other common law jurisdictions ("CLNPIs") of the CFA.</p> <p>JA explained that the reason why many CLNPIs of the CFA were persons of advanced age was because CLNPIs of the CFA were from such common law jurisdictions as the United Kingdom ("UK"), Australia and New Zealand ("NZ") and judges from Australia and NZ were allowed to take up judicial posts in other jurisdictions after they had retired.</p> <p>Mr Paul TSE said that judges from the UK were generally more conservative than those from Australia. Mr TSE hoped that CLNPIs of the CFA comprised a balanced mix of judges of conservative and liberal beliefs.</p> <p>At the request of Mr Paul TSE, JA agreed to provide information on the respective jurisdictions of judges currently serving as CLNPIs of the CFA after the meeting.</p> <p>Dr Priscilla LEUNG expressed concern that as CLNPIs of the CFA did not ordinarily reside in Hong Kong, their consideration of cases might be compromised due to their lack of understanding of the local context.</p> <p>JA responded that there was no cause for such concern as the CFA, being the final appellate court in Hong Kong, dealt with points of law. Sufficient information would be provided to CLNPIs to help them understand relevant facts and the actual situation in Hong Kong where necessary.</p> <p>Mr LEUNG Kwok-hung reiterated the view that the transparency of senior judicial</p>	<p>JA to provide supplementary information (para 20 of the minutes refers)</p>

Time marker	Speaker(s)	Subject(s)	Action Required
		appointments should be further enhanced for better public scrutiny.	
011430 - 011805	Dr Priscilla LEUNG JA	<p>Dr Priscilla LEUNG said that she had from time to time received complaints from members of the public who were aggrieved by the decisions of the Judiciary concerning their complaints against judicial conduct.</p> <p>JA responded that all complaints against judicial conduct were handled by the Chief Justice and/or the relevant Court Leaders as appropriate, and the mechanism was made known to the public on the website of the Judiciary and in the information leaflets placed at all Judiciary premises for public collection. JA further said that if the complaints were against judicial decisions made by judges, the complainants would be advised to pursue his case by appeal through the existing legal procedures.</p>	
011806 - 012140	Chairman D of Admin	<p>The Chairman questioned the appropriateness of the Secretary for Justice ("SJ"), being one of the Principal Officials under the Political Appointment System, to be a member of the JORC.</p> <p>D of Admin responded that the membership of SJ in the JORC had been previously discussed by the Panel on Administration of Justice and Legal Services ("the Panel"). Justifications for SJ to serve on the JORC were spelt out in the Administration's paper for the Panel meeting held on 28 February 2011 and summarized in paragraph 17 of the background brief for the Subcommittee prepared by the LegCo Secretariat.</p>	
012141 - 012510	Chairman Mr Martin LIAO	The Chairman suggested and members agreed that subject to the Judiciary's responses to issues mentioned in paragraphs 14, 16 and 20 of the minutes of meeting, a further meeting might be held.	