

Secret Appointments: Hong Kong's Experience in Selecting Judges

di Julius Yam

1. Introduction

Following the constitutional reforms proposed by the Netanyahu regime, Moshe Cohen-Eliya and Iddo Porat's essay, *A New Deal to the Israeli Judicial System*, suggests ways of reforming the Israeli judicial appointment system and the court's constitutional interpretative approach.¹ The authors aim to depoliticize the Israeli judiciary and regulate the political control around judicial appointment.

One proposal they make is to shift judicial appointment power from the Judicial Selection Committee to the Knesset. Under this plan, judicial candidates nominated by a selection committee must receive at least two-thirds of the legislative votes in order to become judges. The authors also recommend that deliberations within the nomination committee remain confidential.²

These suggestions resemble Hong Kong's existing judicial appointment system, in which the political branches of government control judicial appointments, but judicial candidates are recommended by a commission whose deliberations are kept secret. By recounting Hong Kong's experiences in this regard, this short commentary sheds light on the possible effects of the authors' proposal and the conditions under which it might be effective in improving a judiciary's legitimacy.

2. Appointing Judges in Hong Kong

There are two bodies involved in Hong Kong's judicial appointment process: the Chief Executive, who is the head of the executive, and the Judicial Officers Recommendation Commission ("JORC"). The latter is a nine-member commission consisting of the Chief Justice; the Secretary of Justice, who is the chief legal advisor to the executive branch; two judges; one representative from each branch of the legal profession, solicitors and the Bar; and three persons unconnected to the practice of law.³ The Chief Justice and the Secretary of Justice are *ex-officio* members of the JORC, while the other seven members are appointed by the Chief Executive. Apex court (i.e. the Court of Final Appeal) judges and the Chief Justice

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¹ M. Cohen-Eliya-I. Porat, *A New Deal to the Israeli Judicial System* (2023) *DPCE Online*.

² *Ibid* 6, 8.

³ Judicial Officers Recommendation Commission Ordinance (Cap. 92), section 3(1).

of the High Court, which comprises the Court of First Instance and the Court of Appeal, also have to go through the Legislative Council, the Hong Kong government's legislative branch.

To become a judge in Hong Kong, a candidate must be first recommended by the JORC.⁴ The Chief Executive then decides whether to appoint the candidate recommended by the JORC. Senior judges, namely those who will sit on the Court of Final Appeal or sit as the Chief Judge of the High Court, must also be “endorsed” by the legislature before being appointed by the Chief Executive.⁵ While the Basic Law – Hong Kong's *de facto* constitution – and other legislation do not define what endorsement means, it is generally accepted that the endorsement power of the legislature is substantive, as opposed to merely symbolic,⁶ and that the candidate must receive a majority vote. Throughout Hong Kong's post-handover history, the recommendations made by the JORC have never been openly rejected by the political branches. As a matter of convention, the political branches accept the recommendations of the JORC.⁷

3. Secrecy and Trust

From 1997 to 2019, the Hong Kong judiciary was well regarded both locally and internationally,⁸ and public confidence in the rule of law and the judiciary was generally high. This was partly due to judges' professional – and occasionally strategic – approach to deciding cases,⁹ and partly to Hong Kong's judicial appointment procedures.

As discussed previously, the JORC possesses significant agenda-setting power over the judicial appointment system, as it recommends candidates to the political branches of government. An important aspect of the JORC, though, is that discussions among its members are strictly confidential. Unauthorized

⁴ According to Article 92 of the Basic Law of the Hong Kong Special Administrative Region, judges must be selected based on their “judicial and professional qualities”. Little is known about the selection criteria *actually* adopted by the JORC, however, although a report provided to lawmakers when searching for the next chief justice in 2010 offers some insights. The report suggested that the JORC, when making its recommendation, would look at whether the candidate is “a person of high integrity” and an “outstanding lawyer” with “proven leadership and administrative abilities”, as well as consult different sectors in Hong Kong society. A. Wong, *Three candidates on chief justice shortlist said ‘no thanks’*, *South China Morning Post* (10 April 2010).

⁵ Basic Law of the Hong Kong Special Administrative Region, Article 73(7).

⁶ A. Leung, F. Fung, J. Ng, *Panel head plays down Legco role in selecting next chief justice*, *South China Morning Post* (5 September 2009).

⁷ In 2014, Former Chief Justice Geoffrey Ma commented that the Chief Executive had never declined the JORC's recommendations. ‘Hong Kong official vows to defend judicial freedom’ *BBC* (14 January 2014). Court of Final Appeal appointments are generally passed unanimously by the legislature, except for one instance in 2018. Even then, the motion passed with sixty out of sixty-two votes. K. Chung, *Baroness Hale and Beverly McLachlin become first female judges to join Hong Kong's Court of Final Appeal despite ‘national interest’ concerns*, *South China Morning Post* (30 May 2018).

⁸ J. Yam, *Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts* (2021) 46 *Law & Social Inquiry* 153, 160-1.

⁹ See generally *ibid.*

disclosure of their deliberation is a criminal offense.¹⁰ The confidentiality rule is taken very seriously in Hong Kong. To the best of the author's knowledge, the JORC's internal deliberations have never been leaked.

This secrecy is not without its critics. In the early years after Hong Kong's handover, there were some calls for greater transparency over how the JORC operated.¹¹ However, these went unanswered, and society generally accepted how judges were appointed, at least up until the 2019 protests and the enactment of the National Security Law ("NSL").¹²

I argue that the reason why judicial appointments never attracted significant public attention pre-2019 is because of the secrecy surrounding the JORC and because the public trusted the judiciary. As mentioned, the rule of law was widely *believed* to be strong during this time. The makeup of the JORC rarely raised objections,¹³ as it seemed to consist of a healthy mix of individuals of different professional backgrounds. There were *no good reasons* to question how judges were appointed during this period, since judges and the JORC were seen as doing their jobs properly. The secrecy of the appointment system only *reinforced* the social legitimacy of the courts, as it eliminated opportunities for unnecessary distraction which may have caused public embarrassment.

4. Secrecy and Distrust

The Hong Kong judiciary's reputation suffered a major blow from 2019 onwards.¹⁴ Judges' handling of cases arising from the 2019 Hong Kong protest and their application of the NSL polarized public opinion. Their decisions were criticized by the pro-establishment camp as too lenient,¹⁵ and by others as too harsh.¹⁶ Unsurprisingly, the question of how judges should be appointed has been thrown into the limelight.

In 2020, the NSL laid down a new rule for selecting judges who handle national security cases. The NSL provides that the Chief Executive has the sole power to "designate" certain judges "to handle cases concerning offence endangering national security".¹⁷ Designated judges, who are appointed for a year

¹⁰ It is also an offence to influence or attempt to influence the JORC's decision. See Judicial Officers Recommendation Commission Ordinance (Cap. 92), sections 11 and 12.

¹¹ Panel on Administration of Justice and Legal Services, *Report on Process of Appointment of Judges* (September 2002).

¹² Search results from Factiva show that the vast majority of Hong Kong news reports which mention the term "Judicial Officers Recommendation Commission" were published in 2019 and after.

¹³ It is worth mentioning, however, that the bar had objected to the membership of the Secretary of Justice in the JORC. See Hong Kong Bar Association, *Supplemental Response of the Bar Council of the HK Bar Association to the Consultation Paper on Process of Appointment of Judges* (31 May 2002).

¹⁴ Yam (n 8) 181-2.

¹⁵ See e.g. C. Lau, *Hong Kong's judiciary under fire over alleged leniency in protest cases: will a sentencing council redress claims of bias and lead to tougher penalties?*, *South China Morning Post* (25 September 2020).

¹⁶ See e.g. J. Pang, G. Torode, *Hong Kong judge defends judiciary amid fears of ebbing independence*, *Reuters* (16 January 2023).

¹⁷ The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, Article 44.

and subjected to renewal,¹⁸ must be chosen from existing judges. A designated judge may be removed if he or she “makes any statement or behaves in any manner endangering national security during the term of office”.¹⁹ The JORC has no authority over which judge is to be designated though. Critics argue that this rule undermines the autonomy of the judiciary and the JORC, as it effectively allows the executive to choose judges for national security cases.²⁰ This is further exacerbated by the fact that the standards for selecting designated judges,²¹ as well as the exact list of the selected judges, have never been publicized.

The JORC has also received unprecedented negative publicity in recent years. For instance, in 2021, it was reported that a candidate recommended by the JORC had to withdraw her application to become a Court of Final Appeal judge because of pressure from the pro-establishment camp.²² Not long after, the Chief Executive allegedly rejected the Bar’s nominee to sit on the JORC, because the nominee had previously made comments that were critical of the government.²³ While these reports have not been confirmed by official sources, they show that both the composition and the actual operation of the JORC are increasingly being politicized.

Obviously, there are many reasons contributing to the legitimacy crisis faced by the Hong Kong judiciary. What is interesting for the purposes of this commentary is how appointment procedures which have stayed constant throughout post-handover Hong Kong have suddenly been recast very differently, and acquired new significance in public discourse. This is a product of the fundamental shift in the political context in which the judiciary operates.

Back when the rule of law was believed to be strongly in place, the secrecy around judicial appointment, as argued above, helped preserve the judiciary’s professional and impartial image. Now, when the public lacks confidence in public institutions and when society is polarized, the same kind of secrecy may have the *opposite* effect of further undermining the social legitimacy of courts. The secrecy behind JORC (and in national security cases, the Chief Executive’s handpicking of designated judges) seems to have created *more reasons for skepticism* because the public already distrusts the judiciary and political representatives. In an environment of severe distrust, appointments which lack transparency will be interpreted as the covert machinations of an unaccountable government.

5. Lessons for Abroad?

The Hong Kong example suggests that whether withholding information about judicial appointments enhances a judiciary’s social legitimacy or undermines it

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ See N. Wong, T. Cheung, J. Lam, *Hong Kong leader’s ‘unusual’ power to choose judges in national security law cases spark concern among lawyers, lawmakers*, *South China Morning Post* (21 June 2020).

²¹ As mentioned in footnote 4, there are normally constitutional standards for selecting judges in Hong Kong. However, no such parameters are laid down for the designation of judges under the NSL.

²² P. Riordan, N. Liu, *Hong Kong pro-Beijing legislators intervene in judicial appointment*, *Financial Times* (23 June 2021).

²³ G. Torode, *Hong Kong leader rejects barrister nominee to sensitive judges panel, appoints another*, *Reuters* (25 March 2022).

depends on whether trust and confidence in both the process and those involved in the process *already exists*. When it does, as in the case of Hong Kong before 2019, confidentiality may help create a more reputable court. When these conditions are lacking, though, as in post-2019 Hong Kong, confidentiality seems to breed public suspicion that erodes judicial legitimacy. The extent to which the judicial appointment process should be transparent therefore depends on political context, social expectations and legal culture.

The lessons offered here are tentative, as there may be important contextual differences that limit the applicability of my claims. For instance, Hong Kong has never been fully democratic, and the political representatives involved in Hong Kong's judicial appointment process, unlike those in Israel, arguably lack a democratic mandate. It might also be the case that the confidentiality rule relies on a democratic process, or at least works better when paired with one. Similarly, *how* a confidentiality rule is introduced may also shape its effectiveness. In addition to or instead of making the deliberations of the nominating committee confidential, one could, for instance, also consider introducing a secret ballot when the candidate is put to a legislative vote. An open vote in a plenary session may provide too much of an occasion for public posturing and cheap talk, while a secret ballot may alleviate some of these concerns. This commentary hopes that comparative insights may facilitate constructive dialogue in Israel.

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