## 立法會司法及法律事務委員會文件

## 立法會 CB(2)2302/99-00(01)號文件

# <u>背景</u>

- 1. 二零零零年六月五日,立法會司法及法律事務委員會("事務委員會")秘書 致函司法人員推薦委員會("推薦委員會")要求提供資料("事務委員會函件")。
- 2. 二零零零年六月十日,推薦委員會秘書遵照終審法院首席法官(即推薦委員會主席)的指示作出回覆,表示在不抵觸推薦委員會保密運作的原則下,樂意向事務委員會提供有關推薦委員會就委任終審法院法官一事的一般運作資料,而有關資料並不涉及個別司法人員的任命。

# 委任終審法院法官憲法上安排

3. 《基本法》及《香港終審法院條例》(第484章)規定了以下四個步驟:

(a) 步驟一: 司法人員推薦委員會作出<u>推薦</u>;

(b) 步驟二: 行政長官按推薦委員會的推薦作出任命;

(c) 步驟三: 行政長官就所作任命徵得立法會同意;

(d) 步驟四: 行政長官就所作任命報全國人民代表常委會"備

案"。

4. 《基本法》(見附頁 A 之摘錄)及《香港終審法院條例》(見附頁 B 之摘錄)中有關該等步驟的詳盡條文如下:

(a) 步驟一: 根據《司法人員推薦委員會條例》,推薦委員會的職

能是向行政長官作出推薦,而行政長官則按《基本

法》第88條,根據推薦委員會所作推薦委任法官(見

附頁 A);

(b) 步驟二: 按照《基本法》第88條,以及《香港終審法院條例》 第7、8及9條,終審法院的常任法官及非常任法官 ("統稱終審法院法官"),根據獨立的推薦委員會 推薦(見附頁A及B),由行政長官委任;

(c) 步驟三: 按照《基本法》第 90 條,以及《香港終審法院條例》 第 7A 條,終審法院法官的任命,須由行政長官徵得 立法會同意(見附頁 A 及 B);及

(d) 步驟四: 按照《基本法》第 90 條,以及《香港終審法院條例》 第 7A 條,終審法院法官的任命,須由行政長官報中 華人民共和國全國人民代表大會常委會(見附頁 A 及 B)。

- 5. 由此可見,對於此等高層司法人員任命,憲法上有以下安排:
  - (a) 推薦委員會僅向行政長官一人<u>推薦</u>,並由行政長官按推薦作出任 命。推薦委員會的聯繫介面僅爲行政長官;
  - (b) 行政長官須就所作<u>任命</u>(而非推薦委員會所作推薦)徵得立法會同意。立法會的聯繫介面僅爲行政長官;及
  - (c) 考慮到(a)及(b)段,就此等須徵得立法會同意的司法人員任命而言,立法會在憲法上與推薦委員會並無聯繫介面。
- 6. 此等司法人員任命的憲法上安排,尤指立法會與推薦委員會之間並無聯系介面而言,其根本邏輯依據在於保障司法獨立。司法獨立不但對法治至爲重要,且可避免有令致司法人員任命政治化之虞,因爲使其政治化會嚴重削弱司法獨立。

- 7. 此外,《司法人員推薦委員會條例》第 11 條禁止任何推薦委員會或其他人士,<u>未經行政長官許可</u>,披露其在根據該條例履行職務的過程中,所知悉的任何資料。如有披露,則須負刑責。
- 8. 鑑於以上所述,本文件只提供推薦委員會就委任終審法院法官一事的一般運作資料,而有關資料並不涉及個別司法人員的任命。

# 終審法院法官所須具備的資格

9. 終審法院法官的法律專業資格載於《香港終審法院條例》第 12 條,詳情如下:

# (a) 常任法官

第 12(1)條規定:任何以下人士均有資格獲委任爲常任法官 — (a)高等法院首席法官、上訴法庭法官或原訟法庭法官;或(b)在香港以大律師或律師身分執業最少十年的大律師。

### (b) 非常任香港法官

第 12(3)條規定:任何以下人士均有資格獲委任爲非常任香港法官,不論他是否通常居住於香港 — (a)已退休的高等法院首席法官;(b)已退休的終審法院首席法官;(c)已退休的終審法院常任法官;(d)現職或已退休的上訴法庭法官;或(e)在香港以大律師或律師身分執業最少十年的大律師。

# (c) 其他普通法適用地區非常任法官

第 12(4)條規定:任何符合以下條件的人士均有資格獲委任爲其他普通法 適用地區法官 — (a)屬其他普通法適用地區的民事或刑事司法管轄 權不設限的法院的現職或已退休法官者;(b)他通常居住於香港以外地方;及(c)他從未在香港擔任過高等法院法官、區域法院法官或常任裁判官。

10. 應予注意的是:《香港終審法院條例》第 13 條載有法定禁令,禁止終審 法院法官(不論是常任法官或是非常任法官)在任期之內或在任期屆滿之後以大律師 或律師身分在香港執業。

## 司法人員推薦委員會有關委任終審法院法官的一般運作

- 11. 《司法人員推薦委員會條例》(第92章)第3條規定,司法人員推薦委員會由九名委員組成:
  - (a) 法官3名(包括出任當然主席的終審法院首席法官);
  - (b) 律師 3 名(包括出任當然委員的律政司司長和大律師及律師各 1 名,就兩人的委任,須向有關專業團體作出諮詢);及
  - (c) 與法律執業無關的人士 3 名。

- 12. 推薦委員會受託負責就塡補司法職位空缺的事宜,向行政長官作出推薦 (見《司法人員推薦委員會條例》第 6(a)條)。
- 13. 委員會會議的法定人數爲七名,即必須有主席及不少於六名其他委員出席會議方可(見《司法人員推薦委員會條例》第 3(3)條)。
- 14. 有關終審法院法官的委任,《司法人員推薦委員會條例》規定:
  - (a) 任何被視爲或可合理地視爲塡補有關常任法官或非常任法官空缺的候選 人的委員,須披露假若獲選,他是否願意接受委任,而該項披露須記錄 於會議記錄內。第 3(5B)條;及
  - (b) 任何披露願意接受委任的委員(a)不得參與委員會就該委任所作的任何 商議,亦不得就有關的任何問題表決;及(b)須被視為不能執行委員職 務。第 3(5C)條。

- 15. 通常,在考慮委任終審法院法官時,推薦委員會秘書在徵詢主席意見後, 便向推薦委員會提交具備資格人士的名單。任何委員均可提名其他人士作候選人。
- 16. 就委任終審法院法官而言,推薦委員會及基於《基本法》第92條的選拔 準則選任具備資格人士。該條規定,應根據候選人的司法和專業才能選用法官。
- 17. 就委任終審法院非常任法官而言,推薦委員會亦考慮下列事項:
  - (a) 法律上,非常任法官的總人數不得超逾 30 名(《香港終審法院條例》第 10 條);及
  - (b) 需要足夠數目的非常任香港法官及非常任普通法法官,以便更靈活地處理終審法院的聆訊工作。

- 18. 倘若在推薦委員會會議中有多於2票表決反對,則決議即屬無效。《司法 人員推薦委員會條例》規定,在委員會會議中,以下決議即屬有效 —
  - (a) 凡有7名委員出席時,最少有5票表決贊成;
  - (b) 凡有 8 名委員出席時,最少有 6 票表決贊成;及
  - (c) 凡有 9 名委員出席時,最少有 7 票表決贊成。
- 19. 就終審法院法官的任命,推薦委員會將有效決議知會行政長官,並邀請 行政長官按《基本法》及《香港終審法院條例》接納推薦。同時,推薦委員會亦會告 知行政長官每次委任程序所採取的詳細步驟,以便行政長官能信納有關司法人員任命 的建議是符合有關規定。

司法人員推薦委員會秘書

二零零零年六月

Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.

#### Article 88

Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.

#### Article 89

A judge of a court of the Hong Kong Special Administrative Region may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges.

The Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region may be investigated only for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in this Law.

### Article 90

The Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country.

In the case of the appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region, the Chief Executive shall, in addition to following the procedures prescribed in Articles 88 and 89 of this Law,

obtain the endorsement of the Legislative Council and report such appointment or removal to the Standing Committee of the National People's Congress for the record.

### Article 91

The Hong Kong Special Administrative Region shall maintain the previous system of appointment and removal of members of the judiciary other than judges.

### Article 92

Judges and other members of the judiciary of the Hong Kong Special Administrative Region shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions.

### Article 93

Judges and other members of the judiciary serving in Hong Kong before the establishment of the Hong Kong Special Administrative Region may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.

The Government of the Hong Kong Special Administrative Region shall pay to judges and other members of the judiciary who retire or leave the service in compliance with regulations, including those who have retired or left the service before the establishment of the Hong Kong Special Administrative Region, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, irrespective of their nationality or place of residence.

#### Article 94

On the basis of the system previously operating in Hong Kong, the Government of the Hong Kong Special Administrative Region may make provisions for local lawyers and lawyers from outside Hong Kong to work and practise in the Region.

1. g Kong Court of Final Appeal CAP. 484

Annex B

A B

JUDICIARY

(2) 有席法介述问法俱播之件,负负司法假播的行政管理及执行其他合法地不時 **美子他的战能。** 

(Ba) F列上析法程法育或係訟法庭法官, 一經從委任為自席法官, 即終止所任上 院法院接有威原松法庭法有的戰位· (由 1997 年第 120 晚第 5 條條何) (山 1997 年始 120 健婚 4 終修訂)

### \* 排任法食的委任

(1) 好新法院准任法有组由行政段百批即用法人員推购委員會的推勘委任。

(2) 如你何番目法有的赚拉因蘸塞托法有去用或其他原因而出缺,以致奢任法官 的人做被毫不是1名。則行政長官组很擁可法人員推薦委員會的推薦。在核職位出峽 後, 在在理可能的範圍內面快委任务。名為托法育用商政空缺。

(3) 任何主新法庭法官或原稿法庭法官。 经报委任為准任法官。即终止执任上 新法庭法有或保权法庭法官的联位。 (由 1997 年第 120 班第 6 林鲜相)

山山1997年第120號第4條條刊)

#### 7人,同意抗害法院法官的委任或免赎

(1) | j改良介纸---

(a) 就依據第6、7、8及9條委任的終濟法院法官、非常任法育和共1 通法通用地抵法官的委任政免職徵用立法會同意;及

(b) 消歧等委任或免缴按查继持罪(基本法)第九十條限中華人民共和國多 人民代表人會常務委員會備案。

[2] 私本條而真,"立法食" (Legislative Council) 指立法合。旧在臨時立法負 辅助内国指数略立法介。

756 1997 年第 120 號第7 條州1

(2) The Chief Justice shall be the head of the Judiciary and shall be charged with the administration of the Indiciary and such other functions as may from time to time be lawfully conferred on him. (3) A Justice of Appeal or a judge of the Court of First Justance

appointed as Chief Justice shall cease to be a Justice of Appeal or a Judge of the Court of First Instance. (Amended 120 of 1997 s. 5)

## 7. Appointment of permanent holges

(1) The permanent judges of the Court shall be appointed by the Chief Executive acting in accordance with the recommendation of the Judicial Officers Recommendation Commission.

(2) If the office of any permanent judge becomes vacant, by death or otherwise and the number of permanent judges is thereby reduced to less than 3. the Chief Executive acting in accordance with the recommendation of the Indicial Officers Recommendation Commission shall as soon as tensonably possible after the office becomes vacant appoint another permanent judge tolill the vacancy.

(3) A Justice of Appeal or a judge of the Court of First Instance appointed as a permanent judge shall cease to be a Justice of Appeal or a judge of the Court of First Instance. (Amended 120 of 1997 s. 6)

(Amended 120 of 1997 s. 4)

. JA. Endorsement of Appointment or Removal of Judges of the Court

(1) The Chief Executive shall---

\*(a) obtain the endorsement of the Legislative Council for the appointment or removal of judges of the Court, the nonpermanent judges and judges from other common law jurisdictions appointed pursuant to sections 6, 7, 8 and 9; and

(b) report the appointment or removal to the Standing Committee of the National People's Congress of the People's Republic of China in accordance with Arlicle 90 of the Music Law of the Region for the record.

(2) For the purpose of this section, "Legislative Council" ( it is ft) means the Legislative Council but during the existence of the Provisional Legislative Council means the Provisional Legislative Council.

(Added 120 of 1997 s. 7)

For endorsement of the Legislative Council, please see...

(a) section 4 and Schedule 2 of the Hong Kong Remification Ordinance; and

(b) L.N. 197 of 1997; and L.N. 2 of 1998 (as rectified by L.N. 117 of 1998)

<sup>·</sup> 納於立法自的問題·胡多園---

fal 新推图制作列第4件从图状2:从

<sup>[6] 1997</sup>年第 397 就法律公告:及 1998年第 2 號法律公告 (經 1998年 年 117 號法律公告 9 EI.

(1) 現极…個為"非常任香港法行名罪"的名單。

(2) 被名單組由獲付政長官根據同法人員推薦委員會的推薦委任為非常任香港法 有的法有所構成·

(山 1997 年第 120 戦第 4 蘇條用)

### 1\_9. 其他曾過法適用地區法官名單

(1) 現設一個為"其他井通法適用地區法官名單"的名單。

(2) 政名單須山獲行政異官根據司法人員推薦委員會的推薦委任為其他普通法適 用他风法育的法育所構成。

(山1997年第120 號第4條條制)

### 10. 非常任法官人數的限制

婚托非常任法官職位的人士的總人數·無倫在任何時候均不得超過 30 名。 (山 1997 年賴 120 號第 4 餘條前)

### 11. 法官的排名次序

**络畜法院法育、非常任香他法育及其他普通法通用地匯法官的排名组按以下次** 

- (a) 肖席族官:
- (b) 常任法官、而他們之間的排名須按他們獲委任鹼職的目別先後決定;
- (c) 非常任香港法官。何他們之間的排名狠接他們雙委列入非常任香港法官 **名邓的目期先後决定;及**
- (d) 其他代缅法迪用地概法官,而他们之间的排名组按他们摸委列人其他代 通法通用地概法有名罪的日期先後快定。

(山 1997 年第 120 號前 4 旅修訂)

8. List of non-permanent Hong Kong Indges

(1) There shall be a list to be known as the list of non-permanent Hom Kong judges.

(2) The list shall consist of Judges appointed by the Chief Executive acting in accordance with the recommendation of the Judicial Officer acting in accordance with the recommendation of the desired acting in accommendation Commission, as non-permanent Hong Kong Judges.

[Amended 120 of 1997 s. 4]

## 9. List of hulges from other common law jurisdictions

(1) There shall be a fist to be known as the list of judges from other

common law jurisdictions. (2) The list shall consist of judges appointed by the Chief Executive (2) The list shall consist of judges appointed by the Chief Doffice acting in accordance with the recommendation of the Judicial Office Recommendation Commission, as Judges from other common la Recommendation Commission, as judges from other common la jurisdictions. (Amended 120 of 1997 s. 4 &

### 10. Limit on number of non-permanent judges

The total number of persons holding office as non-permanent judges sha not at any one time exceed 30.

### 11. Precedence of judges

The judges of the Court, the non-permanent Hong Kong judges and II judges from other common law jurisdictions shall lake precedence in the following order ---

- (a) the Chief Instice:
- (b) the permanent judges who amongst themselves shall rat according to the priority of their respective appointments;

a

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- (c) the non-permanent Hong Kong judges who amongst themselv shall rank according to the priority of their respecti & appointments to the list of non-permanent Hong Kong Judge & and
- (d) the judges from other common law jurisdictions who among themselves shall rank according to the priority of their respects." appointments to the list of Judges from other common & & iurisdictions.