

Chapter 2

Consideration of the Judiciary's Proposal as Depicted in the Mason Report

(This chapter affirms the Committee's support for judicial independence. It also records Members' views on the recommendations in the Mason Report.)

Judicial Independence

2.1 We fundamentally premise our report on the pivotal importance of judicial independence in any society. It is, as Professor Albert H Y Chen pointed out in his consultancy study, a cherished principle of the legal system and constitutional law of modern states based on the Rule of Law and the protection of human rights.¹ Such independence includes independence from the executive and legislative branches of Government as well as independence from other institutions, organisations or forces in society and enables the court to adjudicate cases in a fair and impartial manner by ascertaining the facts objectively and applying the law properly.²

2.2 We believe the Administration, like us, recognise the pivotal importance of judicial independence to our community. It is our shared belief that judicial independence is one of the core values of any modern society. It is an important cornerstone of continuing prosperity and stability of our community. Indeed, the Basic Law incorporates a separation of powers. The principle of judicial independence and the institution of an independent Judiciary are constitutionally entrenched and widely respected in Hong Kong. For Hong Kong to maintain its position as Asia's World City, our judicial system should continue to carry features of best practices adopted by other jurisdictions.

2.3 We also agree with the observation that the essential conditions of judicial independence include security of tenure, financial

¹ Professor Albert H Y Chen, *The Determination and Revision of Judicial Remuneration : Report of a Consultancy Study* ("Chen Report") (September 2004), Chapter 1, para 1.01.

² Ibid, Chapter 1, para 1.03.

security and the institutional independence of the judiciary with respect to matters of administration bearing directly on the exercise of its judicial function.³

2.4 Viewed in this light, the Mason Recommendations are in line with such vital principles. They are fundamentally premised on the need for Hong Kong to make a total commitment to the requirements of judicial independence. We are in total agreement with this premise. We do not think that we need to repeat, nor in summary repetition will we do justice to, the learned expositions of judicial independence in the context of the historical and present day debates attending the subject of judicial remuneration by both the Honourable Justice Mason and Professor Chen. These expositions will, we believe, greatly assist the public discussion which should attend the implementation of the Mason Recommendations. From our point of view, we see the need for Hong Kong to ensure that we have a system for determining judicial salaries which makes the strongest possible statement of our community's commitment to ensuring the independence of the Judiciary.

2.5 On the other hand, we also subscribe to the premise that while in general, judicial remuneration should not be reduced during the continuance of judicial office, this general rule may be subject to exceptions applicable in extreme conditions, for example, when judicial remuneration is reduced during a general economic downturn when other personnel being paid from the public purse are having their salaries reduced. This is in line with the theoretical considerations, international norms and overseas experience as discussed in Professor Chen's report.

2.6 Such reduction could also be a voluntary act that demonstrates the need for members of the public service (including judges) to share the community's burden during hard times. As our learned consultant, Professor Chen, has pointed out, this happened in Australia during the Great Depression and more recently, in Japan and Singapore.⁴ We do not know whether subtle pressure (overt political pressure would have been unthinkable in those countries cited) had been put on the judges in those instances, but we would be prepared to assume that the economic conditions in those jurisdictions were adverse and the community expectations were so clear, that it was well possible that the initiative came from the judges.

³ See Chapter 1, para 1.10 of the *Chen Report*.

⁴ Ibid, Chapter 5, paras 5.04-5.05 and Chapter 7, para 7.15.

2.7 Thus, the more pertinent question is not whether such reductions are inconsistent with the principles of judicial independence, but how they are implemented.

2.8 Judging from the detailed research in Professor Chen's report, we have arrived at the same conclusion that while theoretically it is doubtful that judicial independence will be perceived to be threatened by a reduction in judicial salaries which is general and non-discriminatory and is widely perceived in the community as being justified, it has at no time been easy to find a process which is not in any way politicised and that judges are not under any actual or perceived political or community pressure.

2.9 We have therefore concluded that there are inherent risks associated with a decision to reduce (or ask for voluntary reduction of) judges' salaries in Hong Kong. We **recommend** that judicial pay be frozen at the present level for the time being and be reviewed when the new institutional structure, mechanism and methodology are put in place and new benchmarks established within that structure.

Legislation to Prohibit Reduction of Judicial Remuneration

2.10 In the light of our foregoing conclusions, we now consider the question as to whether or not legislation should be introduced to prohibit absolutely any reduction in judicial remuneration (i.e. **Recommendation One** of the Mason Report).

2.11 We note that the principle that judges should not be disadvantaged in terms of remuneration while in office has been widely accepted in Common Law jurisdictions as a necessary safeguard for judicial independence.⁵ This principle has been entrenched in many constitutions⁶ and where such principle has not been constitutionally entrenched, this has been accepted as a convention that is fundamental to the protection of judicial independence. However, as with all principles, there would, and did, come a point in time, when extreme circumstances in society tested their limits. We mentioned earlier that even in jurisdictions which have constitutionally entrenched provisions absolutely prohibiting reduction of judicial salaries, dire economic difficulties had resulted in

⁵ See the citation in the *Chen Report* from Roberts-Wray, *Commonwealth and Colonial Law*, Chapter 7, para 7.04.

⁶ See Chapter 7 of the *Chen Report* and Chapters 3-4 of the *Mason Report*.

judicial salaries being cut voluntarily in line with similar cuts that were applied to the public service.

2.12 Where reduction of this kind takes place, we accept Sir Anthony Mason's note of caution that a system which places the onus on judges to agree to a reduction, is open to the exertion of political pressure on the judges. It is one thing for judges to offer a voluntary reduction as has happened in other jurisdictions and quite another to make a public call on judges to offer a reduction.

2.13 The need to avoid any political pressure being put on judges is of pivotal importance. In the case of Canada where there is no constitutionally entrenched prohibition against reduction of judicial salaries, there was extensive jurisprudence on the way to treat judicial salaries when the economic difficulties were so great that the entire public service including judges were expected to bear the community's burden by a reduction of salaries accomplished by legislation which applied to the entire public service. The Canadian Supreme Court, through the leading opinion of Chief Justice Lamer,⁷ expressed the view that while it was constitutionally permissible to pass legislation to make a general and non-discriminatory reduction in salaries, the reduction must be accomplished in a way which is calculated to avoid any political pressure being put on the judiciary. The constitutional "sieve" of an independent salaries commission was regarded as a necessary safeguard. Subsequently, not only was the safeguard of independent salaries commissions generally adopted in Canada, but there was also widespread use of the "grandfathering" approach (i.e. changes are only applicable to new appointees after a certain date and the salaries of serving staff are frozen pending positive setoffs in future reviews) in freezing the salaries of existing judges as an indirect means of reducing judicial salaries.⁸

2.14 In addition, Professor Chen has also argued persuasively in Chapter 8 of his report that enacting legislation modelled on the format of the United Kingdom (UK) is neither relevant nor necessary as long as the present position in Hong Kong is maintained.⁹

2.15 We believe that although there is no constitutional entrenchment in the Hong Kong Special Administrative Region (HKSAR) of the principle of not disadvantaging judges in relation to their salaries

⁷ See Chapter 6, para 6.08 of the *Chen Report*.

⁸ Ibid, Chapter 6, para 6.22.

⁹ Ibid, Chapter 8, para 8.45.

while in office, the principle is so fundamental in safeguarding judicial independence and so universally accepted in Common Law countries, that in all its public actions, the HKSAR should seek to promote the same principle. However, since pay reduction cannot be implemented without legislation, and the recommendations which we are making will go a long way to confirm the principle of judicial independence, we do not consider it essential to adopt Recommendation One at this point in time. We do however note that there is a degree of community support for this recommendation. Should there be general support from the community to this recommendation, then it might be appropriate for the Administration to consider whether or not to introduce legislation in the future.

Standing Appropriation for the Payment of Judicial Remuneration

2.16 Turning to the proposal of establishing a standing appropriation to meet the payment of judicial remuneration (**Recommendation Two** of the Mason Report), we are aware that this is consistent with the practice in many Common Law jurisdictions. The practice can be found both in countries whose constitutions contain a prohibition of reduction of judicial remuneration (e.g. Singapore and Australia), and in those without such a constitutional prohibition (e.g. UK and Canada). This means that standing appropriation, as a means to securing judicial remuneration by law, can be considered for implementation separately from other considerations such as prohibition of reduction of remuneration. It can be regarded as an important institutional guarantee for financial security of the Judiciary.

2.17 Taking UK as an example, we note that the salaries of judges are charged to the Consolidated Fund by statute so that they need not be subject to the annual appropriation vote in Parliament, alongside other estimates of public expenditure. The Supreme Court Act of 1981 establishes the number of judges¹⁰ in the Supreme Court and delegates to the Lord Chancellor the power to adjust salaries with the proviso that these adjustments cannot be less than the salaries payable to judges at the commencement of the Act, such salaries to be charged on and paid out of the Consolidated Fund.¹¹ This legislation preserves the principle of accrued rights (namely, the right to a salary from a contract of employment shall not be abridged except by another Act of Parliament) as well as the

¹⁰ Sections 2 and 4 of the 1981 Supreme Court Act.

¹¹ Ibid, Section 12.

principle that judges should not be disadvantaged in terms of remuneration while in office, and at the same time, makes a standing appropriation for the salaries of judges. However, in relation to other allowances, monies have to be provided by Parliament¹² and pensions must be paid in accordance with the Judicial Pensions Act.¹³

2.18 Fiscal practice is different in Hong Kong. The salaries of judges in Hong Kong are not provided for by legislation. As in the case of civil servants' pay, judicial pay is legally determined as part of the contractual arrangement between the individual judge and the Administration, and adjusted annually through the appropriation processes of the Appropriation Ordinance and the Public Finance Ordinance. The existing funding process is as follows –

- (a) judicial posts are funded, together with the supporting staff and general expenses of the Judiciary, under Head 80 of the General Revenue Account, which obtains funding either through the annual appropriation process or the interim process established under Section 8 of the Public Finance Ordinance;
- (b) judicial posts are included in the annual Estimates in the first instance and established on an as-needed basis, by the Legislative Council following detailed examination of proposals from the Judiciary Administrator by the Establishment Sub-Committee of its Finance Committee in respect of posts equivalent to civil service posts at the directorate level, and by the Judiciary under delegated authority in respect of those below this level (only a few); and
- (c) applicable pay levels and conditions of service are drawn up by the Government on the advice of the Standing Committee on Judicial Salaries and Conditions of Service and the necessary funding, approved by the Legislature as part of the annual or supplementary appropriation process.

¹² See Section 12(6) of the 1981 Supreme Court Act.

¹³ Ibid, Section 12(7).

2.19 We believe that the time has come and there is good justification for a fiscal guarantee for the payment of judicial salaries. Judges are often called upon to determine the legality of legislation and it is not impossible to conceive of people seeking judicial intervention during the legislative process itself. Thus, protecting judicial salaries from the annual appropriation exercise by the legislature is an important advancement in the cause of judicial independence. We therefore recommend that consideration be given to establishing a standing appropriation for judicial remuneration in Hong Kong. In arriving at this decision, we are fully aware that such standing appropriation does not exist in the local fiscal policy, nor in the public finance control system. Expenditure and revenue are normally budgeted for and appropriated through the General Revenue Account. There are also eight funds¹⁴ set up by resolutions passed by the Legislative Council for holding government investments or financing capital expenditure and government loans but none is for meeting recurrent expenditure. Despite this, as standing appropriation is useful in underscoring the importance of the Judiciary and its independence, it is worthy of consideration.

2.20 We note from the overseas experience that standing appropriation only covers salaries and not allowances which are constituents of the total remuneration package. In Hong Kong, as judges are given the choice in receiving some benefits (e.g. housing) in cash or in kind, it is difficult and indeed inappropriate to include the requirement in a standing appropriation.

2.21 We believe that an alternative arrangement can be introduced to bring about early improvements. We see that civil service and judicial pensions are protected by legislation through a charge on the General Revenue.¹⁵ As a result of this protection, although annual expenditure is funded under Head 120 Pensions of the General Revenue Account through the annual appropriation process, the legislature has limited influence on the funding as the requirement represents the estimated cashflow for that year and the funds appropriated is not cash-limited, i.e. depending on the actual need, supplementary provision will be provided during the course of the year. In other words, the legislature is in no position to limit actual spending under this vote on political or savings considerations.

¹⁴ The eight funds are : Capital Works Reserve Fund, Capital Investment Fund, Disaster Relief Fund, Innovation and Technology Fund, Land Fund, Loan Fund, Lotteries Fund and Civil Service Pension Reserve Fund.

¹⁵ Sections 4 and 5 respectively of the Pensions Ordinance and the Pension Benefits (Judicial Officers) Ordinance.

2.22 We consider that the purpose of a standing appropriation could similarly be accomplished by considering making judicial remuneration a separate charge on the General Revenue. Actual recurrent funding for judicial salaries can continue to be made under the General Revenue Account. As this is essentially an estimate of the likely cashflow for the following year and the provision is not limiting on expenditure in the light of the charge, going through the appropriation process will only be a procedural formality.

2.23 As regards creation of judicial posts equivalent to civil service posts at the directorate level, there may be merits in reviewing the existing practice of seeking approval from the Finance Committee of the Legislative Council. We recommend that, within certain rules and limits to be drawn up, the Chief Justice or the Judiciary Administrator could be delegated with the authority to create and delete judicial posts. He should exercise this authority on the advice of the independent body on judicial salaries and conditions of service. Such an arrangement is not entirely original. Similar practices are being adopted by the Housing Authority (in creating Housing Authority posts as against civil service posts in the Housing Department, its executive arm), the Legislative Council Commission and the Office of the Ombudsman.

Determination of Judicial Remuneration

2.24 **Recommendation Three** of the Mason Report was that judicial remuneration should be fixed by the Executive after considering recommendations by an independent body. To do so would accord the necessary respect for judicial independence and the responsibility of the Administration to draw up and introduce budgets for the expenditure of public money. It also respects the responsibility of the Legislature to examine and approve budgets and public expenditure. Since direct negotiation between the Administration and the Judiciary about judicial remuneration is inconsistent with judicial independence, having an independent body making recommendations to the Chief Executive is desirable.¹⁶

2.25 We strongly endorse the need for an independent body to advise on judicial remuneration. Such a body should be independent of the Administration or the Legislature. As it is already the existing practice that the Administration draws up and introduces the budget for the Legislature

¹⁶ See Chapter 6, para 6.15 of the *Mason Report*.

to examine and approve, the Mason Report recommendation should present no practical problem. We support this recommendation.

Statutory Body

2.26 **Recommendation Four** of the Mason Report was that the independent body should be established by statute. It should have the power to commission surveys, reports, job evaluation studies and academic research as it may consider appropriate, and to consult with interested bodies.¹⁷

2.27 We are of the opinion that an independent body having a fair and transparent methodology to advise on the determination and adjustment of judicial remuneration would best safeguard judicial independence. This body, if established by statute in due course, will highlight the importance the community attaches to judicial independence.

2.28 Whilst endorsing the underlying principles of Recommendation Four, we also note that the existing system of having the Judicial Committee advising on judicial remuneration has functioned well. As pointed out by Professor Chen in his report, the Hong Kong system of judicial remuneration has apparently worked well so far, in comparison with some systems elsewhere which resulted in dissatisfaction, political controversies and even litigation.¹⁸ Therefore, the choice of timing for the introduction of legislation should be left to the Administration.

2.29 Nevertheless, pending the introduction of legislation to transform the existing Judicial Committee into a statutory body, with members' terms of appointment staggered, we believe there is merit in giving prompt consideration to implementing our recommendations in the ensuing paragraphs of this report which are equally applicable to a statutory or non-statutory independent body.

Role of Independent Body

2.30 **Recommendation Five** of the Mason Report stated that the independent body's role should be confined to judicial remuneration exclusively.¹⁹ We agree.

¹⁷ See Chapter 6, para 6.20 of the *Mason Report*.

¹⁸ See Chapter 8, para 8.06 of the *Chen Report*.

¹⁹ See Chapter 6, para 6.21 of the *Mason Report*.

2.31 While we noted the argument in Professor Chen’s report that there are advantages in having a “generalist” body modelled on the UK Review Body on Senior Salaries, the Australian Remuneration Tribunal and the New Zealand Higher Salaries Commission which, apart from dealing with judicial remuneration, also make recommendations on or determine the salaries of senior civil servants, ministers and Members of Parliament, we take the view that the independent body’s role should be confined to handling judicial remuneration exclusively. To do otherwise would not further our cause of emphasising judicial independence in Hong Kong. In any event, we do not think the judicial salaries should be pegged to civil service salaries.

Membership of the Independent Body

2.32 **Recommendation Six** of the Mason Report stated that members of the independent body should be appointed by the Executive. The Report recommended a membership of five and that the statute should contain provisions relating to membership such as providing for members from the legal profession and for members possessing certain experience and expertise, those ineligible for membership, terms of office and grounds for removal.²⁰

2.33 We discussed in detail the proposed membership, in particular whether practising lawyers should be members. We noted Professor Chen’s discourse on Professor Winterton’s writing about the constitution of a proposed judicial remuneration tribunal for both federal and state judges in Australia which suggested that practising lawyers working in the courts, whether as barristers or solicitors should preferably be ineligible. The reasons for the exclusion were not articulated by Professor Winterton. Professor Chen’s interpretation was that judicial independence or the perception of such might be adversely affected by having practising lawyer members who are in a position to determine the remuneration of judges representing clients and arguing cases before the courts.²¹

2.34 On the other hand, Professor Chen also pointed out that such concerns might be minimised if the size of the independent body was larger.²² Drawing on the experience of the Judicial Officers

²⁰ See Chapter 6, para 6.23 of the *Mason Report*.

²¹ See Chapter 8, para 8.36 of the *Chen Report*.

²² Ibid, Chapter 8, para 8.36.

Recommendation Commission (JORC) which makes recommendations to the Chief Executive on matters relating to the filling of vacancies in judicial offices, representations from judicial officers concerning conditions of service, etc., we can see merits in including practising lawyers although they should not be in the majority. They have been appointed to the JORC through recommendations by the Hong Kong Bar Association and the Law Society of Hong Kong and the arrangement has worked well so far. In addition, a full-time academic may be considered for membership notwithstanding that he or she holds a practising certificate as a lawyer.

2.35 In any case, to allay any unnecessary concern, we recommend that the number of members for the independent body should be increased to seven. The exact length of fixed term of appointment can be decided later, but it is important that appointments be staggered so that fresh inputs can be introduced on a regular basis.

2.36 Finally, we believe that the suggestion in the Mason Report that no member of the independent body should be allowed to serve concurrently as a member of any other body assessing civil service remuneration, would serve the process less well. We agree with Professor Chen's observation that there is nothing in the form of experience of Hong Kong, UK, Australia and New Zealand to indicate that this is an unsatisfactory arrangement. On the contrary, some shared membership encourages "cross-fertilisation" of ideas. Such members tend to have a wealth of business and public service experience that would help in the salary determination process, and vice versa. Common members could therefore serve as the bridge for such ideas. Past experience in Hong Kong has indicated that such members are most likely to be perceived as fair and independent, as guardians of the public interests rather than as advocates of the interests of particular groups of persons paid from the public purse.

Methodology

2.37 **Recommendation Seven** of the Mason Report stated that whilst the prescription of a formula for a methodology to determine judicial remuneration is not practical, some factors should, nevertheless, be specified in the statute. Ten such factors, ranging from the maintenance of judicial independence, judicial standing in the community, to comparisons with public and private sector remunerations were listed.

2.38 We agree with the thrust of this Mason recommendation and recommend that the principles therein contained be adopted as guidelines for the independent body pending the introduction of legislation. However, we would caution against overly detailed definition of the factors. In Chapter 3, we will set out relevant factors to be taken into account in determining judicial remunerations.

Performance Pay and Productivity Bonus

2.39 **Recommendation Eight** of the Mason Report noted that as with the private sector, performance pay and productivity bonuses are becoming increasingly an element in public sector remuneration in many jurisdictions. However, such should not form part of judicial remuneration.

2.40 We have no dispute as to this. We observe that this is one of the initiatives of the Civil Service Reform, but has yet to be implemented in the civil service.

Transparency of Pay Determination Procedure

2.41 Regarding the **Ninth** and final **Recommendation** of the Mason Report that the independent body should adopt a procedure which is transparent and its report containing its recommendations to the Executive should be published; we fully agree with this recommendation, bearing in mind public expectation over transparency in all aspects of public governance and administration of justice in Hong Kong.