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## Politics without Democracy: A Study of the New Principal Officials Accountability in Hong Kong

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# Politics Without Democracy: A Study of the New Principal Officials Accountability System in Hong Kong<sup>†</sup>

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## I. INTRODUCTION

Hong Kong should continue to command international attention in its political evolution not only because it provides a unique example of a polity in transition but also because it gauges the tolerance level of China's Central People's Government for political experimentation in a part of the country that has a constitution permitting gradual political reform.

In 1997, sovereignty changed from British to Chinese hands but there was no change to the governing system at that time. Indeed, the goal then was preservation for the sake of stability and certainty. The point of departure from the colonial system came with the introduction of the Principal Officials Accountability System (POAS), which created a new layer of political appointees to become top policy makers. Whilst various aspects of the system remain to be worked out, it will have far reaching consequences for Hong Kong as a whole.

In October 2000, Chief Executive of the Hong Kong Special Administration (HKSAR) Tung Chee-hwa first proposed a new "executive accountability" system during his annual policy address.<sup>1</sup> A year later, he promised to present "feasible proposals" although the next term's Chief Executive would have to decide whether or not to implement them.<sup>2</sup> In his re-selection platform, the Chief Executive made it clear that he wanted to put the system in place by July 2002, at the start of the next term of office.<sup>3</sup> On April 17, 2002, Tung, with his second term firmly secured, announced the details of the POAS to the Legislative Council (LegCo).<sup>4</sup> LegCo was pressured to approve the proposed system within two months. During a government motion in LegCo to approve the POAS in principle on May 29 and 30, 2002, many legislators remarked that they had been given insufficient time to deliberate the issues involved.

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1. Tung Chee-hwa, *Serving the Community, Sharing Common Goals*, Chief Executive Policy Address, at paras. 109–13 (Oct. 11, 2000), at <http://www.policyaddress.gov.hk/pa01/eindex/html>.

2. Tung Chee-hwa, *Building on our Strengths, Investing in our Future*, Chief Executive Policy Address, at paras. 130–40 (Oct. 10, 2001), at [http://www.policyaddress.gov.hk/pa01/speech\\_e.htm](http://www.policyaddress.gov.hk/pa01/speech_e.htm).

3. Tung Chee-hwa, *My Pledge to the People of Hong Kong* (Jan. 29, 2002), at [http://english.peopledaily.com.cn/200112/13/eng20011213\\_86634.shtml](http://english.peopledaily.com.cn/200112/13/eng20011213_86634.shtml).

4. Tung Chee-hwa, *Address to the Legislative Council on the Introduction of the POAS* (April 17, 2002), at <http://www.info.gov.hk/ce/speech/cesp.htm> [hereinafter *Tung, Speech to LegCo on the POAS*, April 17, 2002]. See *infra* Appendix I for the full text.

Despite the haste with which it was promoted, the POAS is an important milestone in Hong Kong's political evolution. It has introduced fundamental change to Hong Kong's governing system that is unprecedented in scope and complexity. There are opportunities as well as pitfalls. The POAS represents a tacit acknowledgement that the system of governance envisaged in the Basic Law, Hong Kong's post-1997 constitution, was not functioning well.

Although many critics have impugned the Chief Executive for his lack of effective leadership, they have also acknowledged that the tension between the executive and civil service has hampered his efforts to address the HKSAR's troubles. The POAS represents a partial victory for the Chief Executive over top administrators. However, with its promise to improve the administrative apparatus, the POAS has raised expectations. The executive's performance will be constantly monitored and pressure will be high. Putting the POAS in place and making it work will require the Chief Executive and his close advisers to build a wider base of political support, which must include the battered civil service. Moreover, with Tung Chee-hwa ineligible for a third term of office in 2007, the POAS provides a new testing ground for ambitious politicians.<sup>5</sup>

Beijing had originally envisaged Hong Kong to be an economic city with mild politics. The Central People's Government might find that economic policies cannot be developed and implemented in a modern society without rigorous debate among stakeholders as well as public participation via the ballot box. Regardless of whether Hong Kong was intended to be an experimentation zone for political reform or not, the HKSAR is a part of China where democratic reform is openly and frequently discussed. As such, despite constraints on Hong Kong developing a fully democratic system, the HKSAR will continue to provide a window through which the world can observe the subtleties of Chinese politics—and assess Beijing's appetite for “controlled” political reform.

Although the Basic Law anticipates major change to the electoral system some time after 2007 for the Chief Executive and members of the legislature, questions remain about the commitment of the current government and authorities in Beijing to these reforms. The POAS represents a fundamental alteration to the system of governance in Hong Kong that could very well make it the fulcrum upon which further reform will turn. As it now stands, the POAS does not in fact go far enough to fulfill the promises of better governance, and further adjustments will be required. The need for further reform of the system

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5. Article 46 of the Basic Law stipulates a term limit of two consecutive terms. THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATION REGION OF THE PEOPLE'S REPUBLIC OF CHINA, 29 I.L.M. 1511 art. 46 (1990) [hereinafter BASIC LAW].

as a whole must eventually include the building of a much more purposeful relationship between the executive and legislative branches.

Despite the outlook for increased pressures for reform, the next few years present a tremendous challenge to the “opposition”. The POAS is likely to produce a new political elite with the advantage of executive power on its side. This new elite is bound to try and develop wider public support. The “opposition” in the legislature—Hong Kong’s current crop of professional and elected politicians—will be forced to adapt to a different environment.

Within the first month of implementing the POAS, the Chief Executive had to face his first political “crisis” arising from the stock exchange’s publication of proposed criteria for continuing listing eligibility, which led to a panic sell-off of micro-cap stocks. The responsible principal officials as well as the respective heads of the stock exchange and the securities regulatory body were all embroiled in controversy. The “crisis” offers insights into the functioning of POAS, which is discussed in Part VII.

This Article seeks to discuss a range of issues related to the POAS. These issues include:

- The “one country, two systems” framework;
- The background to the introduction of the POAS;
- The fundamentals of the POAS;
- The notion of accountability pre- and post-POAS;
- An evaluation of executive government systems;
- The issues arising from the implementation of POAS; and,
- A best practice ministerial model for Hong Kong.

## II. “ONE COUNTRY, TWO SYSTEMS” FRAMEWORK

The “one country, two systems” principle forms the main pillar of Beijing’s Hong Kong policy enabling the HKSAR to exercise “a high degree of autonomy” and to have “Hong Kong people ruling Hong Kong.” It is a political innovation based on pragmatism that can be seen from both a domestic and an international perspective. Beijing’s policy is enshrined in the Basic Law to allow the coexistence of socialist China with capitalist Hong Kong within “one country”. The highly pragmatic policy, encapsulated in the phrase, *changqi dasuan, chongfen liyong*, was designed to enable Beijing to use Hong Kong to the maximum extent to contribute to China’s economic modernization and facilitate other areas of policy

development.<sup>6</sup> Scholars Poon Kit and Kuan Hsin-shi pointed out that it also represents “a credibility test for China as a world power, demonstrating its willingness to honor its international pledge toward Hong Kong and its capability to manage a world-class city” after British rule.<sup>7</sup>

Since the transition in 1997, Beijing has shown significant self-restraint in leaving Hong Kong authorities to govern Hong Kong. Self-restraint has not meant disinterest, however. Indeed, Beijing has kept a close eye on Hong Kong. Its overall stance has been to show support for the Chief Executive, who is directly accountable to the Central People’s Government.<sup>8</sup> Tung Chee-hwa was Beijing’s original choice to lead Hong Kong, and Beijing backed him for a second term.<sup>9</sup>

The Chief Executive has likely had extensive discussions with Beijing on the development of the POAS. In fact, the procedure for installing the principal officials entails a nomination by the Chief Executive and actual approval by the Central People’s Government.<sup>10</sup>

Beijing will likely remain wary of substantial political reform in the HKSAR in the foreseeable future. During a June 26, 2002 speech in Hong Kong, Vice-premier Qian Qichen reminded the public of Beijing’s reluctance:

To promote democracy in Hong Kong, one cannot have Hong Kong emulate the system of other regions. . . . Hong Kong is a commercial city and it is one of our country’s special administrative regions. This determines that it cannot copy the political systems of another country. The past practices have shown that model based on functional constituency elections is an effective way to ensure that people from various walks of life can have balanced participation in political life. As a result, this should be kept intact. Other systems that also conform to Hong Kong’s characteristics should also be retained.<sup>11</sup>

### A. *Constitutionality of the POAS*

Although the POAS represents the most significant step towards political reform to date, as well as the first major departure from the colonial style of governing, the HKSAR Government determined that the Basic Law did not need to be amended to implement the POAS. During legislative scrutiny of

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6. Other areas of policy include using Hong Kong to earn hard currency, to provide a window to the outside world, and to provide neutral ground for conducting informal contacts with Taiwan. HOU LI, *THE CLOSURE OF A HUNDRED YEARS OF HUMILIATION: THE BEGINNING AND THE END OF THE HONG KONG ISSUE* 125 (1997).

7. Poon Kit & Kuan Hsin-shi, *The Hollowing Out of the “One Country, Two Systems” Framework: China’s Hong Kong Policy in a Changing Context* (unpublished manuscript, on file with the authors).

8. BASIC LAW, *supra* note 5, art. 43.

9. The current Chief Executive, Tung Chee-hwa, was chosen prior to 1997 through a selection process of 400 people. In 2002, he was the sole candidate for re-selection. Several top Chinese leaders publicly stated that they supported Tung for a second term.

10. See BASIC LAW, *supra* note 5, art. 15.

11. Qian Qichen, *HK democracy must forge own path, not emulate others*, SOUTH CHINA MORNING POST, June 26, 2002, at 6 (edited transport).

the POAS, critics questioned whether it accorded with the Constitution because Basic Law drafters had sought to preserve a civil service-led system. An examination of those parts of the Basic Law relating to the civil service makes this clear. These provisions indicate that the Constitution envisages a civil service-led system and the continuation of civil servants assuming both administrative and ministerial roles.<sup>12</sup>

The HKSAR Government has argued that the POAS is consistent with the spirit of the Basic Law because there is no specific prohibition against appointing political heads to government departments, nor is there a requirement that principal officials must be employed as civil servants. The government also argues that the underlying theme of continuity in the Constitution did not prevent changes.<sup>13</sup> In contrast, officials say that, despite the Basic Law's explicit statement that the HKSAR's ultimate aim is a fully elected LegCo and directly elected Chief Executive, Hong Kong needs to move cautiously ahead.

The Basic Law was designed to establish a political system where power flows from the Chief Executive. The Chief Executive has countered criticisms that the POAS concentrates power in the Chief Executive by stating that he already had this power and that the POAS was a device to devolve power to his principal officials.<sup>14</sup>

12. See BASIC LAW, *supra* note 5, arts. 99–103.

13. Although the Basic Law does not provide for a ministerial-type of appointment, it does not explicitly prohibit it. Similar issues have arisen in other jurisdictions. For example, Australia's written constitution has no specific provision about cabinet government and a range of other aspects related to a Westminster-style ministerial system. Nevertheless, it is well-established that those "extra-constitutional" measures are legitimated and permitted under the Constitution. Some of the practices, such as ministerial responsibility, are classified as constitutional conventions. LC Paper CB(2)1735/01–02(01) (Apr. 25, 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm).

14. The Basic Law provides that the Chief Executive is the head of the HKSAR Government. He leads the Government and the civil service. According to the Basic Law, the powers of the officials of the HKSAR Government originate from the Chief Executive. It is for the Chief Executive to determine how he should delegate his authority according to his policy agenda. As the Basic Law has already conferred all necessary powers on the Chief Executive, there is no need for these powers to be strengthened by the new system . . . . In fact, in implementing the Accountability System, the Chief Executive will be devolving further his authority . . . .

Tung, Speech to LegCo on POAS, April 17, 2002, *supra* note 4. The Chief Secretary also emphasized in a speech to the British Chamber of Commerce on April 25, 2002 that: "If you look at the Basic Law, the Chief Executive has all the power he needs. All political and administrative power flows from his constitutional position at the apex of government in Hong Kong." Donald Tsang, CS's Speech, Address delivered at Luncheon of British Chamber of Commerce at the Hong Kong Convention and Exhibition Centre (Apr. 25, 2002), at <http://www.info.gov.hk/gia/general200204/25/0425224.htm>.



Regardless of how the introduction of the POAS affects the hallowed status of the Basic Law, it provides a new staging-point for future changes to deal with real challenges to governance in Hong Kong. By arguing that what is not expressly prohibited in the Basic Law is consistent with the Basic Law, the HKSAR Government has opened the door for others to use the same argument for further reform. It will be difficult for the HKSAR Government to argue in the future that what is not expressly provided for is inconsistent with the Basic Law.<sup>15</sup>

### B. *Limited Scope of Further Reform*

Nevertheless, the prospects for a more significant legislative role in government do not appear bright. Despite references in the Basic Law that constitutional change is possible at an unspecified time after 2007,<sup>16</sup> Article 59 is explicit that the government of the HKSAR “shall be the executive authorities,” which does not include the legislature. Although Article 64 provides for the government (headed by the Chief Executive) to be accountable to the legislature, the Basic Law does not envisage a power-sharing relationship between the executive and the legislature. For that to happen, the core of the Basic Law would need to be amended. Most observers cannot imagine that Beijing would, in the near term, allow such a substantial reform within the “one-country, two systems” framework. Yet, there is room for incremental electoral reform, which represents an important opportunity to create and define a unique polity within a one-party state.

## III. BACKGROUND TO THE INTRODUCTION OF THE POAS

### A. *Troubled Early Years*

The new HKSAR Government had faced a series of challenges from the start.<sup>17</sup> The Asian financial crisis that began in 1997 reverberated through all the regional economies. The authorities had to confront volatile conditions in the property and stock markets as well as rising unemployment.<sup>18</sup> The

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15. During the LegCo scrutiny process, legislators pointed out that the HKSAR Government “should not use different reasoning at different time to suit different needs, and that a consistent approach should be adopted in interpreting the Basic Law.” LC Paper CB(2)2015/01-02 (May 22, 2002) at <http://www.legco.gov.hk/yr01-02/english/hc/papers/hc0524cb2-2015.pdf>.

16. See BASIC LAW, *supra* note 5, arts. 45–68, annex II (providing the possibility for electoral reform in the future).

17. For a useful record of the early years see *generally* THE FIRST TUNG CHEE-HWA ADMINISTRATION—THE FIRST FIVE YEARS OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (Lau Siu-Kai ed., 2002).

18. The HKSAR Government’s intervention in the stock market in 1998 was a controversial decision.

avian flu outbreak in 1997 resulted in a mass slaughter of more than 1.3 million chickens and ducks. The discovery of piling defects in several public housing blocks led to calls for the resignation of housing officials. The opening of the new airport at Chek Lap Kok was chaotic. The decision to bypass existing tender procedures to award the Cyberport development to one party added to the perception of incompetent leadership. During the first three years in office, the legislature raised two motions of no confidence against specific senior members of the executive adding to a general sense that Hong Kong suffered from poor governance.<sup>19</sup>

*B. Inexperienced Leadership and Poor Management of  
Public Expectation*

The leadership's failure to articulate clear political objectives for its various policies and build the necessary policy consensus both within the administration and with the public contributed to the problems of the early years. One consequence was that the relationship between the Chief Executive and top civil servants deteriorated. A stark example of this failure was the Chief Executive's major initiative to build 85,000 housing units a year without any clear announcements of its political objectives, policy strategies, and technical and procedural goals. This left the administration as a whole unable to coordinate its response in the face of a deteriorating economic environment. On the one hand, the Chief Executive felt the civil servants did not sufficiently support his efforts. On the other, the civil servants believed that the Chief Executive and his other advisors had failed to heed their advice. Within eighteen months, the target was simply dropped without proper explanation causing much public confusion and damaging the credibility of both the Chief Executive and the civil service.<sup>20</sup>

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19. Many critics saw the development as essentially a property rather than a specialized information technology development that any developer should have been able to do. However, the HKSAR Government promoted it as an IT project, arguing that the designated party was the best one to develop the site. Although unsuccessful, the motion of no confidence raised on March 11, 1999 against the Secretary for Justice for her decision not to prosecute newspaper publisher Sally Aw Sian, whose deputies were convicted of corruption charges, damaged the government's credibility. On June 28, 2000, the legislature passed a motion of no confidence against the Chairperson of the Housing Authority (who was also an Executive Councilor) and the Director of Housing for defective piling in a number of public housing blocks. The Chairperson had in fact resigned on June 24, 2002.

20. On June 30, 2000, the Chief Executive revealed on a TV program that he had dropped his target for 85,000 housing units over a year back in 1998. Senior housing officials had not been told about the Chief Executive's decision further damaging the government's credibility. See Lok Sang-Ho, *Policy Blunder of the Century Threatens*

### C. Intra-Executive Tensions

Amid the challenges presented by the external economic conditions and other unexpected challenges, the crisis of leadership sapped Hong Kong's confidence. Serious intra-executive tensions emerged between the Chief Executive, his close advisers, and the senior ranks of the civil service. It became apparent that there were two different understandings of what an "executive-led" government meant.<sup>21</sup> The Chief Executive and his close advisers saw power arising from the Chief Executive in a style of executive government more akin to the running of a private corporation. The civil service operated in accordance with past practice, essentially a bureaucratic-led administration steeped in a public service tradition. Senior civil servants regarded the in-coming Chief Executive and his advisers as inexperienced. The Chief Executive and his advisers in turn viewed the administrators as disrespectful. According to the senior ranks of the service, their responsibility was to give honest advice to the Chief Executive regardless of whether it may run counter to his personal preferences. The Chief Executive and his advisers saw the bureaucrats as obstructionist. There were also substantial differences and disagreements on a variety of issues, including the relationship with Beijing and human rights and political freedoms.<sup>22</sup>

### D. LegCo's Call for Accountability

The series of blunders by the first HKSAR Government provoked public discussion on how to make government decision-makers "accountable" for their decisions. Accountability in this sense meant

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*Hong Kong Economic Future, in THE FIRST TUNG CHEE-HWA ADMINISTRATION—THE FIRST FIVE YEARS OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, supra note 17, ch. 8 for a useful summary of land and housing policy issues.*

21. Anthony Cheung, *Transforming the Post-97 Hong Kong Civil Service: Reconfiguring the Mandarinate and the Rise of a Political Class*, Session 39: Crisis and Transformation in China's Hong Kong since 1997, Association for Asian Studies, 54th Annual Meeting, April 4–7, 2002. Furthermore, a close reading of the Chief Executive's address in announcing the POAS provides many clues to how he sees the civil service having been an impediment to his leadership.

22. The relationship between ExCo [Executive Council] and the civil servants is uneasy and occasionally combative . . . most of the ExCo members appointed by Tung hold different political views and policy ideas from those of the civil servants. Moreover, a number of ExCo members, especially those with pro-Beijing bias or business background, hold the [civil servants] in contempt, which is fully and bitterly reciprocated.

Lau Siu-kai, *Tung Chee-hwa's Governing Strategy: The Shortfall in Politics*, in *THE FIRST TUNG CHEE-HWA ADMINISTRATION: THE FIRST FIVE YEARS OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, supra note 17, at 12–13*. Lau was appointed to head the Central Policy Unit for the Chief Executive's second term of office.

that they should resign to take political responsibility. In June 2000, LegCo recommended that the HKSAR Government should:

Explore the feasibility of developing constitutional conventions under which principal officials shall voluntarily resign as a result of having committed serious mistakes in the formulation or implementation of government policies; and Study the proposal of implementing a more flexible contract system so that principal officials may be held politically accountable for their decisions.<sup>23</sup>

### *E. Chief Executive's Response*

In his October 2000 Policy Address, the Chief Executive responded: "As Hong Kong people are now running Hong Kong, I appreciate their aspirations for the SAR Government to be subjected to a higher degree of accountability." He undertook to review "the accountability of principal officials for their respective policy portfolios" by devising a new system of appointment, stating that a decision would be made soon.<sup>24</sup>

The response of LegCo and the public was on the whole positive.<sup>25</sup> Government papers show that the Chief Executive set up and chaired a special Steering Group to consider a new accountability system.<sup>26</sup> The Steering Group concluded that there was "broad consensus on the need to re-jig the top echelon of senior officials and for a new system of appointments, but views on the detailed arrangements differed."<sup>27</sup>

In his October 2001 Policy Address, the Chief Executive described the basic framework of the new accountability system. He made it clear that the new system of appointing principal officials would be put in place for the Chief Executive's second term of office (2002–07), and that the Chief Executive would nominate and recommend candidates to the Central People's Government for appointment.<sup>28</sup>

23. LegCo adopted in a motion debate on June 14, 2000 the report of its Panel on Constitutional Affairs on *The Development of the Political System of Hong Kong*. LC Paper CB(2)2207/00–01(01) (Aug. 27, 2001), at <http://www.legco.gov.hk/yr00-01/english/hc/papers/hc0607cb2-2207.pdf>.

24. Tung, *supra* note 3, at paras. 111–22.

25. LC Paper CB(2)2007/00–01(01) (Aug. 27, 2001), at <http://www.legco.gov.hk/yr00-01/english/hc/papers/hc0607cb2-2007.pdf>.

26. Members of the Steering Group were the most senior officials—Chief Secretary, Financial Secretary, Secretary for Justice, Secretary for Constitutional Affairs, Secretary for the Civil Service, Head of the Central Policy Unit and Information Coordinator.

27. LC Paper CB(2)2261/00–01(01), at paras. 3–4 (Aug. 27, 2001), at <http://www.legco.gov.hk/yr00-01/english/panels/ca/papers/b2261e01.pdf>.

28. Tung, *supra* note 3, at paras. 130–40.

On December 13, 2001, Chief Executive Tung Chee-hwa declared his intention to stand for a second term of office. In his published pledge, he stated:

Over the past four years or so, I have constantly reflected on how we could have done better, for there are undoubtedly deficiencies. In particular, I believe the development and implementation of some policy initiatives could have been better managed; the interests of different sectors better balanced; the reform initiatives better prioritized; and the response and reaction of the community better assessed.<sup>29</sup>

A key plank of his second term platform was to implement the new accountability system by July 1, 2002:

Through a more accountable system, senior officials will better serve the community. In addition, we believe this will foster a more service-oriented culture within the entire civil service that is in tune with the times. Following introduction of the new accountability system, we will restructure the Executive Council to ensure that this body performs its role in an effective manner.<sup>30</sup>

By the end of the nomination period on February 28, 2002, Tung Chee-hwa had secured 714 valid nominations among the 800-member Election Committee and was declared the “winner” of the selection process. Once campaign formalities were completed, he announced the details to the POAS at a special LegCo meeting on April 17, 2002. He again made it clear that he wanted it in place by July 1, 2002.

#### *F. Ad Hoc Reform*

Legislators complained that they did not have enough time to scrutinize the proposal. The official view was that Hong Kong had had sufficient time to discuss the new system because it had been first raised in October 2000. Critics argued that despite earlier allusions to the new system, solid details of the proposal were not articulated until quite late in the implementation process. Officials promoting the POAS defended the tight timetable by saying that the government had exchanged views with legislators and others on various occasions.<sup>31</sup> Moreover, they claimed that the government had the public’s support to push ahead as evidenced by an opinion survey conducted in May 2002.<sup>32</sup>

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29. Tung, *supra* note 4, at 4–5.

30. *Id.*

31. LC Paper CB(2)2015/01–02, *supra* note 15.

32. Critics argued that the survey asked leading questions, the principle one being: “Do you support the HKSAR Government’s proposal to introduce the Accountability System for Principal Officials to enhance its accountability to the public?” *Opinion Survey on Public’s Views Towards the Accountability System for Principal Officials*, (AC Nielsen) May 24, 2002, at <http://www.info.gov.hk/hab/content/index.htm>.

The HKSAR Government used subsidiary legislation in the form of a Resolution to effect substantive change in the government structure and creation of a new class of political appointees—the principal officials.<sup>33</sup> Some legislators complained that the executive should have proposed new primary legislation to establish the POAS in view of the far-reaching effect of the new system and with the government structure being radically changed. Officials maintained that the new system could be implemented by means of a Resolution. The Secretary of Justice has argued: “[T]here is no requirement in the Basic Law that policy decisions of the Chief Executive, or the Chief Executive in Council, must be formally promulgated.”<sup>34</sup> Legislator, Margaret Ng, noted that what LegCo was being asked to do with passing the Resolution was:

[T]o take away all the powers and functions exercised by civil servants, and put them in the hands of these ministers. This is a kind of transfer that this Council has certainly never seen before, neither in kind or scope . . . . This Resolution affects at least half of the sum total of executive powers and functions our laws have conferred on the entire government.<sup>35</sup>

Furthermore, because the implementation of the POAS would be accompanied by a re-organization of a number of policy bureaus, the government used an Order (another form of subsidiary legislation) for the other amendments needed to revise the changes to the post-titles of the bureau heads who were to take charge of the re-organized bureaus.<sup>36</sup>

The HKSAR Government moved and successfully passed a motion debate in LegCo on May 29, 2002 to seek support for the POAS.<sup>37</sup> On June 14, LegCo agreed to funding of HK\$42 million (US\$5.4 million) to meet the costs of the new principal officials positions.<sup>38</sup>

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33. The purpose of the Resolution under Section 54A of the Interpretation and General Clauses Ordinance (Cap. 1) (Resolution) was to effect a transfer with effect from July 1, 2002 of statutory functions of certain “Secretaries” who would be involved in the amalgamation of policy portfolios pursuant to the proposed accountability system. For details of the resolution see LC Paper LS112/01-02 (June 5, 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm).

34. LC Paper CB(2)2000/01-02(01) (May 17, 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm); Secretary of Justice, Speech at the LegCo motion debate (May 30, 2002), at <http://www.info.gov.hk/gia/general/200205/30/0530237.htm>.

35. Margaret Ng, Speech at the debate on the passage of the Resolution (June 19, 2002).

36. LegCo also had to pass a new order subsequent to the passage of the Resolution under Schedule 6 to the Interpretation and General Clauses Ordinance to effect changes to post titles. See LC Paper CB(2)2068/01-02(02) (May 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm).

37. The motion was passed thirty-five in favor and seventeen against.

38. The cash remuneration of the fourteen principal officials is among the highest in the world, commensurate with pay in the private sector for top executives. The Chief Secretary earns HK\$345,850 (US\$44,400), the Financial Secretary earns HK\$334,150 (US\$43,000), the

On June 19, 2002, LegCo passed the resolution to affect the reorganization of the policy bureaux thereby completing the process for setting up the POAS.<sup>39</sup> On June 24, the Chief Executive announced the new line-up for his second term of office: the principal officials, the new members of the Executive Council, the Director of the Chief Executive's Office, and the head of the Central Policy Unit (a government think-tank).<sup>40</sup>

#### IV. FUNDAMENTALS OF THE POAS<sup>41</sup>

In his announcement of the POAS, the Chief Executive said that he expected the principal officials to be "motivated by common perspectives, shared policy goals and a collective mission" and that the new system would "bring about a new style of governance" where principal officials and the HKSAR Government would "have to assume responsibility . . . place importance on public opinion . . . make further efforts to gauge public sentiments" . . . and be proactive in facing the public, and in gaining the trust and support of the public by delivering results.<sup>42</sup>

##### A. Objectives, Elements, and Arrangements

The HKSAR Government noted six objectives and seven major elements of the POAS, upon which three sets of specific arrangements were based. The following boxes provide a summary of the relevant statements.<sup>43</sup>

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Secretary of Justice earns HK\$322,850 (US\$41,400), and each of the other eleven principal officials earn HK\$311,900 (US\$40,000) per month. Justification of the financial implications of the POAS can be found in LC Paper CB(2)2068/01-02(03) (May 27, 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm).

39. The Resolution was passed thirty-six in favor and twenty-one against.

40. Press Release, Chief Executive Tung Chee-Hwa, Statement on appointments (June 24, 2002), at <http://www.info.gov.hk/gia/general200206/24/0624128.htm>; Press Release, Government of Hong Kong, Details of appointments of the Principal Officials (June 24, 2002), at <http://www.info.gov.hk/gia/general200206/24/0624107.htm>; and, Press Release, Government of Hong Kong, Appointments of the Director of the Chief Executive Office and the Head of the Central Policy Unit (June 24, 2002), at <http://www.info.gov.hk/gia/general200206/24/0624105.htm>.

41. The Constitutional Affairs Bureau produced a briefing paper, LC Paper *System of Accountability for Principal Officials Provided by Constitutional Affairs Bureau to Members at the Council Meeting on 17 April 2002* (Apr. 17, 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm), for LegCo to accompany the Chief Executive address on April 17, 2000. See discussion *supra* note 13 for website for all LegCo Papers.

42. See *infra* Appendix I.

43. Michael Suen, Secretary for Constitutional Affairs in moving a motion on the POAS in LegCo on May 29, 2002, at <http://www.info.gov.hk/gia/general/200205/29/0529263.htm> [hereinafter Suen, Speech to LegCo, May 29, 2002].

<b>OBJECTIVES</b>	<b>MAJOR ELEMENTS</b>
<ol style="list-style-type: none"><li>1. To enhance the accountability of principal officials for their respective policy portfolios.</li><li>2. To enable senior government officials to better appreciate the aspirations of and better respond to the community.</li><li>3. To select the best and most suitable persons to take up the principal positions.</li><li>4. To enhance cooperation between the Government and LegCo.</li><li>5. To better coordinate the formulation and implementation of policies.</li><li>6. To maintain a permanent and politically neutral civil service.</li></ol>	<ol style="list-style-type: none"><li>a. Principal officials shall be accountable for matters falling within their portfolios and may have to step down for serious failures.</li><li>b. They should not come under the civil service establishment.</li><li>c. Candidates may come from outside or within the civil service.</li><li>d. They should be directly responsible to the Chief Executive.</li><li>e. They shall be members of the Executive Council and take part in high level decision-making process.</li><li>f. They shall keep close tabs on public sentiments to ensure greater responsiveness.</li><li>g. They shall engage more proactively in communication with LegCo.</li></ol>

<b>SPECIFIC ARRANGEMENTS OF THE POAS</b>
<ol style="list-style-type: none"><li>I. The appointment arrangements for the principal officials are more “flexible” for the Chief Executive to appoint whom he sees fit.</li><li>II. The principle officials have “better defined powers commensurate with their responsibilities”. As members of the Executive Council, the officials are in a better position to coordinate policy priority, implementation and resource allocations.</li><li>III. The POAS is meant to “foster a culture of enhanced accountability”. Principal officials are expected to communicate more with LegCo and make district visits.</li></ol>



### *B. Reorganization of Portfolios*

The Chief Executive appointed a total of fourteen principal officials, including the Chief Secretary, the Financial Secretary, the Secretary for Justice,<sup>44</sup> and eleven Directors of Bureaus.<sup>45</sup> A number of the policy portfolios have been amalgamated. Changes were announced at the time of the LegCo debate on May 29, 2002 to reorder some of the responsibilities as a response to legislators' lobbying. Appendix II compares the previous structure, the first proposed structure, and the final reorganized structure.

### *C. Revamped Executive Council*

Article 55 of the Basic Law permits membership of the Executive Council to be drawn from among the principal officials, legislators, and public figures. All the principal officials are now members of the Executive Council, which is the closest thing to a cabinet in Hong Kong. In addition, there are five members with three legislators among them who have no portfolio responsibilities: James Tien, who chairs the Liberal Party; Tsang Yok-sing, who chairs the Democratic Alliance for the Betterment of Hong Kong; and, Cheng Yiu-tong, who is the chairman of the Federation of Trade Unions. The appointment of political party members sets a new convention that people with political affiliation can serve on the Executive Council.<sup>46</sup>

During LegCo scrutiny of the POAS, legislators questioned whether a person who is a member of a foreign or non-Hong Kong based political party, such as the Chinese Communist Party or the Kuomintang, could be appointed as a principal official. The official response was that "freedom of association is protected by law in Hong Kong" and that it was for the prospective principal official to consider whether his or her affiliation would give rise to conflicts of interest. The affiliation should be disclosed to the Chief Executive, and it would be for the Chief Executive to decide whether to nominate the candidate.<sup>47</sup>

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44. During the scrutiny process, some legislators objected to the position of Secretary for Justice be made a political appointment and suggested that the Secretary's power to make prosecution decisions should be transferred to the Director of Prosecution, but their suggestion was rejected. See Secretary of Justice Speech (May 30, 2002), at <http://www.info.gov.hk/gia/general/200205/30/0530237.htm>.

45. The title "Director of Bureau" is the official designation of a principal official although s/he is referred to as the "Secretary" of the relevant bureau.

46. Although Tam Yiu-chung, a member of the Democratic Alliance for the Betterment of Hong Kong, was appointed to the Executive Council during the Chief Executive's first term of office, the appointment was seen more as a gesture to include someone from the labor sector rather than to include political parties.

47. LC Paper CB(2)2171/01-02, at paras. 44-45 (June 6, 2002), at <http://www.legco.gov.hk/yr01-02/english/hc/papers/hc0607cb2-2171.pdf>. See also LC Paper CB(2)2066/01-02(04) (May 25, 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm).

In total, there are twenty-two members in the Executive Council, making it a much larger body than the previous one, which had twelve members including the Chief Executive. The Executive Council is now clearly dominated by full-time professional politicians for the first time in Hong Kong's history. These changes have effectively turned the Executive Council into a sort of "proto-cabinet".

Although these individuals clearly represent Hong Kong's political elite, the Executive Council remains first and foremost an advisory body to the Chief Executive. It has no role to check and balance the decision-making power of the Chief Executive. Its constitutional role as "an organ for assisting the Chief Executive in policy-making" does not change.<sup>48</sup> Article 56(2) of the Basic Law provides that the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the legislature, making subordinate legislation, or dissolving LegCo. The Chief Executive chairs Executive Council meetings, and according to Article 56(3), if he does not accept a majority opinion of the Executive Council, he "shall put the specific reasons on record." Nevertheless, Executive Council papers and records are kept confidential.

The official position states: "There will not be any difference in the functions and operations of the Executive Council as provided by the Basic Law."<sup>49</sup> Otherwise, the Basic Law would have had to be amended for the creation of a real cabinet. Members of the Executive Council abide by the Principle of Collective Responsibility, which in British parliamentary tradition implies that all ministers assume responsibility for cabinet decisions and action taken to implement those decisions. As such, there must be a display of public unanimity on those decisions and actions.<sup>50</sup> The three legislators, including two chairmen of respective political parties in Hong Kong, would therefore not be able to criticize Executive Council decisions made after their appointments.<sup>51</sup>

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48. BASIC LAW, *supra* note 5, art. 54.

49. LC Paper CB(2)2034/01-02(01) (May 21, 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm).

50. A minister may disagree with a cabinet decision or with the manner of its implementation, but if he wishes to express dissent in public he should first resign. See STANLEY DE SMITH & RODNEY BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 187-88 (Penguin Books 1990) (1971).

51. To what extent this arrangement will bind members of these parties in LegCo to vote for all Executive Council decisions remains to be seen. It is not difficult to imagine legislators from the Democratic Alliance for the Betterment of Hong Kong coming under significant grassroots pressure to oppose some government decisions seen to affecting employment or social welfare, for example. It has to be seen whether there

In another change, the Secretariat of the Executive Council has merged with the Office of the Chief Executive. Previously, it was attached to the Chief Secretary's Office. This move is a clear indication that the Chief Executive wants direct control of his key advisory body. The Chief Secretary remarked at a press conference on the POAS on April 17, 2002: "An Executive Council comprising, at its core, the Chief Executive and all of his Principal Officials is much more in tune with the Cabinet-style principles and practices of executive-led government."<sup>52</sup>

#### *D. Director of the Chief Executive's Office*

A new political post of the Director of the Chief Executive's Office has been created whose main job is to oversee the running of the Executive Council Secretariat and act as the spokesperson for this office. His duties have clear political content. Although not a principal official or member of the Executive Council, the Director is "part of the senior team of the HKSAR Government" and attends Executive Council meetings, and, if invited, the Director can provide input. He cannot vote, however.<sup>53</sup>

Heated controversy arose during LegCo's discussion of the creation of this post. Some legislators feared that the Director might become a "special envoy" of the Chief Executive with excessive influence to determine the agenda of Executive Council meetings as well as act as a personal missionary for the Chief Executive. The concern was heightened by the controversy surrounding the Robert Chung incident where Chung had stated in a newspaper article on July 7, 2000 that the Chief Executive had on several occasions passed to him an indirect message that his polls on the Chief Executive were unwelcome. The Chief Executive's senior special assistant, Andrew Lo, had discussions in 1999 with the head of the University of Hong Kong in regards to Robert Chung's work in carrying out public opinion surveys, which resulted in suggestions to Chung that he perceived to have been pressure to change his work. The incident eventually led to the resignation of the university head and resulted in an inquiry that

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will be any changes to party discipline mechanisms for these two parties as a result of their chairmen being appointed to the Executive Council. *See also infra* Part VII.

52. The merger of the Executive Council's Secretariat with the Chief Executive's Office may have been driven by the Chief Executive's desire to reduce intra-executive tension that existed between him and his non-civil service advisors and the civil servants during his first term of office. Donald Tsang, Opening Remarks at the Press Conference on Accountability System (April 17, 2002), at <http://www.info.gov.hk/gia/general/200204/17/0417271.htm>.

53. Although the post is clearly a key political appointment, the Director cannot be a principal official because that role is not provided for in the Basic Law. LC Paper CB(2)1929/01-02(01) (May 13, 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm).

severely damaged the public image of Lo and the Chief Executive. Despite mounting public pressure, the Chief Executive refused to remove Lo from his post.<sup>54</sup>

### Summary of Duties of the Director of the Chief Executive's Office

OVERSEEING EXECUTIVE COUNCIL SECRETARIAT	INFORMATION COORDINATION
<ul style="list-style-type: none"> <li>(a) Ensure the meeting agenda reflects the overall policy of the government as determined by the Chief Executive.</li> <li>(b) Ensure expeditious discussion of the Executive Council's sub-committees' advice.</li> <li>(c) Ensure proper recording of decisions.</li> </ul>	<ul style="list-style-type: none"> <li>(a) Formulate media and PR strategy.</li> <li>(b) Serve as spokesperson for Chief Executive and media liaison.</li> <li>(c) Plan the Chief Executive's public engagement program.</li> <li>(d) Monitor public opinion.</li> </ul>

There has also been considerable concern about the Director's role in setting the meeting agenda of the Executive Council. The government response has been that the Chief Executive will determine the overall government policy agenda with the assistance of the Chief Secretary and the Financial Secretary, while the Director will only ensure that the Executive Council meeting agenda reflect the priorities of the overall government agenda.<sup>55</sup>

#### *E. Chief Secretary's Position*

The position of the Chief Secretary has been made less important even though it remains the most senior among the principal officials. Under the previous system, the Chief Secretary chaired the most powerful body within the administration, the Chief Secretary's Policy Committee. It

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54. See Johannes Chan, *Civil Liberties: Rule of Law and Human Rights*, in THE FIRST TUNG CHEE-HWA ADMINISTRATION—THE FIRST FIVE YEARS OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, *supra* note 17, at 114 for a succinct summary of the "Robert Chung Affair".

55. See LC Paper CB(2)2068/01-02(01) at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm) (providing the job description of the Director).

was made up of a series of policy groups represented by the heads of the policy bureaus. The Chief Secretary played a leading role in coordinating policy-making and arbitrated conflicts among the bureaus heads. With the POAS designed to make the principal officials take direct political responsibility, the Chief Secretary will play more of a coordination role. As a result, under the POAS there is significantly less scope for the Chief Secretary to make the final decision on policy than was the case previously.

Under the new system, the Chief Secretary will chair various Executive Council sub-committees that replace the policy groups under the Chief Secretary Committee.<sup>56</sup> The Chief Secretary is also tasked with assisting the Chief Executive in supervising the policy bureaus, ensuring harmonization in policy formulation and implementation, and supervising specific priority areas of the Chief Executive's policy agenda. Finally, the Chief Secretary will also be responsible for forging a better relationship with the Legislative Council and for designing the Government's legislative program.<sup>57</sup>

#### *F. Chief Executive in Council*

In the British tradition, there is a longstanding practice for a subject to appeal to the "King (or Queen) in Council" on certain matters. The council was the Privy Council, the body of persons appointed (by the Crown) to advise the sovereign.<sup>58</sup> In a jurisdiction such as Hong Kong, which retained many aspects of a colonial governance system even today, the "Chief Executive in Council", retains a residual power to hear appeals against certain decisions. Most of these rights to appeal (which are in addition to any legal right applying) are now set down in legislation.

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56. The Financial Secretary (FS) will also chair Executive Council Sub-committees relating to economic, monetary, and financial affairs. At a Q/A session at a luncheon talk on April 25, 2002, the Chief Secretary (CS) said that:

The idea is that the FS will sit in my subcommittees as a member and I'll sit in his subcommittee as a member. So we'll know the entire cross-section of the Hong Kong Government activities as we try to promote a political agenda for the next five years. It will be more coherent, with a sharper focus, and I think working for the first time as a real political team in action.

See Tsang, *supra* note 14.

57. HKSAR GOV'T SECRETARIAT, *Organizational Changes in the Government Secretariat of the Government of the HKSAR Arising from the Accountability System*, GEN. CIRCULAR NO.4/2002, JUNE 28, 2002 (describing the specific responsibilities of all fourteen principal officials) [hereinafter GEN. CIRCULAR NO. 4/2002].

58. The height of the influence of the Privy Council was during the Tudor period. Subsequently its political role was largely transferred to Parliament. Its judicial role became formalized with the formation of the Judicial Committee of the Privy Council, which continues as the court of final appeal for various former British colonies, such as New Zealand, to this day.

Legislators questioned how appeals to the Chief Executive in Council against decisions of principal officials or their deputies would be handled under the POAS. Hong Kong ordinances have 689 references to the term “Chief Executive in Council”. Of these, fifty-three references provide for appeals in particular situations, such as on the decisions of the Director of Immigration; thirty-two references relates to approval of plans, such as those under the Town Planning Ordinance; and, the rest relate to the making of subsidiary legislation, amendment of schedules of primary legislation and miscellaneous matters. The “Chief Executive in Council” sits to hear appeals in an administrative and not a judicial capacity. Where an appeal arises from a decision of a bureau or department, the principal official who holds the relevant portfolio is given legal advice as to whether he or she should excuse himself or herself from the particular appeal.<sup>59</sup>

### *G. Appointment and Removal of Principal Officials*

The Chief Executive in theory can appoint whom he sees fit as principal officials. In reality, there are practical constraints. First, candidates have to go through an integrity and medical check before they are nominated for appointment.<sup>60</sup> Second, because the Central People’s Government upon nomination by the Chief Executive actually appoints the principal officials, the Chief Executive would likely be sensitive to Beijing’s views. Third, and most fundamentally, candidates have to be willing to serve. It has been reported that several people from the private sector and civil service who had been asked to serve as principal officials turned down the offer.<sup>61</sup>

Civil servants who accept appointments as principal officials under the POAS (with the exception of the Secretary for the Civil Service) must resign from the civil service to become effectively full-time political appointees employed on contract. Non-civil servants join as principal officials on contract. The new

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59. This issue was extensively discussed during LegCo scrutiny. It would be useful to put in place a mechanism to deal with appeals that go to the Chief Executive in Council against decisions of principal officials to ensure consistency and transparency. Judicial interpretation provides where an appeal may be made to the Chief Executive in Council, that administrative remedy is additional to, and not a substitute for, any remedy by way of judicial review of the original administrative decision. LC Paper CB(2)1911/01–02(01) (May 10, 2002) at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm).

60. LC Paper CB(2)2075/02–02(02) (May 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm); LC Paper CB(2)2171/01–02, *supra* note 47, at paras. 37–40.

61. *See, e.g., San ju tou wu gu lu shi bai: Ma Shi Heng dai yi zhong*, MING PAO, June 19, 2002, at A1.

employment packages are no longer linked to the civil service pay scale but may be reviewed from time to time at the discretion of the Chief Executive.

Principal officials are employed on contract for a term that does not exceed that of the Chief Executive who nominates them, and their employment may be terminated at any time without cause or compensation.<sup>62</sup> Article 48(5) of the Basic Law provides the Chief Executive with the power to recommend the removal of principal officials to the Central People's Government.

The principal officials' contracts of service have a condition that they need to uphold the principle of maintaining an impartial civil service system, the terms of which are laid out in a new Code of Practice. At the same time, the government released a new General Circular to civil servants setting out the working relationship between civil servants and principal officials. The Code also applies to the Director of the Chief Executive's Office who is not a principal official. The General Circular makes reference to the Director in spelling out the working relationship between principal officials and civil servants.<sup>63</sup> These arrangements were put in place in recognition of the potentially sensitive relationship between civil servants and political appointees. They are meant to ensure that individual civil servants are not put in a position that may compromise their integrity, probity, or impartiality.

Former principal officials will be required to obtain the advice of a special advisory committee appointed by the Chief Executive before taking up any employment or going into any business within a year of stepping down from office.<sup>64</sup>

#### H. Civil Service Reorganization

The most senior civil servants are now known as "permanent secretaries," and their role is to provide full support to the principal officials in formulating, explaining, and defending policies, as well as securing support of the public and LegCo. They will run the relevant bureaus and departments. In addition, they will represent the principal officials at LegCo panels, bills committees, and at public forums. This will relieve the principal officials of certain tasks such as internal coordination, administration, and particular LegCo duties to focus on their priority policy roles.<sup>65</sup>

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62. LC Paper CB(2)2075/02-02(02), *supra* note 60; LC Paper CB(2)2171/01-02, *supra* note 47, at paras. 37-40.

63. LC Paper CB(2)2101/01-02(01) (May 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51_ppr.htm); LC Paper CB(2)2171/01-02, *supra* note 47, at para. 34; LC Paper CB(2)2467/01-02(01) (June 28, 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm).

64. LC Paper CB(2)2015/01-02, *supra* note 15, at paras. 134-38.

65. LC Paper CB(2)1711/01-02(01) (Apr. 23, 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm). See also GEN. CIRCULAR NO. 4/2002, annex F (describing the responsibilities of the permanent secretaries).

More changes are in store. Upon assumption of office, the principal officials will review the staffing and structure of the policy bureaus. The purpose of the review, to be completed within twelve months, is to streamline the structure and relationship between the policy bureaus and executive departments in the quest for greater efficiency and better implementation. The review is meant to help ensure that the introduction of the accountability system will prove to be a “cost neutral exercise”.<sup>66</sup>

The Secretary for the Civil Service position was designed to allay fears that the political neutrality of the civil service may be compromised. Despite being a principal official posting, the Secretary for the Civil Service will continue to be chosen from among civil servants, and, upon the end of his or her term of service, he or she can return to the civil service in other civil service postings.<sup>67</sup>

## V. ACCOUNTABILITY—THEN AND NOW

“Accountability” can have several meanings. In the narrowest sense, “accountability” means simply the obligation to account for or explain one’s actions. In the sense of “administrative accountability”, the term refers to performance and deals with the relationship between subordinates and superiors. In the still broader sense of “political accountability”, the term refers to the relationship between authorities and the public or its representatives. To compare accountability under the new system with Hong Kong’s previous system, it is important to understand the sense in which this term is being used.

### A. *Colonial Legacy*

Under the previous system of government in Hong Kong—a legacy of colonialism—decision-makers were not accountable in a political sense. It was never thought that decision-makers had to be held accountable to colonial subjects. Until 1997, Hong Kong had a colonial system of government where bureaucrats acted effectively as both administrators and ministers. They were accountable in an administrative sense to their superiors and had to abide by civil service regulations but they were not accountable politically.<sup>68</sup> They

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66. LC Paper CB(2)2066/01–02(04), *supra* note 47, at para. 2.

67. Tung, Speech to LegCo on POAS, April 17, 2002, *supra* note 4; Suen, Speech to LegCo, May 29, 2002, *supra* note 43.

68. Civil service regulations are in the form of subsidiary legislation. The Public Service (Administration) Order and Public Service (Disciplinary) Regulation spell out civil service appointments, dismissal, suspension, and disciplinary procedures.



were answerable in the sense that they provided answers to the public directly and via the legislature.

The fusion of politics and administration in the colonial model of government downplayed the importance of politics and political participation in policy-making. At the same time, the top layer of the civil service was in fact politicized as it also effectively played a political role.

Hong Kong's post-1997 political system adopted much of the colonial structure. The Basic Law was created in the mid-1980s to enable the colonial "executive-led" (i.e. civil service-led) system to continue essentially unchanged. Although relevant articles are somewhat vague, the Basic Law does not provide for political accountability.

The Basic Law expects that, together with the Chief Executive, civil servants will continue to play the most important political role in post-1997 Hong Kong. Article 48(5) refers to a number of the most senior official posts, most of whom were civil servants, as "principal officials".<sup>69</sup> The administrative apparatus and the Chief Executive together make up the "executive authorities", which is the HKSAR Government.<sup>70</sup> Although the Basic Law provides that the HKSAR Government is "accountable" to the legislature, it does not seem to incorporate the notion of political accountability.<sup>71</sup> Article 99 makes it clear that "public servants" (a category that includes civil servants) are responsible to the HKSAR Government and not to the legislature.<sup>72</sup>

It is therefore understandable why a large number of civil servants do not see themselves as being responsible politically.<sup>73</sup> Instead, according to official documents prepared for LegCo, civil servants should only be "accountable for administrative and managerial mishaps, as well as for personal misconduct." Noting the existence of a "well-established civil service appointment, management and disciplinary system," the study concludes that "it would not be appropriate to ask civil servants to

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69. The majority of the principal officials were civil servants. The Director of the Independent Commission Against Corruption and the Director of Audit were not employed as civil servants but on contract terms.

70. See BASIC LAW, *supra* note 5, arts. 59–60.

71. See *id.* art. 64.

72. "Public servants" is a wider term than civil servants and covers legislators, principal officials, and appointees to public bodies who are not employed on civil service terms, as well as mainstream civil servants. LC Paper CB(2)1809/01–02(03) (Apr. 29, 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm) (providing the official definitions for "civil servants" and "public servants").

73. A University of Hong Kong survey in 1999 of civil servants showed that less than 44.5% of the senior official respondents believed that the civil service should be accountable to the legislature. Furthermore, 51.4% believed that being accountable did not mean that they should resign to take responsibility for policy errors, reflecting the civil service's position as a whole. A majority of 58.9% believed that "executive-led" government meant that the government could implement policy that had not first been approved by LegCo.

assume political responsibility” because it “would seriously undermine the political neutrality of the civil service and the integrity of the civil service system.”<sup>74</sup> Former Secretary for Constitutional Affairs Michael Suen argued:

There are increasing calls for senior civil servants to be held accountable for policy failures, including calls for some of them to step down. These changes have shown an inherent mismatch between the civil service status of these officials and the demands placed on them . . . . Holding them responsible and expecting them to step down in the case of serious policy failures is incompatible with the underlying philosophy of a permanent civil service and its established appointment and removal system.<sup>75</sup>

In summary, in the previous system, accountability was equated with answerability and administrative accountability. That sort of accountability carried no political sanctions.<sup>76</sup>

In announcing the POAS, the Chief Executive sought to strengthen accountability to the executive by requiring principal officials to be responsible to him for their policy portfolios. According to the Chief Executive, principal officials would be: “. . . [A]ccountable to the Chief Executive for the success or failure of their policy initiatives. Under the leadership of the Chief Executive, they will be accountable to the community. Where necessary, the Chief Executive may terminate their contracts.”<sup>77</sup>

The accountability as stated, however, is to the Chief Executive and not to either Hong Kong’s elected legislature or to its electorate. The POAS is therefore not a system that provides for political accountability in a democratic sense.

The HKSAR Government’s position is consistent with the Basic Law. Under the Basic Law as it is currently drafted, democratic political accountability is not available. Principal officials are still considered to be “public servants” and thus not accountable to the legislature.<sup>78</sup> The Basic Law contains no provision for the legislature to remove a principal official through a vote of no confidence. LegCo only has power to

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74. LC Paper CB(2)194/01–02(01) (Oct. 26, 2001), at <http://www.legco.gov.hk/yr01-02/english/panels/ca/papers/ca1030cb2-194-1.pdf>.

75. Suen, Speech to LegCo, May 29, 2002, *supra* note 43. See also Anson Chan, Speech at the LegCo motion of no confidence on short piling (June 28, 2002) in *Official Record of Proceedings*, Legislative Council, at 9317–20.

76. John P. Burns, Accountability and the Senior Civil Service in the HKSAR, (2002) (paper delivered at the University of Hong Kong).

77. Tung, Speech to LegCo on POAS, April 17, 2002, *supra* note 4.

78. LC Paper CB(2)693/01–02(01), at <http://www.legco.gov.hk/yr01-02/english/panels/ca/papers/ca1217cb2-693-1e>.

impeach the Chief Executive.<sup>79</sup> However, the Chief Executive has said that if LegCo passes a motion of no confidence against a principal official, he would “consider among other things the circumstances leading to such a motion.”<sup>80</sup>

The existing constitutional framework did not anticipate the emergence of professional politicians and the government was unprepared to seek amendment of the Basic Law. Principal officials under the POAS have thus had to be fitted within the existing framework of the Basic Law. This has led to their being described as—and regarded as—“public servants”. It is clear that the new principal officials, like professional politicians and legislators in other jurisdictions, are “public servants” in a general sense. But, although they are in “public service”, Hong Kong’s new principal officials are not subject to the rules, norms, and accountability systems applying to civil servants and executive branch employees within the HKSAR. A key point of the POAS was to terminate the civil service status of (almost all) the new principal officials.

The next question which arises is, are the new POAS principal officials not just “generic” public servants, but also “public servants” within the strict meaning of that term as it is used in the Basic Law. This is really an important issue only with respect to the eligibility of members of LegCo to serve, *concurrently*, as principal officials under the new system. Under the pre-POAS system, it was clear that LegCo members could *not*, also, be principal officials. Under the new system it is less clear-cut that a serving LegCo member is prohibited from being concurrently appointed as a principal official. Article 79(4) of the Basic Law provides that a legislator is to be disqualified if he accepts a “government appointment” *and becomes a public servant*. The question is, are principal officials appointed under the POAS properly to be regarded as “public servants” within the meaning of the Basic Law? Professor Ghai has noted that there is some uncertainty about whether certain “principal officials” (like those created by the POAS who, explicitly, are *not civil servants*) are “public servants” within the strict meaning of the Basic Law. That is, to be a public servant within the *strict meaning of Article 79 (4) of the Basic Law*, is it mandatory for that principal official to be a mainstream civil servant? If this is a necessary requirement to be a public servant within the meaning of Article 79(4), then one can argue that a currently serving member of LegCo could be appointed as a principal official *without* endangering his or her eligibility to hold a LegCo seat. Although he or she would have accepted a “government appointment”, he or she would not have become a “public servant” within the meaning of Article 79(4). Ghai notes the uncertainty about the validity of this line of reasoning. Good sense thus suggests it would be unwise to attempt to appoint a legislator as a principal official with portfolio.<sup>81</sup>

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79. See BASIC LAW, *supra* note 5, art. 73(9).

80. LC Paper CB(2)1711/01–02(01) (Apr. 23, 2002), *supra* note 65.

81. YASH GHAI, HONG KONG’S NEW CONSTITUTIONAL ORDER 295 (2nd ed. 1999).

Article 55 of the Basic Law specifically allows legislators to join the Executive Council. There is, thus, no problem with a legislator also being a member of the Executive Council—provided the LegCo member does not have a specific portfolio. Ultimately, Article 55 negates any attempt to draw an implication from Article 79(4) that such an appointee (without portfolio) could be considered to be a “public servant” within the meaning of that Article.

### *B. Accountability to LegCo*

Article 64 of the Basic Law provides that the Government is accountable to LegCo. Specifically, the Government shall:

- (i) implement laws passed by the Council already in force;
- (ii) present regular policy addresses to the Council;
- (iii) answer questions raised by members of the Council; and,
- (iv) obtain approval from the Council for taxation and public expenditure.

Thus, the accountability to LegCo on its face is restricted to four areas. Article 74 further constrains the power of LegCo by limiting legislators’ ability to propose private bills except where they do not relate to public expenditure, political structure, or the operation of government. Otherwise, the written consent of the Chief Executive is required before any such introduction. With respect to public expenditure, LegCo can only accept or reject proposals from the executive but not amend them. Articles 50 through 52 of the Basic Law provide that if there is deadlock over legislation or a budget, the Chief Executive may dissolve LegCo. Only if the new legislature and the Chief Executive found themselves in deadlock once more would the Chief Executive have to resign.

Although LegCo’s constitutional powers to hold the government accountable are limited, the Power and Privilege Ordinance gives LegCo enormous power to investigate possible government wrongdoing. LegCo invoked this Ordinance in 1994 to investigate the dismissal of a high-ranking corruption investigator, in 1997 to investigate questionable actions of the Director of Immigration, in 1998 to investigate the problems associated with the opening of the Chek Lap Kok airport, and in 2001 to investigate defective construction. The Ordinance provides the legislature with the power to summon the Chief Executive and anyone else in the jurisdiction for questioning.

Although motion debates in LegCo carry no legislative effect and are therefore purely persuasive in nature, motions can be influential if carried. On both occasions when motions of no confidence against specific officials were moved, they were highly charged and solemn events where the

executive lobbied hard against them.<sup>82</sup> Likewise, in the future, if the legislature were to pass a motion of no confidence against a principal official, it would likely be extremely difficult for the person concerned to remain in office.

## VI. EVALUATING SYSTEMS OF EXECUTIVE GOVERNMENT

Hong Kong's system of government bears a greater structural resemblance to a presidential system, as in the United States, than to the ministerial (parliamentary) system used in Britain. That said, the dominant political-constitutional tradition in Hong Kong is British. Hong Kong has therefore inherited a somewhat schizophrenic political personality. To understand how the new system of accountability will work in Hong Kong, it is important to understand both these political traditions. To be successful, efforts to reform government accountability in Hong Kong must understand the real nature of the existing system.

### A. Ministerial and Presidential Systems

Official documents do not refer to the POAS as a "ministerial system" even though public debate and press coverage have done so and the media typically refer to the new principal officials as "ministers". Nor is the term "Cabinet" officially used.<sup>83</sup> The system is always referred to as the "Principal Officials Accountability System" or the "Accountability System". The POAS is, nonetheless, a form of ministerial system, as that term is generally understood.<sup>84</sup> Professional politicians have taken key positions of public responsibility, and they have been formed into a governing collective under the leadership of a chief minister, which in Hong Kong's case is the Chief Executive. In short, despite the HKSAR Government's careful use of nomenclature, Hong Kong now has a form of ministerial government.

At the same time, the POAS is not a typical ministerial system because Hong Kong's ministers are not elected. The general understanding of a ministerial system includes an expectation that the ministers should be regularly accountable to the people through some form of popular election.<sup>85</sup>

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82. See discussion *supra* note 19 for details of the two motions.

83. Nevertheless, the Chief Secretary, at a luncheon talk, used the word "cabinet" several times. See Tsang, *supra* note 14.

84. The media often refer to the principal officials under the POAS as "Ministers". See also THE CONCISE OXFORD DICTIONARY OF POLITICS (Iain McLean ed., Oxford University Press 1996) for the definition of "Minister".

85. This is the essence of popular accountability under a Westminster System of government modeled on the U.K. parliamentary system. The U.S. model uses "ministers" (called Secretaries, normally) who are not directly elected. But they answer to a popularly elected President and their appointments and performances in each case are subject to scrutiny by Congress.

The POAS lacks any institutionalized system of popular (or democratic) accountability (although principal officials may be able to be dismissed more readily for poor performance than under the previous system).

The POAS is also not a typical ministerial system because of the way it reflects certain fundamental features of Hong Kong's inherited governance structure. Hong Kong, like any long established jurisdiction already has an established political profile. Short of revolutionary change, political reform proceeds within the structure of a jurisdiction's political profile.

### *B. The Origins of Ministerial Government*

The concept of ministerial government is rooted in the development of the modern concept of the Rule of Law, which has developed over a very long time.<sup>86</sup> In Britain, after the loss of the U.S. colonies in the late eighteenth century, the system of government changed as Parliament absorbed considerable power from a discredited Monarchy. The resulting "figurehead" constitutional monarchy continues in Britain to this day. The essence of the resulting (Westminster) Parliamentary System of Government (or "Responsible Government") is that the executive government is formed from within the legislature and is responsible to the legislature.<sup>87</sup> This was Britain's answer—some decades after the American Revolution—to the question of how to keep the government of the day in check.

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86. When we speak about the Rule of Law, it is often assumed that there is common agreement on what it means. There is in fact fundamental disagreement about the meaning of the term within the Common Law world—of which Hong Kong is a part. There is also disagreement between the Common Law world and other parts of the world with a different political-legal tradition, such as China. Notwithstanding these differences, there is fairly wide agreement within the Common Law world (and often beyond) on the basic requirements for any political-legal system to make a credible claim that the Rule of Law operates within that system. The Rule of Law concept is widely regarded as having been encapsulated as a Doctrine of the Common Law by A.V. Dicey in the nineteenth century. Originally, the concept had been applied principally to mediate the relationship between Monarch and Parliament. In the wake of the massive social, economic, and political changes wrought by the Industrial Revolution, it was also used to mediate the relationship between the government and its citizens. See David Clark, *The Many Meanings of the Rule of Law*, in LAW, CAPITALISM AND POWER IN ASIA (Kanishka Jayasuriya ed., 1999). See also, with respect to the Rule of Law in Hong Kong in particular, Carol Jones, *Politics Postponed*, in LAW, CAPITALISM AND POWER IN ASIA (Kanishka Jayasuriya ed., 1999).

87. The Doctrine of Responsible Government, which is part of British constitutional law, states that the entire executive branch of government (civil servants, government departments, and all members of the cabinet (ministers) should be answerable to the legislature. The Doctrine also stipulates that ministers must be members of Parliament. See BEDE HARRIS, *ESSENTIAL CONSTITUTIONAL LAW* 15 (2000).

### C. *Hong Kong's System of Executive Government*

Despite radical developments within Britain itself, these political reforms were not then exported throughout the British Empire. The British retained what might be termed the "George III model" as its template for colonial governance—a very powerful, centralized executive with a comparatively weak law-passing legislature plus a separate judiciary. During the nineteenth century, Britain did allow parliamentary government to develop to a significant (but still controlled) extent in Canada, Australia, and New Zealand, for example. In other colonies, though, the executive-led model prevailed. After World War II, Britain shed most of its colonies although Hong Kong remained an exception. Right through until the handover in 1997, Hong Kong retained its executive-led system of government, with its deep roots in the eighteenth century. As discussed earlier, this is the system of government that the British and the Chinese sought to lock into place when they were drafting the Joint Declaration and the Basic Law.

Hong Kong is a unique political entity, neither an independent country nor a typical province or city. In contrast to other British colonies, Hong Kong did not gain independence in 1997. It is not a nation-state but a special administrative region of the People's Republic of China. Hong Kong differs from a typical province, municipality, county, or city because of its extensive autonomy and ability to deal in external relations, but it is not an independent entity.<sup>88</sup> Likewise, the position of Chief Executive of the HKSAR is unique. On the one hand, he is able to participate in some international gatherings of heads of state.<sup>89</sup> On the other hand, his position is really similar to that of a typical large city mayor. Despite his international standing, the Chief Executive cannot be compared to a national president or a prime minister.

### D. *Contrasting Systems of Executive Government*

Different systems of government seek to enforce responsibility to the people in different ways. Presidential systems, such as in the United States, *separate* the powers of government into legislative, executive, and judicial institutions to avoid excessive concentrations of power and to allow each of the arms of government to act as a check and a balance on the others.<sup>90</sup> The overriding concern is to prevent the abuse of government power.

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88. Chapter VII of the Basic Law allows the HKSAR to conduct extensive external relations that falls short of diplomatic affairs.

89. For example, Hong Kong can be a member of international bodies with a separate identity from China, such as the World Trade Organization and APEC. Thus, in the case of APEC, the Chief Executive attends meetings together with other heads of state on an equal footing.

90. In the United States (as in other federal systems) power is also *divided* between the central (Federal) and regional (State) governments.

In parliamentary systems, the executive is responsible to the people through Parliament. Although the judiciary is independent, the executive and legislative branches work in concert. The executive government both resides in Parliament and, of necessity, enjoys majority legislative support. Should the government lose that support, then, under a parliamentary system, it will cease to be the government.

**Comparing Parliamentary and Presidential Systems<sup>91</sup>**

<b>PARLIAMENTARY</b>	<b>PRESIDENTIAL</b>
<p>All members of the executive—the chief executive (prime minister) and other members (ministers)—are members of the legislature.</p>	<p>The members of the executive—the chief executive (president) and other members (secretaries)—are not also members of the legislature.</p>
<p>The constitutional power of the executive is vested in the head of state who is either a monarch (United Kingdom) or a president (India).</p>	<p>The constitutional power of the executive is vested in the head of state (president) who is also the chief executive.</p>
<p>The constitutional power is exercised by the prime ministers and ministers.</p>	<p>The constitutional power of the executive is exercised by the president with the assistance and support of the secretaries.</p>
<p>The prime minister is appointed by the head of state on the basis of having the confidence and support of the legislature, and the ministers are appointed by the head of state upon the prime minister's advice.</p>	<p>The president is elected to office by the public, and the secretaries are appointed by the president with the approval of the legislature.</p>
<p>The prime minister and ministers collectively are dependent on the confidence and support of the legislature to remain in office and, thus, do not hold office for a fixed term.</p>	<p>The president is elected to office for a fixed term and is not dependent on the confidence and support of the legislature to remain in office (other than where formally impeached by the legislature).</p>
<p>The prime minister and ministers are, both collectively and individually, accountable to the legislature and through the legislature to the public.</p>	<p>The secretaries are accountable to the president, and the president is accountable to the public.</p>

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91. The table is adapted from Ian Thynne, *Accountability: An Elusive but Fundamental Element of Modern Government*, (June 2002) (paper delivered at the University of Hong Kong).



## VII. ISSUES ARISING FROM THE IMPLEMENTATION OF THE POAS

### A. *The Price of Expediency: Designing and Implementing POAS*

The POAS was designed and imposed quickly, without sufficient input from LegCo, the civil service, and the public. There were only two and one-half months from the time the POAS was formally announced to its implementation. No detailed public consultation paper was released. Instead, the HKSAR Government preferred to use the short scrutiny process in LegCo through questions and answers with legislators as a substitute for a more complete consultation. This process was unfortunately typical of the leadership style of the last few years. Head of the Central Policy Unit and scholar Siu-kai Lau has called the Tung administration “a paternalistic regime” and concluded that its “decision-making style . . . is characterized by a top-down policy making format and limited public consultation.”<sup>92</sup>

Although there is no doubt that even a more comprehensive consultation would not have addressed every detail of or concern about the new system, the lack of thorough discussion, especially within the civil service and with LegCo, may come back to haunt the Chief Executive when problems arise because he will be blamed for inadequate planning. For example, a change to the portfolio structure at the level of permanent secretaries was found necessary within a month of its announcement at the Environment, Transport, and Works Bureau.<sup>93</sup>

Moreover, an early political “crisis” over proposals to “de-list” penny stocks from the Hong Kong stock exchange during the first month of the system being in place provides an even clearer picture of the risk in moving ahead so quickly with a fundamental change of the governance structure. The key issue which this crisis has highlighted is: who among the principal officials is responsible and therefore accountable for which functions?

The stock exchange announced proposals for consultation on the criteria for continuing listing eligibility of stocks on the exchange, which led to a panic sell-off of micro-cap stocks the following day taking HK\$10 billion off the market. The stock exchange immediately announced that it would extend the consultation period to avoid

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92. Lau, *supra* note 22, in *THE FIRST TUNG CHEE-HWA ADMINISTRATION—THE FIRST FIVE YEARS OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION*, *supra* note 17, at 16.

93. The original bureau structure divided responsibilities between two permanent secretaries. One looked after environmental issues, and the other transport and works. The revised proposal put transport responsibilities with environmental issues as it was felt that the combined responsibilities of transport and works was too large. See May Sin-mi Hon, *Reshuffle of bureau portfolios 'will lighten workload'*, *SOUTH CHINA MORNING POST*, Aug. 2, 2002, at 4.

confusion and then withdrew the proposals altogether.<sup>94</sup> Public discussions turned on who should be held accountable for not having foreseen the market reaction. Those involved included the respective heads of the exchange and the Securities and Futures Commission (the regulator reporting to the government), the Secretary for Financial Services and the Treasury and the Financial Secretary, who have various oversight responsibilities. Within days, LegCo called an urgent meeting to seek clarification. To diffuse tension, the Financial Secretary sent a letter to LegCo, prior to the meeting, informing legislators that he had appointed a two-person panel to investigate and report on the circumstances leading up to the event and recommend corrective measures.<sup>95</sup> Legislators questioned the appropriateness of the Financial Secretary appointing such a panel, pointing out that unless it was appointed by the Chief Executive, under Hong Kong law, the panel would not have the proper powers of investigation. Moreover, the Financial Secretary was also a party to be investigated.

There are several hundred references to the Financial Secretary in Hong Kong's statute books. The Financial Secretary's powers and functions include the supervision and regulation of companies, the Monetary Authority, and the Securities and Futures Commission. In the past, the Financial Secretary was defined to mean "the Financial Secretary of the HKSAR and the Secretary for the Treasury", meaning that any power of the Financial Secretary could be exercised by the Secretary for the Treasury. This made sense because the Secretary for the Treasury reported to the Financial Secretary under the old hierarchical civil service structure.

With the implementation of the POAS, the Resolution (discussed in Part III.) that was passed to effect the transfer of functions from one secretary to another, the Secretary for the Treasury had been changed to become the Secretary for Financial Services and the Treasury. This newly created principal official is able to exercise all the powers and functions of the Financial Secretary. However, these two persons are now equal ranking political appointees rather than civil servants. The Secretary for Financial Services and the Treasury no longer reports to the Financial Secretary, yet the former can exercise all powers and functions of the latter in law. The

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94. For a useful summary of the events leading up to the "crisis" see *Dao Heng Bank Group Limited*, available at <http://webb-site.com/articles/0223a.htm> (last visited March 12, 2002).

95. See Government Press Release (July 31, 2002), at <http://www.info.gov.hk/gia/general/200207/31/0731277.htm>.

Resolution did not take the new political situation into account and thus there is no clear delineation of powers and functions to be exercised by these two principal officials. This issue was raised during LegCo's scrutiny of the POAS but there was no clear response from the government.<sup>96</sup>

The important task of clearly establishing the powers, functions and duties of the principal officials could have been done more effectively given more time. There was also no handover period between those who headed bureaus under the previous system and the new principal officials, which would have been particularly useful for those appointees who came from the private sector.<sup>97</sup> A more thorough deliberation before implementation of the POAS, as well as allowing time to prepare for a proper handover of duties to the new ministers and the permanent secretaries would have engendered greater "buy-in" to the new policy and a smoother transfer of responsibilities. Better preparation could also have provided a useful cushion against criticism.

### B. *Elites and Public Opinion*

The Hong Kong policy system before and after 1997 has co-opted the business and professional classes into a leading role within the power structure. "During the colonial era, the British had sought to enhance their legitimacy in the absence of democracy through endorsement from representatives of the 'business elite,'" argues a former head of the Central Policy Unit, Leo Goodstadt. "Chinese officials . . . proved equally eager to have this group's support, and well before 1997 China

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96. LC Paper CB(2)2122/01-02(01), at annex C, 1-2, at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/papers/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/papers/hs51_ppr.htm) (showing textual amendments provided for in the Resolution relevant to the transfer of statutory functions from the former civil service Secretary for Financial Services to the new Secretary for Financial Services and the Treasury relating to the Securities and Futures Commission). In legislator Margaret Ng's speech during the passage of the Resolution on June 19-20, 2002, she said:

The office of Secretary for Financial Services and the Treasury will be added to our statute books by this Resolution. Yet, the simple question, "what powers and functions does the [Secretary] have?" has no answer. I asked Mr. Suen [Secretary of Constitutional Affairs] the question. He told me bluntly that the Government has not yet sorted that out, and will do so only in the coming year.

See Ng, *supra* note 35.

97. Under the POAS, two bureaus covering financial services and the treasury were amalgamated. The previous civil service head for financial services became the principal official for economic development and labor on the July 1, and the former head of the treasury became the permanent secretary for commerce and industry in another bureau. There was no handover period for either the principal official (Secretary for Financial Services and the Treasury), who came from the private sector and took office on July 1, or the permanent secretary for financial services, who was transferred from the Housing Department, at the last moment. During a LegCo meeting held on July 31 to seek clarification on the penny stocks "crisis", Frederick Ma, the principal official, came under fire for saying it was not his duty to know details of the proposals. See *Battered Ma admits: I'm no wizard*, THE STANDARD, Aug. 1, 2002. See also *Dao Heng Bank Group Limited*, *supra* note 94 for a longer discussion.

ha[d] replaced 'the colonial bureaucracy as the political partner of the bourgeoisie' and was recruiting a majority of its new political establishment from the business elite."<sup>98</sup> Tung Chee-hwa was a member of Hong Kong business elite before he became Chief Executive and his governing style is often more corporate than political. In fact, the head of the Central Policy Unit, Lau Siu-kai, had described his attitude towards politics as "apolitical or even anti-political".<sup>99</sup>

In announcing the POAS, the Chief Executive emphasized that the principal officials "will place importance on public opinion . . . make further efforts to gauge public sentiments . . . be proactive in facing the public, and . . . gaining the trust and support from the public through delivering results."<sup>100</sup> Upon beginning his second term, the Chief Executive emphasized that there would be a new style of governance that would "feel the pulse of the community, take community sentiments fully into account, and enable different sectors of the community to participate in the policy making process."<sup>101</sup>

These statements indicate a degree of acceptance that his government needs to increase its political sensitivity and policy capacity to reflect social realities, but it still has yet to be seen whether during his second term the Chief Executive can craft an agenda and generate public debate that will resonate with the majority of the people rather than the elites especially when there is an ideological and value gulf between the elites and the ordinary people.

### *C. Power and Pressure Concentrated on the Chief Executive*

The Basic Law reflects a political design that downplays the roles of political parties, elections, and the legislature. With such a concentration of power in the Chief Executive, the Hong Kong governing system puts tremendous pressure on one person. The current holder of the post has no political party structure to rely on and relatively few experienced politicians and political advisers he can call upon for advice. He had little experience in public life before 1997. With no public mandate but with a

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98. Leo Goodstadt, *China and the Selection of Hong Kong Post-Colonial Political Elite*, 163 THE CHINA Q. 721, 721 (2000).

99. Lau Siu-kai, *Preface to THE FIRST TUNG CHEE-HWA ADMINISTRATION—THE FIRST FIVE YEARS OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION*, *supra* note 17, at viii–ix.

100. Tung, Speech to LegCo on the POAS, April 17, 2002, *supra* note 4.

101. Tung Chee-hwa, Speech on Assuming his Second Term Office (July 1, 2002), at <http://www.info.gov.hk/gia/general/200207/01/0701080.htm>.

high concentration of power, the Chief Executive's personal style and behavior in exercising power becomes critical to how the public relates to him as the head of the HKSAR Government.

#### *D. Governing Style*

The Chief Executive has said he hopes the POAS will “strengthen solidarity, to enhance internal working relationship and to smooth cooperation”<sup>102</sup> and “bring about a new style of governance”.<sup>103</sup> Nevertheless, he is likely to find that his personal style in dealing with the new principal officials and the civil service will still matter a great deal.

#### *E. Pressure to Perform*

The stated objectives for the POAS are to enhance political accountability, maintain a professional civil service, and improve the quality and effectiveness of government policies. With heightened public expectations, the new team will be under tremendous pressure to perform. Responding to this growing pressure, the Chief Executive has delayed his annual policy address usually scheduled for the first Wednesday in October to coincide with the start of the new LegCo session after the summer recess to mid-January 2003 to give him and his new team time to formulate policy priorities.

Yet, time may not be on the side of the new governing team. Global economic conditions are far from stable. Local conditions remain tough, with unemployment standing at 7.7 percent in July 2002. Hong Kong has seen more than forty-four months of continuous deflation. The government is running a substantial budget deficit although it still has healthy reserves.<sup>104</sup> Markets are likely to remain volatile as Hong Kong attempts to restructure itself into a full-service economy requiring a higher skilled workforce.

Besides thinking of new policies, the government has already had to deal with an unexpected and sudden “crisis” arising from the stock exchange's proposal to “de-list” penny stocks,<sup>105</sup> which tested the competence of the Financial Secretary and the Secretary for Financial Services and the Treasury—the two top principal officials responsible for financial matters. Moreover, the respective heads of the Securities and Futures Commission as well the stock exchange are likewise

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102. Tung, Speech to LegCo on POAS, April 17, 2002, *supra* note 4.

103. *Id.*

104. See Hong Kong's Special Administrative Region Government 2002–03 Budget, available at <http://www.budget.gov.hk/eindex.html> (last visited Mar. 6, 2003).

105. See discussion *supra* Part VII.A.

implicated. Thus, within the first month of implementing the POAS, Hong Kong's heavyweights in financial matters have all been embroiled in a major problem with local and international repercussions.

#### *F. Policy Uncertainty*

The Chief Executive needs to manage his new principal officials to ensure a unified front and produce policies that are well-integrated across all policy areas. This is particularly difficult, however, for two reasons. First, there is no party system that unites them. Second, because they did not come to power through elections, they lack any mandate from the people to govern according to values and policies announced during an election campaign.

Recruitment of the principal officials took place without an institutionalized political party system that in other jurisdictions would offer the public predictability about the leaders' values and policy objectives. In Hong Kong, these values and objectives are tied to the personal preferences of the Chief Executive and principal officials. This creates a degree of uncertainty for the political environment, as the public has no way to predict the policy preferences of the principal officials. Furthermore, the preferences of one principal official may affect the portfolio of another, which could cause not only rivalry but also confusion, thereby affecting the credibility of the government as a whole.

Some principal officials from the private sector created controversy within days of their appointment. The Secretary for Financial Services and the Treasury, for example, appeared to have overstepped his jurisdiction by asserting his preferences on whether the Hong Kong Stock Exchange should keep its listing committee and even expressed his personal preference on the exchange's opening hours.<sup>106</sup> The Secretary for the Environment, Transport, and Works said that she had been liaising informally with Guangdong authorities on a cross-border emissions trading scheme even before she formally took office and had time to speak to colleagues responsible for energy.<sup>107</sup> Moreover, a war

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106. Enoch Yiu, *U-turn on listing committee*, SOUTH CHINA MORNING POST, July 4, 2002, at 1. See also *Real Problem Dodged*, SOUTH CHINA MORNING POST, July 5, 2002, at 17 for a commentary on the Secretary's remarks; *Listing Chaos: July 28, 2002*, at <http://webb-site.com/articles/listingchaos.htm>.

107. Cheung Chi-fai, *Cross-border Pollution Scheme 'in 3 years'*, SOUTH CHINA MORNING POST, July 11, 2002, at 2. The Secretary only took up her post formally on August 1, 2002.

of words broke out between Executive Councilor and legislator, James Tien, and the Secretary for Education and Manpower, Arthur Li. On July 23, Tien said it was “dangerous” that some principal officials were speaking out before they fully understood their portfolios. As chair of the Liberal Party, he also said that if policy was not first properly discussed in the Executive Council, the principal officials could not count on his party’s support for LegCo votes. Li said on August 1 that he had the right to voice his own opinions and said that: “Mr. Tien is of course entitled to his own personal opinions. And his personal opinions are not government policies.”<sup>108</sup>

No doubt the principal officials, particularly those who did not come from the civil service, feel the need to make a mark early on, but “their first priority”, according to the Chief Secretary, is “to draw up a five-year plan for their areas of responsibility”<sup>109</sup> and gain internal support before going public. Careless remarks may ruffle colleagues’ feathers as well as cause confusion. The Chief Secretary Donald Tsang commented,

These plans will need to be approved by the Chief Executive-in-Council. Before that, they will have to be argued out in ExCo sub-committees chaired by the Chief Secretary or Financial Secretary. So plans and priorities will have been exhaustively sieved and sifted even before they reach the full “Cabinet”.<sup>110</sup>

### *G. Policy Making Mechanisms*

The Chief Executive has proposed new mechanisms to improve government policy making. These include:

- (a) Putting in place “an effective opinion survey system to ensure the highest level of Government is aware of community attitudes, sensitivity, and reaction to policy initiatives”;<sup>111</sup>
- (b) Strengthening the role of the Central Policy Unit in gauging community views and sentiments;<sup>112</sup> and,
- (c) Reviewing and revising “the structure covering over 400 advisory boards and committees, so that the organizational arrangements will enable us to consolidate the views and contributions of different sectors including the political, business, academic, and grass-root sectors, among others.”<sup>113</sup>

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108. Ambrose Leung, *Tung’s Recruits Told to Button Lips*, SOUTH CHINA MORNING POST, July 24, 2002, at 4; Na Kang-chung, *Outspoken Minister to Stick to His Guns*, SOUTH CHINA MORNING POST, Aug. 2, 2002, at 4.

109. Tsang, *supra* note 14.

110. *Id.*

111. Tung, *supra* note 3, at 5.

112. Tung Chee-hwa, Speech delivered at the Second Term Government Swearing-in Ceremony (July 1, 2002), at <http://www.info.gov.hk/gia/general/200207/01/0701080.htm>.

113. *Id.* The vast array of government advisory committees could be consolidated. Although they perform useful tasks, many observers believe that the benefits they produce do not always match the demands they make on both officials and private citizens. Substantial benefits may be possible by rationalizing and sharpening their roles.

The Chief Secretary noted that the government would not only strengthen the Central Policy Unit but also tap into research institutes, universities, and think-tanks in Hong Kong: "By necessity, there will be more research into individual policies when principal officials will be held personally accountable for his end results."<sup>114</sup> His statement acknowledged that government policies might not have been adequately researched in the past.<sup>115</sup>

Better research and more comprehensive surveys of public opinion, however, are not sufficient in themselves unless the whole policy making, consultation, and implementation process works better to generate true community consensus—something the Chief Executive and his principal officials will have to prove that they are capable of doing.

#### *H. Relationship With the Media*

It has often been remarked that the Chief Executive frequently seems uncomfortable with the media. In his announcement of the POAS, for example, Tung complained that the media was "increasingly progressive and aggressive" subjecting the government to "increasing public scrutiny and pressure."<sup>116</sup> This attitude reflects his dismay with the inability to capitalize on opportunities to sell and defend his policies. No doubt the Chief Executive will expect his principal officials to do most of the talking to the media, but as head of government he still needs to cultivate a direct relationship with both the local and the international media because it is through them that Hong Kong is presented to the public and to the international community. Whether it is fairly reasoned or not, observers may often use the personal style of the top political leader as a reference to measure the place itself. The media skills of his principal officials, particularly those from the private sector, will also be tested.

#### *I. Relationship With the Legislature*

The Chief Executive has also been reluctant to interact with LegCo directly in open sessions. Important announcements have not always been made in the legislature. For example, it would have been appropriate for the Chief Executive to have announced his change of housing target in LegCo, with the relevant officials in attendance, as well as announcing his new line-

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114. Tsang, *supra* note 14.

115. See, e.g., CIVIC EXCHANGE, HONG KONG, SUSTAINABILITY TRANSPORT IN HONG KONG: DIRECTIONS AND OPPORTUNITIES, ch. 7 (June 2002), at <http://www.civic-exchange.org> for a discussion of the problems of policy decision making in Hong Kong in the transport area.

116. Tung, Speech to LegCo on POAS, April 17, 2002, *supra* note 4.



up of principal officials in LegCo instead of holding a press conference. By avoiding making important announcements in LegCo, the Chief Executive leaves the impression that he would prefer not to be questioned by legislators. With LegCo having a stronger public mandate than the Chief Executive, signs of reluctance on his part towards the legislature may be interpreted as being disrespectful of an elected institution.<sup>117</sup>

To achieve the POAS's goal of strengthening the "working relationship between the Executive and the Legislature,"<sup>118</sup> the Chief Executive will have to overcome the reservations he may have with LegCo. The government could develop a convention for the Chief Executive and the principal officials to go to LegCo to make important government announcements and take questions before any press briefings so as to acknowledge LegCo's role as Hong Kong's representative body.<sup>119</sup> This would better reflect Hong Kong's British political-constitutional tradition although it may appear unusual when viewed from the perspective of a U.S.-presidential system.

When LegCo returns from its summer recess, legislators will also have to consider how they may wish to reorganize their panels to reflect the new structure of the policy bureaus. This will be another early test of executive-legislative relationship stemming from the POAS. In turn, the frequency of attendance at LegCo meetings by the principal officials is likely to be used by legislators as an indicator of how willing the principal officials are to engage the legislature.

### *J. Party Politics and Alliances*

The Basic Law is silent on whether the Chief Executive can be a member of a political party. However, the Chief Executive Election Ordinance provides that he should not have any party affiliation.<sup>120</sup>

The significance of the inclusion of two party chairmen in the new Executive Council remains to be seen. In one respect, the Chief Executive will have access to first-hand advice on working more successfully with LegCo.<sup>121</sup> A "consensus" has also been reached between the government

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117. All sixty seats are elected. Twenty-four seats are directly elected by geographical constituencies, thirty seats by functional constituencies, and six seats by the same 800-member election committee that would have returned the Chief Executive had the selection for the second term been contested.

118. Tung, Speech to LegCo on the POAS, April 17, 2002, *supra* note 4.

119. Lo Shiu Hing, *Constitutional Conventions and Ministerial Accountability in Hong Kong* (June 3, 2002) (paper delivered at the University of Hong Kong) (providing a useful discussion on the subject).

120. See Chief Executive Ordinance § 31 (requiring the winning candidate to declare that he is not a member of any political party).

121. Tam Yiu-chung, a member of the Democratic Alliance for the Betterment of Hong Kong, was both a member of LegCo and the Executive Council during the Chief Executive's first term of office.

and the two party chairmen and the other three Executive Councilors without portfolios to take an active part in the early stages of the policy-making process.<sup>122</sup> It will be interesting to watch how these two members reconcile their requirement to abide by the rule of collective responsibility<sup>123</sup> for government policies made after July 1, 2002 with their role as party leaders.

Nevertheless, the Chief Executive cannot take for granted that the three legislators can or will always secure votes of their own political parties or fellow trade unionists. Although the three Executive Councilors will have to vote for all government motions, bills, and expenditure proposals, their members and affiliates do not have to do so. For example, in July 2000, the Democratic Alliance for the Betterment of Hong Kong legislators, despite one of the party's senior members sitting on the Executive Council and strong lobbying efforts by the government, voted for the motion of no confidence related to defective public housing construction.<sup>124</sup> Thus, although the chairman of the Liberal Party has said that due to his role as a member of the Executive Council, the Liberal Party would continue to air its opinions in LegCo, "but the difference [from the past] is that it will, in the end, cast its votes in support of the government."<sup>125</sup> He has also said that the other seven Liberal Party members in LegCo could apply for "exemptions" from the party line if it clashed with their constituency interests.<sup>126</sup>

Hong Kong's political parties and groupings may be said to be divided along two fault lines: on socio-economic policy and on the pace of democratization. Although the Chief Executive has appointed representatives with socio-economic views that vary from his, he was unwilling to include legislators who prefer a faster pace of democratic reform.<sup>127</sup>

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122. Ambrose Leung and Angela Li, *Tung's pledge on policy-making*, SOUTH CHINA MORNING POST, July 29, 2002. In that report, Tsang Yok-sing, the chairman of the Democratic Alliance for the Betterment of Hong Kong was quoted as saying: "A consensus has been reached among the ministers and the permanent secretaries that we will be able to participate in the policy formulation at a very early stage." *Id.*

123. See discussion *supra* Part IV.

124. Tam Yiu-chung voted against, but his party voted in favor of the motion of no confidence.

125. Ambrose Leung, *Liberals beg to differ, but will still back government policy*, SOUTH CHINA MORNING POST, July 24, 2002, at 4.

126. Angela Li, *I'll quit or be fired if no Liberal Party proposal accepted, says James Tien*, SOUTH CHINA MORNING POST, Aug. 5, 2002, at 6. In that report, Tien said that: "I have told Mr. Tung that most likely, such exemptions will be limited to one or two members of our party. Mr. Tung certainly finds it all right." *Id.*

127. The three legislators on the new Executive Council also have good relations in Beijing.

The political parties and groupings in LegCo have come together on several occasions in the past, most notably to lobby on budgetary issues.<sup>128</sup> A likely effect of the addition of party leaders to the Executive Council is a reduction of future broad cross-party alliances in LegCo to pressure the government.

The participation in government of leaders from the Liberal Party and the Democratic Alliance for the Betterment of Hong Kong may lead to greater cooperation between those two parties. James Tien of the Liberal Party has already noted that the two parties formed “a ruling coalition in LegCo.”<sup>129</sup> Although both are conservative on political reform, their political constituencies and their policy preferences on socio-economic issues are considerably different. Nevertheless, their cooperation in Executive Council may help them to join forces formally or informally in the 2004 or future LegCo elections to compete with the Democratic Party, the Frontier, and the Association of Democracy and People’s Livelihood.<sup>130</sup>

#### K. *New Governing Coalition*

The ruling elite are likely to look for opportunities to build a power base in the districts. Central Policy Unit head Lau Sui-kai has publicly advised the Chief Executive to develop political allies and build political organizations. The Chief Executive can do this in part through his appointments of up to twenty-five percent of the members of the eighteen district councils.<sup>131</sup>

The principal officials could well spend more time in the districts with district councilors and local community organizations. This will enable them to get input from the public and to build district-based constituencies. Unlike elected representatives, principal officials have real power to respond directly to public demands. By developing direct connections in the community, they will also be able to compete head-to-head with the directly elected legislators in the political popularity stakes.

The principal officials are likely to influence appointments to the government’s vast array of advisory bodies and committees, as well as

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128. The parties and groups came together to put pressure on the government, for example, on the 2002–03 Budget not to raise taxes.

129. Leung, *supra* note 125, at 4.

130. James Tien of the Liberal Party has so far said that the parties have not considered cooperation and that “it would surely not happen in 2004.” *Id.* at 4.

131. Seventy-five percent of the seats on the District Councils are elected by universal suffrage. The next District Council election will be in September 2003. Immediately after the election the Chief Executive can make appointments to twenty-five percent of the seats.

powerful institutions with executive power, such as the boards of the Urban Renewal Authority, the Hospital Authority, and the Airport Authority. These will provide further opportunities for them to strengthen their networks in the community.

#### *L. Challenge to the "Opposition"*

A more politically aggressive ruling elite presents a substantial challenge to the "opposition" in LegCo, in particular the Democratic Party and the Frontier, whose members have been among the most popular politicians in Hong Kong for many years (although recent surveys show a steady decline in their popularity).<sup>132</sup> They will need to respond with innovative strategies. They might offer alternative development strategies to those of the government, thereby forcing a wider and deeper debate about public policy.

#### *M. Political Neutrality and the Civil Service*

While the POAS puts an end to "executive-led" government by civil servants, official pronouncements continue to emphasize the need to maintain the integrity and neutrality of the civil service. The Code of Practice for principal officials and the composite Circular to civil servants<sup>133</sup> explicitly state that principal officials must observe and promote the political neutrality of civil servants.<sup>134</sup> These documents indicate that there has been some negotiation between the Chief Executive and the civil service on what is considered acceptable behavior of principal officials towards civil servants.

Nevertheless, for the principles of integrity and neutrality to be properly safeguarded, there must be clear demarcation of functions between the principal officials and the most senior civil servants. It is unclear at present how the work of the permanent secretaries under the POAS will differ from such work in the previous system. The permanent secretaries will still "formulate and implement policies, listen

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132. THE HONG KONG TRANSITION PROJECT, THE FIRST FIVE YEARS—FLOUNDERING GOVERNMENT, FLOUNDERING DEMOCRACY? (May 2002), at <http://www.hkbu.edu.hk/~hktp>.

133. See discussions *supra* Parts IV.G.–H.

134. The Circular could also be renamed the Civil Service Code to give it the same gravity as the Code of Practice for Principal Officials. Moreover, in Britain, there is debate about legislation so that the values of a permanent, neutral, professional, and impartial civil service could have the protection of law.

to the views of the public and LegCo, explain policies to these respective groups, respond to questions raised and gain support from different quarters for government policies.”<sup>135</sup> However, permanent secretaries are also expected to “defend” government policies.<sup>136</sup>

The permanent secretaries may well attend most of the LegCo meetings and public forums to “relieve the principal officials from . . . certain LegCo duties, so that they can focus on their priority policy roles.”<sup>137</sup> With so much official emphasis on the principal officials coming up with the right policies, the pressure on permanent secretaries can only mount.

In Westminster executive-government models, permanent secretaries may appear before parliament to explain government policies but are not required to defend them, as that would be seen to contradict the principles of neutrality and accountability through the ministers.<sup>138</sup> An explanation describes what the policy is and how it works, whereas a policy defense requires justification of the rationale and the values behind the policy. The distinction may be hard for both the principal officials and the permanent secretaries to draw. The principal officials may well see defense of government policy as just a part of explaining them. The permanent secretaries, who are used to playing administrative-political roles, are used to defending policies. But having to defend policies publicly will make civil servants appear to be playing partisan politics. To protect the political neutrality of a permanent civil service, both the principal officials and civil service need to give this aspect further consideration.

#### N. *Rebuilding Relations With the Civil Service*

The Chief Executive also needs to rebuild battered relations with the civil service. As one commentator has noted, “the ministerial system introduced ostensibly to enhance accountability, has effectively relieved the civil servants of governing power. By bringing in ‘outsiders’ to help him lord over the mandarins who had proved to be troublesome during his first term, Chief Executive Tung Chee-hwa has staged a silent coup with Beijing’s blessing.”<sup>139</sup>

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135. Tung, Speech to LegCo on POAS, 17 April 17, 2002, *supra* note 4.

136. LC Paper CB(2)711/01-02(01), at para. 18(a) (Apr. 23, 2002), at [http://www.legco.gov.hk/yr01-02/english/hc/sub\\_com/hs51/hs51\\_ppr.htm](http://www.legco.gov.hk/yr01-02/english/hc/sub_com/hs51/hs51_ppr.htm).

137. *Id.*

138. SYNERGYNET, HOW TO TAKE GOVERNANCE REFORM FORWARD? ACCOUNTABILITY TO WHOM AND HOW? (June 2002), at <http://www.synergynet.org.hk>. See also Burns, *supra* note 76.

139. Anthony Cheung, *Guidelines needed to negotiate change*, SOUTH CHINA MORNING POST, July 20, 2002, at 12.

The Chief Executive and the new principal officials still depend on the civil servants to help with policy formulation and implementation. Civil servants have a litany of complaints. Senior civil servants, including some who are now principal officials, believed the Chief Executive had not adequately consulted them on the POAS. Many permanent secretaries and their deputies have complained they were not consulted about the last-minute rearrangement of the policy bureaus. Rank and file civil servants remain angry because they feel they have been used as scapegoats. There is, in the difficult economic climate of the last several years, significant popular unease about, and resentment towards, the way civil servants seem protected from the harsh economic winds affecting so many others. In response, the HKSAR Government has now moved to cut the pay of civil servants. Many civil servants see this initiative as being as much political (playing to the public) as economic. The civil servants also resent the government's determination to implement this pay cut legislatively. The civil servants were willing to negotiate to reduce pay and resented the decision of top policy makers resort to legislation. With about seventy percent of the civil service belonging to more than 200 staff associations or unions, a militant civil service could become a serious opposition force to the executive.<sup>140</sup>

In a novel move, the HKSAR Government put together for more than 14,000 middle and senior ranking civil servants a specially designed and facilitated forum for team building and to sharpen their focus "in appreciating and tackling the challenges of governance in modern age Hong Kong."<sup>141</sup> The forum had apparently been in the making for eight months prior to the event. It was designed to help civil servants gain a better understanding of: (a) how global competition has impacted on Hong

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140. There are approximately 184,000 civil servants in Hong Kong. The service had been downsized by seven percent from about 198,000 in March 2000. More than 30,000 civil servants and their families took to the streets to protest on July 7, 2002 against the use of legislation to cut their pay. Thus, despite passing the legislation the following week, relations remain tense today. *See id.* for a useful summary of the civil pay cut saga.

141. The forum was entitled "Civil Management Forum—A World-class Government for Asia's World City" held on Aug. 26–29, 2002. *See* Press Release, HSKAR Government, Speech by the Chief Secretary for Administration (Aug. 26, 2002), at <http://www.info.gov.hk/gia/general/200208/26/0826081/htm>. *See also* Press Release, HSKAR Government, FS urges civil servants to embrace '3R's' in government (Aug. 26, 2002), at <http://www.info.gov.hk/gia/general/200208/26/0826183.htm> (speech by the Financial Secretary); Press Release, HSKAR Government, Civil service plays a critical role in world city vision: CS (Aug. 26, 2002), at <http://www.info.gov.hk/gia/general/200208/26/0826176.htm>.

Kong; (b) the challenges and opportunities facing the community; (c) the impact of these on the government; and, (d) the role of civil servants in the Hong Kong of today. Attempts to use facilitation techniques to regain the civil service's *esprit de corp* are undoubtedly helpful but they need to be a part of developing an overall policy to make the governing system truly transparent, responsible, and accountable.

### VIII. BEST PRACTICE MINISTERIAL MODEL FOR HONG KONG

This section sets down a range of primary benchmarks for the operation of what might be termed a "Model Ministerial System". By drawing on the wide experience of other jurisdictions with the operation of ministerial systems, it is possible to put together a "best practice" model. This section provides a summary of such a model. This model provides one useful tool for observing and evaluating the future operation of the POAS.

Hong Kong's new POAS is unique. It is neither presidential nor parliamentary in structure. The POAS is still, in essence, a ministerial system—but one lacking any direct, electoral accountability.<sup>142</sup> It retains the other hallmarks of a full ministerial system. In particular, it comprises a group of avowedly professional politicians led by a chief minister who has stated unequivocally that his new set of principal officials are to be accountable to him.

Despite the lack of any electoral accountability with the POAS, it is still entirely proper that the new system be open to and subject to benchmarking. The lack of suitable electoral checks and balances suggests an even greater need than usual for establishing standards as a means by which to measure the POAS in operation.

#### A. *Benchmarking Ministerial Systems*

The following outline draws on a review of systems operating within both presidential and parliamentary frameworks. It summarizes best-practice, operational principles from the two principal systems of executive government. This inventory is not meant to be exhaustive. It does seek to identify, in precise form, certain key requirements for choosing, monitoring and dismissing ministers in a transparent and effective way.

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142. Voters in Hong Kong will have an opportunity, to an extent, to express their views on the POAS at the next LegCo elections due in 2004. This is especially so now that the leaders of two of the main LegCo parties (the Democratic Alliance for the Betterment of Hong Kong and the Liberal Party) have aligned themselves so closely with the POAS by becoming, effectively, members of the new "proto-cabinet" within the Executive Council. See discussion *supra* Part IV.

For a ministerial system to achieve good standing in terms of integrity, effectiveness and openness, the following requirements must all be met:

- Ministers must satisfy key integrity, competence, and suitability assessments.
- Ministers should be dismissed/resign from their portfolio for any serious maladministration, fraud, negligence, conflict of interest, corrupt practice, or breach of the ministerial Code of Conduct [see below]. This requirement covers dismissal both for direct ministerial policy blunders and cases of significant operational or administrative blunders within a department controlled by a minister.
- Ministers should be accountable or responsible to their superiors, peers in the Legislature, and ultimately to the voters or the people generally through a system of checks and balances.
- Most ministers will be the legal head of at least one government department but ministers must not force the civil service to act in a corrupt or politically partisan manner.
- Decisions on any significant criminal prosecution should be made by an entity independent of the ministry and the police. As a general rule, the government should not pay for or underwrite, directly or indirectly, any civil action taken by a minister (for example in defamation).
- Ministers should conduct themselves in their private capacity so as to provide a good example. Ministers should strive to avoid intemperate or scandalous behavior in their private life. Ministers who fail to maintain such standards of general behavior may be judged as unfit to continue as a minister especially if their inferior general behavior seriously impedes their performance as a minister.
- All ministerial conduct, decisions, and documentation must be subject to scrutiny by other political institutions and personnel, courts, tribunals, the media and the public generally. All ministers must make themselves available to answer questions about their performance as ministers to the appropriate scrutinizing bodies.
- Ministers must be candid and direct in responding to appropriate enquiries. They must, at all times, avoid deceitfulness in dealing with such enquiries.

### *B. Ministerial Code of Conduct*

Many jurisdictions with ministerial systems have ministerial codes of conduct or practice.<sup>143</sup> Often these codes have been created in response to significant public outcry about failures by ministers to resign after misconduct or major policy failures. Governments have felt compelled to set down express standards of performance and behavior. Typically, they have done so to curb public outrage—and reduce the risk of possible electoral defeat.

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143. Australia provides a case in point. The Code of Practice set out in this section draws on the Ministerial Code applied to members of cabinet by the current government in Australia.



The Hong Kong solution of devising a Code of Practice for principal officials *as a part of their employment contract with the government* is far from ideal. The HKSAR Government should consider creating, if not legislating, a clear, stand alone ministerial Code of Practice for the sake of good administration, transparency, and accountability. Further, the present General Circular, which also serves to spell out the relationship between the principal officials and the civil service, would also be better if it were legislated as a Code of Conduct for civil servants. The respective standards of performance and behavior would then be significantly clearer.

The principal purpose of a ministerial Code of Practice is to prohibit any form of conduct by ministers that creates a conflict of interest between their ministerial duties or privileges and the private interests of ministers and their near family. The following list encapsulates certain primary requirements for a firm and effective ministerial Code of Practice.

- A minister and his/her family must divest themselves of any shareholdings, business relationships, etc. that fall within the subject areas of the particular portfolio held by the minister;
- No minister shall assist in any way in obtaining employment for any member of his/her family or friends within the government;
- A minister must not accept any fringe benefit as part of his/her ministerial position that is not part of his/her normal government employment package, nor shall s/he use her/his ministerial privileges unfairly for her/his own benefit or that of her/his family; and,
- A minister and his/her near family must not profit or benefit in any improper way from their ministerial position after s/he ceases to be a minister.

The Code of Practice should prohibit any discrimination based on a minister's religious, sexual, or cultural preferences (unless they seriously impede the performance of their ministerial duties).

## IX. CONCLUSION

The Asian Financial Crisis (AFC) commenced on July 2, 1997 when Thailand's currency, previously linked to the U.S. dollar, collapsed. This was one day after British Hong Kong became the HKSAR. The AFC had immediate and powerful economic effects within the region and for some countries including Indonesia, Thailand, and South Korea, its impact was devastating. Many countries responded with legislative and related reforms designed to improve the operation of their banking systems and to strengthen corporate governance. These economic-infrastructure reforms are ongoing within the region.

The AFC also sparked political reform in the region. Major political-constitutional reforms have now been put in place in, for example, Thailand and Indonesia. There have been political-control shifts in South Korea, Taiwan, and the Philippines. Also, the AFC indirectly triggered fundamental clashes within Malaysia's traditional ruling party.

In most respects, Hong Kong managed to cope with the AFC better than many other countries. The strength of the banking and legal systems provide some of the explanation. The crisis has, nevertheless, highlighted various weaknesses in the HKSAR's basic economic infrastructure. The Hong Kong way of doing business, with its excessive reliance on networks when making decisions on major projects, for example, has already been noted *supra* in Part III.

As with other jurisdictions in the region, the crisis also underlined flaws in Hong Kong's *political* system. As noted *supra* in Part II., the scope for political reform in the HKSAR is constrained by the political reality that the Hong Kong is now a comparatively free and wealthy enclave within the largest one-party state the world has ever seen. Beijing ultimately has the power to denote the dimensions of the political zone in which Hong Kong operates.

Despite these constraints, Hong Kong has now moved, albeit somewhat later than several other jurisdictions, to address some of the flaws in its political structure highlighted by events which have unfolded since mid-1997. The POAS (or at least a precursor thereto) has been on the reform-agenda since 2000. Now it has arrived, formulated and implemented with something of a gust over a short period of a few months.

It is clear that the POAS does represent an important milestone in Hong Kong's political evolution. For the first time in its free-port history, Hong Kong has dropped its reliance on an executive led (that is, civil service run) system of government. Now it has a ministerial system of government run by professional politicians. True, the POAS does not deliver the sort of political accountability one normally associates with a ministerial system, but it has severed Hong Kong's dependence on a colonial-style mode of governance and replaced it with a model far more likely to enhance the development of a professional political class within the HKSAR.

The POAS reform initiative has also been restrained by the Basic Law. It was, the reformers clearly decided, axiomatic that the introduction of the POAS should *not* require any formal amendment of Hong Kong's hallowed Basic Law. Any sort of formal amendment of the Basic Law is a highly sensitive political issue for a variety of reasons. All the changes wrought by the POAS initiative have therefore had to fit within the existing four corners of the Basic Law. As it happens, the Basic Law was drafted (by mutual agreement between Britain and China) so as to try and retain, as far as possible, the old colonial governance model the HKSAR inherited from British Hong Kong. The POAS reforms, it is widely agreed, *are* compatible with the letter of the Basic Law. It is also widely agreed that they run counter

to the spirit of the Basic Law insofar as they have shifted Hong Kong significantly away from its previous, accepted form of governance. Finally, it is clear that Beijing has put aside its prior preferences and endorsed the need for significant change in Hong Kong's system of Executive Government.

Certain aspects of the POAS reform relate to the fact that it has taken place within Hong Kong's colonial, hybrid presidential-parliamentary tradition. It was that tradition which ensured that Hong Kong's civil servant "politicians" were never accountable in the "lose-your-job" sense to the local legislature. The lack of any formal political accountability of the new principal officials to LegCo is consistent with this custom—and with the Basic Law. That said, it is widely believed that, were LegCo to pass a motion of no-confidence in a particular principal official, that person would find it very hard to retain his or her position.

Unfortunately, the POAS has been developed and put into service with immoderate haste. The costs of moving so quickly became apparent within the first month of the new system's operation. The "penny-stock" mess is, in significant part, a product of the uncommon speed with which the POAS came into being. New principal officials had to hit the ground running. They have enjoyed practically no "learning curve" space and, perhaps even more crucially, no-one seems sure, in certain vital areas, just who is responsible for what within the new team. It seems likely the POAS is going to see further similar stumbles. Further, the world can expect the Hong Kong media, one of the freest in the region (and easily the largest, per capita) to be on hand to capture every alleged bungle, frame by frame.

The "bedding down" period for the POAS looks likely to be lengthy. Apart from the problem of inexperience and hasty implementation stresses just noted, the system has put together a coterie of politicians who, at the same time, have to work as a team while keeping a sharp eye on their own interests. No longer can the principal officials rely on their civil service status with its guaranteed employment as their career-anchor. Now, those officials need to "re-apply" for their own jobs at least every five years. Balancing personal needs and ambitions with the necessity of pulling together as a team will be far from easy—especially for people mostly facing a challenge of this order for the first time in their lives.<sup>144</sup>

Another challenge will be settling down the relationship between Hong Kong's new set of professional politicians and a currently unsettled, and indeed, grumpy, Civil Service. The way in which the

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144. Even professional politicians like Gordon Brown and Tony Blair in the United Kingdom have difficulty managing this tension despite having had years of experience dealing with the challenge and being able to call on deeply embedded party learning. Developed political parties also have "minders" whose task it is to defuse damaging spasms of rivalry. Hong Kong's new professional politicians are going to have to get by without having access to this level of political-party infrastructure.

government has handled the pay cut for civil servants has aggravated relations already made tense by the hurried introduction of the POAS. Concerns also remain about how the introduction of the POAS may impact on the political neutrality of the Civil Service.

The lack of proper democratic accountability within the POAS is clearly a significant drawback yet somewhat unexpectedly, it is this lack of accountability that makes the job of the new principal officials that much more difficult. Officials lack democratic legitimacy and all of Hong Kong knows this—not least of all, the principal officials themselves. This means they could be held to a higher standard of performance in the court of public opinion—whose principal caretaker is the Hong Kong media. True, they do not have to face the voters regularly, but if they lose popular favor, they have no mandate to fall back on. They cannot delay a day of reckoning by saying, “I was chosen by the people to do the best I can—and I will face the people again come the next election and they can make their decision based on the totality of my performance during my period of office.”

The POAS has incorporated certain elements that are designed to try and improve the working relationship between the Executive Government and LegCo. These include the recruitment of two pro-government, LegCo party leaders into the Executive Council. They are not (and likely cannot be) principal officials. They are more like ministers-without-portfolio. This move seems designed to link the Executive Government to some sort of working majority within LegCo. This may assist the government to a degree. It also has introduced party politics quite explicitly into the Executive Council. This is another (POAS-driven) first for Hong Kong.

Overall, however, the government now seems by these moves to have put even greater distance between itself and the (broadly termed) democrats in LegCo. The democrats still draw major support from across the HKSAR in the directly elected LegCo seats. Unlike the principal officials, they *do* enjoy a popular mandate, which significantly enhances legitimacy vis-à-vis the government. The HKSAR Government is rightly focused on trying to improve its generally poor public ratings. Its failure to engage more constructively with Hong Kong’s “loyal opposition” in LegCo has cost it public support. There is nothing in the POAS initiative to indicate that government has any sort of plan drafted to try and address this aspect of the LegCo-government relationship-malfunction.

The “opposition” in LegCo also faces concerns about the POAS that extend beyond the new system’s lack of democratic legitimacy. The recently installed principal officials are, as noted, professional politicians. Even

though they do not need to secure popular re-election, the principal officials know that they will need to work constantly to maintain an adequate level of public favor and prevent themselves from being humiliated in the court of public opinion. This means the citizens of the HKSAR can expect to see principal officials “pressing the flesh” regularly in direct competition with the generally less well-funded, popular politicians in LegCo.<sup>145</sup>

The POAS is, in essence, a notably compromised reform. The government (and Beijing) correctly concluded that Hong Kong’s previous colonial governance system was well past its expiration despite the attempts made in the Basic Law to add significant “preservative” to the model. Although neither were ready to link any sort of fresh democratization initiative with the POAS reform there is now true political reform—minus real political accountability.

The HKSAR Government (and, by implication, Beijing) have conceded that accountability is now very much part of Hong Kong’s political vocabulary. The POAS has officially opened the door on the discussion of government accountability in Hong Kong. If some accountability is, authoritatively, a “good thing”, it becomes more difficult to argue that greater accountability does not make even better sense.

The very real constraints applying to political development in Hong Kong mean that rapidly increased democratization is not likely and nor does the POAS directly change the democratization equation. It has made it impossible to argue that Hong Kong has some sort of “everlasting” governance system, which is cemented into place by the Basic Law, however. In fact, the Basic Law itself has sign-posted 2007 as the year during which (or not too long there-after) we should expect to see some significant move towards increased democratization in Hong Kong. One rather interesting outcome of the POAS initiative is that, at the same time that it has ushered in a raft of planned, direct changes, it has also, less directly but unavoidably, buttressed the position of those arguing for an increased level of democracy in Hong Kong.

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145. During March 2003, the POAS has been tested as never before. The Financial Secretary (FS) of the HKSAR, ranked second in protocol among the ministers, was found to have taken a tax advantage shortly prior to the handing down of the HKSAR, 2003 budget. The initial reaction of the FS was defensive—verging on arrogant. Massive public-media discussion ensued. Shortly after this, the FS offered to resign. The Chief Executive said that what the FS had done involved “gross negligence”, was “highly inappropriate”, and constituted a “breach” of the ministerial code. The Chief Executive still declined to accept the resignation, however.

APPENDIX I:  
CHIEF EXECUTIVE ON THE PRINCIPAL OFFICIALS  
ACCOUNTABILITY SYSTEM

*The following is the government translation of the address by Chief Executive, Tung Chee-hwa, at the Legislative Council on the introduction of the POAS delivered on April 17, 2002.*

In the 2000 Policy Address, I proposed that we should examine the possibility of introducing a new Principal Officials Accountability System. In my 2001 Policy Address, I set out in greater detail the framework of the Accountability System being considered. In the last two years, we have listened closely to the views of the community through various channels. This includes attending a series of meetings with the Legislative Council and listening to the views of Honorable Members. We are heartened that the community have generally identified with the concept of introducing the Accountability System. I have decided to come in person to the Legislative Council to introduce to Honorable Members the plans of the HKSAR Government for introducing the Accountability System on July 1, 2002, and to seek Members' support for the associated expenditure and the resolution for the relevant legislation to be amended, so as to transfer relevant statutory powers and functions to the respective Directors of Bureaus under the Accountability System. Our hope is that the Accountability System can be implemented on schedule.

In the last two Policy Addresses, I have emphasized that the purpose of introducing the Accountability System is to enable Principal Officials of the HKSAR Government to assume responsibility for their policy portfolios, to share a common agenda and to have clear directions. We need to feel the pulse of the community, to understand community sentiments, and to strengthen liaison and communication with the Legislative Council, different sectors of the community and the general public. We need to improve the prioritizing of the Government's agenda and to improve overall policy coordination, so that we would be in a position to provide better services to the community and the general public.

Now let me set out the principal elements of the Accountability System.

Firstly, the upper echelon of the Government, including the Chief Secretary for Administration, Financial Secretary, Secretary for Justice, and all Directors of Bureaus, will be covered by the Accountability System. These officials will no longer be civil servants, but will be appointed on

contract terms as Principal Officials under the Accountability System. They may serve for a term of five years, but not exceeding that of the Chief Executive who nominates them. They will cover the respective portfolios assigned to them by the Chief Executive, oversee the work of associated departments, formulate policies, explain policy decisions, market policy proposals and gain the support of the Legislative Council and the public. They will be accountable to the Chief Executive for the success or failure of their policy initiatives. Under the leadership of the Chief Executive, they will be accountable to the community. Where necessary, the Chief Executive may terminate their contracts.

Secondly, all Principal Officials under the Accountability System will be appointed to the Executive Council. This will strengthen the work of the Executive Council. The Principal Officials will participate directly in the Government's policy decision-making, in prioritizing the policy agenda, and in harmonizing the work, which straddles across different departments. In overall terms, governance will be improved; decision-making will be quickened; responses to the demands of the community and the needs of the public will be more direct. In accordance with the provisions of the Basic Law, the Executive Council may continue to include other community leaders and Members of the Legislative Council.

Thirdly, the remuneration of Principal Officials under the Accountability System is comparable to the packages currently applicable.

Fourthly, various Policy Bureaus will be combined to facilitate better deployment of resources and closer coordination of policy portfolios. Through this re-organization, the original sixteen Policy Bureaus will be revised to eleven. Including the three Secretaries of Departments, following the restructuring, there will be fourteen Principal Officials covered by the Accountability System. There are the Chief Secretary for Administration, Financial Secretary, Secretary for Justice, Secretary for Home Affairs, Secretary for Constitutional Affairs, Secretary for Housing, Planning and Lands, Secretary for Education, Secretary for the Environment, Health and Welfare, Secretary for Transport and Works, Secretary for Economic Development, Secretary for Commerce, Industry and Manpower, Secretary for Financial Affairs & the Treasury, Secretary for Security, and Secretary for the Civil Service.

Fifthly, the terms and conditions of service of civil servants who presently fill the positions of Directors of Bureaus will remain unchanged. These positions will be re-titled Permanent Secretaries. Under the Accountability System, they will act as the interface between Directors of Bureaus and the civil service. Under the Direction of Bureaus, the Permanent Secretaries will be responsible for formulating and implementing policies, listening to the views of the public and the Legislative Council, explaining policies to these respective groups,

responding to questions raised and gaining support from different quarters for Government policies.

In the process of formulating our proposals for the Accountability System, we realize that various concerns have been raised among certain quarters of the community—namely, that under the Accountability System power might be concentrated in the Chief Executive; that as there are Principal Officials and Permanent Secretaries under the Accountability System, this will result in unnecessary duplication; that the Accountability System will affect the stability, permanence, professionalism, political neutrality and the uncorrupt nature of the civil service. Let me take the opportunity to address these concerns.

Firstly, in implementing the Accountability System, will power be concentrated in the hands of the Chief Executive? We all know that the Basic Law has clear provisions governing the powers of the Chief Executive. The Basic Law provides that the Chief Executive is the head of the HKSAR Government. He leads the Government and the civil service. According to the Basic Law, the powers of the officials of the HKSAR Government originate from the Chief Executive. It is for the Chief Executive to determine how he should delegate his authority according to his policy agenda. As the Basic Law already conferred all necessary powers on the Chief Executive, there is no need for these powers to be strengthened by the new system; nor should such a question arise. In fact, in implementing the Accountability System, the Chief Executive will be devolving further his authority, not only to the three Secretaries of Departments, but also to the eleven Directors of Bureaus, so that in assuming responsibility for their respective portfolios, they will have the necessary authority to formulate, coordinate and implement policies.

In implementing the system, changes have to be made for each official under the Accountability System to be responsible for his policy portfolio. According to the design of the Accountability System, Directors of Bureaus are ultimately responsible to the Chief Executive. However, the Chief Executive will continue to rely on the Chief Secretary and Financial Secretary to oversee and coordinate the work of the respective policy bureaus and to coordinate work which straddles different policy bureaus. The two Secretaries of Departments will also coordinate the work in respect of important policy agendas and priorities determined by the Chief Executive and Executive Council. For example, in the last year or so, the Chief Secretary has covered Guangdong/Hong Kong cooperation and major



infrastructure coordination. The Financial Secretary has covered discussions with the Mainland concerning the “Closer Economic Partnership Arrangement”. This modus operandi will not be changed following the introduction of the Accountability System. Furthermore, the role of the Executive Council will be enhanced. The Chief Secretary for Administration will chair various Executive Council Sub-committees. These Executive Council Sub-committees will replace the policy groups under the Chief Secretary’s Committee. Likewise, the Financial Secretary will chair relevant Executive Council Sub-committees.

As for the inter-relationship between the respective Policy Bureaus, this concerns primarily better use of resources and closer coordination between related policy portfolios. Some of the policy bureaus will be combined. For example, Housing, Planning and Lands will be amalgamated; Transport and Works will be placed under one roof. In putting forth this re-organization, we have reflected carefully on what would constitute the optimum organization. We cannot have, and do not have, a pre-set number of policy bureaus. We have to base our assessment on practical need and our cumulative experience in running the Government. The proposals we have put forth represent the most appropriate package.

To complement the introduction of the Accountability System, and to facilitate strengthening of the coordination role of the Executive Council in the decision-making process, the Executive Council Secretariat will be transferred to the Chief Executive’s Office. The position of Information Coordinator will be re-titled as Director of the Chief Executive’s Office. The Director will oversee the running of the Executive Council Secretariat and continue to perform the duties of the Information Coordinator.

In future, the Central Policy Unit will strengthen its capabilities in respect of conducting surveys on public opinion and long-term policy researches. This will ensure that in determining long-term policies, the HKSAR Government will have a broad base of support in the community.

All of these adjustments are directed to one single purpose, i.e. to enable Principal Officials under the Accountability System to have a clear understanding of their respective responsibility, to strengthen solidarity, to enhance internal working relationship, and to smooth cooperation. The team will be able to set, coordinate and implement policies more effectively to meet the needs of the community and our expectations. They will also be able to meet proactively the challenges facing Hong Kong. I would also like to emphasize that the checks and balances designed for the HKSAR, including those in respect of the Chief Executive and the Executive Authorities, will not be diminished following the introduction of the Accountability System. The Legislative Council will continue to play the same important role in holding the Government accountable.

In introducing the Accountability System, one of the fundamental aims is to enable Principal Officials to be responsive to the calls of the community in assuming personal responsibility for the success or failure of their policies. This is to be done on the basis of maintaining the stability and continuity of the Civil Service. There are increasing calls for senior civil servants to be held accountable for policy failures, including calls for some of them to step down. However, due to the permanence of the current system and the established appointment and removal systems, the current civil service system is not compatible with these demands. Furthermore, following the return of Hong Kong to the motherland, and with the elected Chief Executive, a fully elected legislature, the increasingly progressive and aggressive media, Government operation and policy formulation are subject to increasing public scrutiny and pressure. In addition to expectation for Principal Officials to undertake their statutory duties, they have to cover political work within the community. However, the traditional roles which civil servants are expected to play under the current system run into conflict with the demands of the times.

If we adopt an approach of introducing the Accountability System within the civil service structure, we may achieve the ends of "accountability". But in the process, we may lose the permanent, professional and politically neutral civil service which has been established through years of experience and efforts. Thus, in these circumstances, it is appropriate for us to establish on top of the current civil service system a new Principal Officials Accountability System complemented by a suitable set of terms of employment.

Officials under the new Accountability System will not be civil servants. They will no longer be constrained by the civil service structure, and will be motivated by common perspectives, shared policy goals and a collective mission. The Accountability System will provide them with the environment to strengthen the communication and liaison with the public in implementing policies. They will have more latitude in strengthening their relationship with the Legislative Council and the media, so that they will be able to gain broader public support and assistance for their initiatives.

As I mentioned just now, in introducing the Accountability System, we must ensure the continuity and the stability of the civil service structure. Not only do we have to achieve this, but through the introduction of the Accountability System, we must preserve and enhance the distinctive qualities of the civil service system i.e. permanence, professionalism,

political neutrality, and an uncorrupt administration. These are the qualities which I, and the Principal Officials under the Accountability System in future, would wish to preserve. I also believe that the community takes the same view. We wish to preserve these qualities, because they are essential to the good governance of the HKSAR. With the Accountability System, it will be possible for civil servants to focus on their important role of implementing policies and putting forth proposals, in the face of increasing political pressures and the need to be involved in more political work. Furthermore, we have emphasized the importance of retaining the D8 rank of Permanent Secretary as part of the civil service system. We have taken this view in order to preserve the integrity of the civil service system, to guarantee that we will continue to attract the best and the brightest to the civil service career, and to ensure that our community will benefit from having such talent to provide public service of the highest quality. In order to highlight the importance which we place on the civil service, we have determined that the Secretary for the Civil Service should be selected from among senior civil servants. This will guarantee that this Principal Official will have a full understanding and appreciation of the civil service structure and system. As the Secretary for the Civil Service will be a member of the Executive Council, he will be able to represent the expectations and interests of the Civil Service in the process of policy-making at the highest level of the Government. At the same time, he can also convey the considerations taken into account in respect of major decisions to civil service colleagues. This will facilitate full and effective implementation of policies adopted.

There has been quite a lot of attention on the financial implications of introducing the Accountability System. The HKSAR Government intends to make the introduction of the Accountability System cost-neutral within one year through internal redeployment of savings. Furthermore, the remuneration of the Second Term Chief Executive will remain basically at the present level, and will be adjusted necessarily according to the current mechanism. It will not be increased due to the introduction of the Accountability System. I suggest that the remuneration package for the Third Term Chief Executive should be considered by an independent committee.

I believe that by introducing the Accountability System in responding to public demands, the HKSAR Government will bring about a new style of governance. There will be two prominent changes. First, because officials under the Accountability System will have to assume responsibility, they will place importance on public opinion; they will make further efforts to gauge public sentiments; they will be proactive in facing the public, and in gaining the trust and support from the public through delivering results. By so doing, the HKSAR Government will become more open, will be more

prepared to listen to the voices of the people, will be more ready and able to respond to public demands in a timely fashion, and will build a government which has stronger public support.

Secondly, through the establishment of the top echelon of the HKSAR Government under the Accountability System, our objectives will be more clearly defined and our directions more firmly set. In pushing forward our policy initiatives, we will be deploying our resources more effectively; we will be more sensitive in setting priorities; the working relationship between the Executive and the Legislature will be strengthened. Accordingly, we will all be able to serve the public more efficiently and more responsibly.

**APPENDIX II:  
NEW STRUCTURE OF THE POLICY BUREAUS UNDER THE POAS**

<b>FORMER STRUCTURE</b>	<b>PROPOSAL STRUCTURE</b>	<b>FINAL STRUCTURE</b>	<b>PRINCIPAL OFFICIAL</b>
Civil Service Bureau	Civil Service Bureau	Civil Service Bureau	Secretary for the Civil Service (Joseph Wong)
Trade, Industry, and Commerce Bureau	Commerce, Industry, and Manpower Bureau	Commerce, Industry, and Technology Bureau	Secretary for Commerce, Industry, and Technology (Henry Tang)
Information Technology and Broadcasting Bureau			
Constitutional Affairs Bureau	Constitutional Affairs Bureau	Constitutional Affairs Bureau	Secretary for Constitutional Affairs (Stephen Lam)
Education and Manpower Bureau	Economic Development Bureau	Economic Development and Labor Bureau	Secretary for Economic Development and Labor (Stephen Ip)
	Education Bureau	Education and Manpower Bureau	Secretary for Education and Manpower (Arthur Li)*
Transport Bureau			
Environment and Food Bureau	Transport and Works Bureau	Environmental, Transport, and Works Bureau	Secretary for Environment, Transport, and Works (Sarah Liao)*

Works Bureau	Environment, Health, and Welfare Bureau	Health and Welfare Bureau	Secretary for Health and Welfare (E K Yeoh)
Health and Welfare Bureau			
Financial Services Bureau	Financial Services Bureau and The Treasury	Financial Service Bureau and The Treasury	Secretary for Financial Services and The Treasury (Frederick Ma)*
Finance Bureau			
Home Affairs Bureau	Home Affairs Bureau	Home Affairs Bureau	Secretary for Home Affairs (Patrick Ho)*
Housing Bureau	Housing, Planning, and Lands Bureau	Housing, Planning, and Lands Bureau	Secretary for Housing, Planning, and Lands (Michael Suen)
Planning and Lands Bureau			
Security Bureau	Security Bureau	Security Bureau	Secretary for Security (Regina IP)

\* Denotes recruitment from the private sector.

**OTHER MEMBERS OF THE EXECUTIVE COUNCIL**

The Chief Executive—Tung Chee-hwa

The Chief Secretary—Donald Tsang

The Financial Secretary—Antony Leung

The Secretary for Justice—Elsie Leung

Leung Chung-Ying—Chairman of the DTZ Debenham Tie Leung Global

James Tien—Legislator and Chairman, Liberal Party

Tang Yok-sing—Legislator and Chairman, Democratic Alliance for the  
Betterment of Hong Kong

Cheng Yiu-tong—Legislator and President of the Hong Kong Federation of  
Trade Unions

Andrew Liao—Senior Counsel