The Controversial Appointment of Under Secretaries and Political Assistants in 2008

The chain of controversies arising from the appointment of the first batch of Under Secretaries and Political Assistants in the expanded "political appointment system" introduced by Chief Executive (CE) Donald Tsang gave rise to the single greatest setback suffered by the Tsang administration since he was successfully re-elected as CE in 2007. This comment traces the background of the incident, discusses the legal and political issues involved, and reflects on its significance for the constitution and governance of the Hong Kong Special Administrative Region (HKSAR).

Until 2002, all senior officials responsible for the governance of the HKSAR, with the exception of the CE himself, were civil servants. When CE Tung Chee-hwa began his second term of office in July 2002, a new system of "political appointment" was introduced, commonly known as the system of accountability of Principal Officials. Under this system, Principal Officials would no longer be civil servants with permanent careers in the civil service until retirement. Instead they would be appointed by the CE for a fixed term not exceeding the term of the CE himself. They can be recruited either inside or outside the civil service. The system is considered to have the advantages of broadening the pool of political talents which may be recruited into the highest echelons of government in Hong Kong, enhancing the political accountability of the Principal Officials concerned, while at the same time contributing to the political neutrality of the civil service.

In October 2007, the Government published the *Report on Further Development of the Political Appointment System* ("the Report"),[1] which set out the Government's policy decision on the matter after the consultation exercise conducted from July to November 2006 on the consultative document it published on the subject on 26 July 2006. On 14 December 2007, the Finance Committee of the Legislative Council approved the budget for 24 new positions of Under Secretaries and Political Assistants as proposed in the Report. On 20 May and 22 May 2008, the Government announced the appointment of 8 Under Secretaries and 9 Political Assistants respectively.

"Under Secretary" is the title of the post which has as its "rank title" "Deputy Director" of the Bureau concerned.[2] In Chinese both the position title and rank title are *fujuzhang* (副局长).[3] Since the re-organisation of the HKSAR Government in July 2007, there exist 12 bureaux in the

1 *See* http://www.cmab.gov.hk/en/issues/pa_report.htm (last visited 15 June 2008).
2 *See* para 4.04 of the Report.
3 *Ibid.*

Government. The full title of the post "Political Assistant" is "Political Assistant to Director of Bureau". Under Secretaries are paid at 65-75 per cent of the remuneration package for a Director of Bureau, while Political Assistants at 35-55 per cent of the Director's remuneration package.[4]

The main justification for the creation of the new positions was that the "political tier" of the Government (which consists of political appointees rather than civil servants) was "too thin"[5] and needed to be increased in size so as to cope with the increasing demands of "political work",[6] which includes, for example, liaising with legislators and lobbying for support for the Government's policies and bills in the Legislative Council, among political parties, District Councils, interest groups and other stakeholders, appearing in the media to explain and defend government policies, and generally securing support in the community for government policies. It is argued that the expansion of the political tier of the government "will reduce the exposure of civil service colleagues from having to deal with politically sensitive issues in LegCo".[7] The neutrality and impartiality of the civil service will thus be enhanced,[8] as will the political accountability of the political tier of government. Senior civil servants can focus on "policy work"[9] rather than "political work". The division of labour between the "political stream"[10] of the HKSAR government and the civil service has been explained as follows:

> "Principal Officials are responsible for providing leadership, making policy and political decisions and canvassing community support. They assume political responsibility for the success or failure of matters falling within their respective portfolios and are involved in political work such as defending government policies and lobbying for support from political parties. .... Civil servants, on the other hand, focus on assisting Principal Officials in policy formulation, policy explanation, policy implementation and delivery of services to the public. They conduct research and analysis on policy options and make policy proposals for Principal Officials to consider."[11]

In this regard the Report draws on the experience of Canada and Britain, where "the vice-ministers and political aides tender political advice and

4 *See* para 9.05 of the Report.
5 Para 2.04 of the Report.
6 This term appears many times in the Report.
7 The Report, Executive Summary, para 3.
8 *See* chapter 5 ("civil service under the political appointment system") of the Report.
9 *See* para 4.09 of the Report.
10 *See* para 5.02 of the Report.
11 Para 5.02 of the Report.

input to their ministers, whereas senior civil servants provide policy analysis and options. Ministers would amalgamate policy options and political assessment to form government policies. We envisage a similar situation in Hong Kong after expansion of the Political Appointment System."[12]

The Report suggests that the nature of the political appointment in the proposed system is such that Under Secretaries and Political Assistants should not be recruited in the same manner as civil servants, who are "appointed through an open, transparent and competitive process based on merit".[13] The Report states that unlike the case of civil servants, "open recruitment"[14] is not appropriate in the case of Under Secretaries and Political Assistants, and points out that open recruitment has not been used in the appointment of Principal Officials under the political appointment system established in 2002. This is because it is necessary to ensure that political appointees share the CE's governing philosophy and vision and can work with other members of his political team.[15] The Report states that an Appointment Committee chaired by the CE will handle the selection of candidates for the newly created positions.[16] The candidates selected will be appointed and removable by the CE on the advice of the Appointment Committee; their term of office will not exceed that of the CE himself.[17]

The controversies that erupted after the announcement of the identity of the new political appointees in May 2008 revolved around the issues of nationality, salaries and the process and criteria of selection. Immediately after the announcement of the appointment of 8 Under Secretaries on 20 May, the media reported that at least one of them held a foreign passport: Mr Greg So Kam-leung, vice-chairman of the Democratic Alliance for the Betterment and Progress of Hong Kong appointed to the post of Under Secretary for Commerce and Economic Development, was alleged to hold a Canadian passport. The media, opposition politicians and public opinion put mounting pressure on the government and the appointees to disclose the nationality status of the appointees, and the issue of whether the appointees may hold a foreign passport or have the right of abode elsewhere was also raised. The controversy soon spread to include the salaries of the appointees, with demands for disclosure of the exact salary point to which each appointee was appointed. There were then queries regarding the criteria and process of selection (including the role played by Mr Norman Chan Tak-lam, Director of the CE's Office and a key member of the Appointment

[12] Para 3.13(b) of the Report.
[13] Para 5.04 of the Report.
[14] Para 7.09 of the Report.
[15] Para 7.04 of the Report.
[16] Para 7.10 of the Report.
[17] Paras 7.16-7.17 of the Report.

Committee), and whether particular appointees (e.g. Mr Paul Chan Chi-yuen, 28-year-old Political Assistant-designate to the Secretary for Food and Health)[18] were sufficiently well qualified to deserve to be appointed to particular salary points.

On the issue of nationality, the Government's original position was that unlike the case of Principal Officials appointed by the Central People's Government on the recommendation of the CE, there is no requirement under the Basic Law that any of the new appointees must be Chinese nationals with no right of abode elsewhere; whether they held foreign passports were matters of privacy and the Government would not therefore disclose information on this matter. On the question of salary, the Government's initial position was that the exact salary point to which each of the new appointees was appointed was also a matter of privacy; the Government would only disclose the salary range applicable to the appointees and how many of them were on which salary points. On the issue of selection, the Government insisted that this was a collective decision made by the Appointment Committee on the basis of the merits of the individuals concerned, but refused to disclose the details of the nomination and short-listing process.

Despite the Government's original position on the issues of nationality and salaries, public opinion as expressed in the media on the days following the announcement of the appointment soon pressured the political appointees to disclose their nationality status and precise salary figures, and some publicly agreed to renounce their foreign citizenship. On 29 May 2008, 5 of the 8 Under Secretaries-designate revealed that they had foreign citizenship, and two among the five (including Mr Greg So) declared that they would renounce it. On 2 June, the remaining three followed suit. On 10 June, all 17 new political appointees voluntarily disclosed their own salary figures. A press conference was held on the same day in which each of the new appointees talked to the media and Mr Donald Tsang himself apologized to members of the public for the controversies caused by the Government's handling of the arrangements for the announcement of the appointment. On the other hand, three Political Assistants-designate, who were known to hold foreign passports, did not take any steps to renounce them.

The main legal issue raised during the controversy was whether under the Basic Law the new appointees could hold foreign passports, have

[18] It was eventually revealed that Mr Chan's existing salary as a researcher at a university was approximately HK$30,000 per month, and his new salary as Political Assistant would be $134,150 per month, which was the middle point on the salary scale (point 3 of a 5-point scale) for Political Assistants. It was queried why he was not appointed to the starting point on the scale, which would be $104,340.

foreign citizenship or a right of abode in a foreign country. It should be noted that according to the Interpretation of the Chinese Nationality Law made by the Standing Committee of the National People's Congress on 15 May 1996,[19] Hong Kong residents who were originally Chinese nationals can continue to be treated as Chinese nationals for the purpose of Hong Kong and Chinese law even if they have obtained foreign nationality after migration abroad and subsequently returned to live in Hong Kong; the foreign passports they hold would be deemed to be travel documents only. However, such persons would not be eligible to become Principal Officials, whom the Basic Law requires to be "Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country".[20] The Principal Officials to whom this provision applies include Secretaries and Deputy Secretaries of Departments (the Secretaries being the Chief Secretary for Administration, Financial Secretary and Secretary for Justice) and Directors of Bureaux (who are also called Secretaries).

Both the HKSAR Government and the Liaison Office of the Central People's Government[21] pointed out during the controversy that the Basic Law does not require any of the new political appointees to be Chinese citizens without a right of abode elsewhere. The abovementioned *Report on Further Development of the Political Appointment System* published in October 2007 expressly provides that the new political appointees must be permanent residents of the HKSAR, but imposes no restrictions on their nationality or right of abode overseas.[22] It is noteworthy that no controversy arose at that time on this point.

It is significant that the Basic Law provisions restricting the right of abode of Principal Officials expressly mention Deputy Secretaries (*fusizhang* 副司长) but not Deputy Directors (*fujuzhang* 副局长).[23] Posts in the colonial administration equivalent to Deputy Secretaries and Deputy Directors had been in existence at the time of the drafting of the Basic Law, and a policy decision was taken during the drafting process not to include Deputy Directors in the list of Principal Officials. Only Principal Officials need to be appointed directly by the Central People's Government and to be subject to restrictions regarding nationality and right of abode.

[19] See "Legal Preparation for the Establishment of the HKSAR: Chronology and Selected Documents" (1997) 27 HKLJ 405 at 415-416.

[20] Art 61 of the Basic Law. See also Art 48(5) (listing the Principal Officials appointed by the Central People's Government) and Art 101 (listing the Principal Officials who may not have right of abode in any foreign country).

[21] For the statement of the Liaison Office, see various Hong Kong newspapers of 8 June 2008 (e.g. *Ta Kung Pao*, p A6 (in Chinese)).

[22] Para 7.12 of the Report and para 9 of the Executive Summary of the Report.

[23] See arts 48(5) and 101 of the Basic Law.

Although the Government was technically correct in determining that no question of contravention of the Basic Law arises even if any of the new political appointees hold foreign passports, it definitely under-estimated the political sensitivity of the matter and over-relied on the text of the Basic Law. The Basic Law was drafted and enacted at a time when all holders of posts equivalent to Secretaries, Deputy Secretaries, Directors and Deputy Directors were civil servants. The system of "the accountability of principal officials" and their political appointment outside the civil service system was only introduced in 2002. The issue of whether the political appointees to the newly created positions of Under Secretaries and Political Assistants should not only be permanent residents of the HKSAR but also Chinese citizens without foreign passports is a new and real policy issue that was not considered when the Basic Law was drafted. The strong reaction of the Hong Kong community to the appointment in May 2008 demonstrates that members of the public may have a high expectation of the political appointees in terms of their nationality and allegiance that goes beyond the literal requirements of the Basic Law. Thus at least in retrospect it was unwise of the Government to try to avoid the issue by refusing to disclose the nationality of the appointees concerned and focusing only on the technical legal position. Similarly, the initial decision not to disclose the salary information ran against the growing demands in the Hong Kong polity for transparency and accountability in the use of public money.

The pan-democratic camp or opposition parties in Hong Kong had not originally been supportive of the new system of political appointment when it was first proposed. They had argued that the system would not improve political accountability unless the CE himself was elected by universal suffrage.[24] It would appear that the opposition made gains from the Government's mishandling of the situation that evolved after the announcement of the appointment. Even pro-Government politicians did not rise to the defence of the Government on this occasion, probably because the Legislative Council election would soon take place in September 2008 and it would be foolish to stand against the tide of public opinion.

The controversies surrounding the political appointment of May 2008 demonstrate the fragility, limited legitimacy and structural problems of the "executive-led" system of government of the HKSAR. In a full democracy with a head of government elected by universal suffrage, the discretion of the president or prime minister in making political appointments would enjoy more respect as a normal part of the democratic process. The problem in the HKSAR is that the CE is not popularly elected, has no guaranteed

[24] See eg para 3.08(c) of the Report.

support in the legislature (which is half elected by universal suffrage) and relies heavily on the senior civil service in the governance of Hong Kong. The civil service, recruited in an open and competitive process and operated on the basis of individuals' merits, enjoys considerable respect and legitimacy. The appointment exercise of May 2008 was an attempt to strengthen the "political tier" of government that exists above and outside the civil service and that constitutes the CE's "political team". It is ironic that this vehicle for the strengthening of "executive-led" government in the HKSAR turned out at the very beginning of its journey to be a cause of its embarrassment and to have diminished the standing of the executive government in the eyes of the community.[25] Whether it will fare better as it moves forward in its journey remains to be seen.

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[25] According to one opinion poll, 56 per cent of the respondents "said the controversy had undermined their confidence in the administration's plan to expand the political appointment system". "Asked to evaluate the government's handling of the nationality saga on a scale of one to 10, with one the worst and 10 the best, 47 per cent of respondents gave a rating of one to three": Gary Cheung, "78pc want deputies' salaries revealed", *South China Morning Post*, 10 June 2008.

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