

**Comments to LegCo Panel on Constitutional Affairs
On
Restrictions on Activities of Former Heads of Government and Former Senior
Members of Government**

February 2002

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Overall Comments

Necessity and Urgency

With the “politicalization” of the political system and the civil service in Hong Kong, I think it is *necessary* and *urgent* for the government to establish restrictions on the activities of former heads of government and former senior members of government. In the past, this did not seem to be a problem because most civil servants took their service inside government as their lifelong career. When many civil servants retired, instead of seeking further employment in the private sector, they would simply enjoy their retirement life. With regard to the governors of Hong Kong, most of them would return to the Great Britain. Since the global economy was not as mature as that of today, there was relatively limited connection between Great Britain and Hong Kong. Consequently, the problem of conflict of interest created by the post-government service activities of the head of government and senior members of government did not become a major issue.

“Politicalization” of the Political System

Nevertheless, there are a few major changes that have totally changed the picture. All these lead to the necessity of the establishment of the restrictions. First of all, it is the “politicalization” of the political system in Hong Kong. Hong Kong is used to be described as a “pure administrative state”. It referred to the fact that the civil service assumed the role of politicians to make all the political and policy decisions in Hong Kong. In fact, for most of the governors sent by the Great Britain to Hong Kong, most of them were civil servants in the British civil service themselves. There were simply no real politicians in Hong Kong who really had the decision-making power. For a long time, the Legislature Council and also the Executive Council were only mainly consultative in nature.

However, with the implementation of the Basic Law after 1997, the Chief Executive is now elected by the election committee of 800 people. He is a real politician, not a civil servant, any more. Because of the composition of the election committee, it is widely believed that the interest of the business will dominate the choice of the Chief Executive and his policies. Most importantly, according to the Basic Law, the Chief Executive can only serve a maximum of two terms (10 years). Consequently, it becomes a great concern here about whether the Chief Executive will use his power in his office to

promote his private interest or the interest of the private sector, or uses his power and connection gained during his office to compete unfairly with other groups after his retirement as the Chief Executive. In the context of the executive-led government in Hong Kong, the Chief Executive is the single most important and powerful person in the entire HKSAR Government. Therefore, there is just a serious and legitimate concern over the conflict of interest on the post-government activities of the Chief Executive.

“Politicalization” of the Civil Service

Secondly, the civil service of Hong Kong is also “politicalized”. The major force that leads to the politicalization of the civil service is the coming implementation of the “ministerial system” in this July. In fact, with the use of contract or agreement terms for the appointment of some principal officials, including the Secretary for Justice and the Secretary for Health and Welfare, the politicalization of the civil service has already began. To a certain extent, the principal officials are serving under the pleasure of the Chief Executive. This trend will definitely be further reinforced under the new ministerial system as all the ministers will serve at the pleasure of the Chief Executive and can be removed by him at any time. The minister system will create many short-term or “temporary” principal officials in the HKSAR Government. As they are also powerful people in government with official authority and they are also expected to return to their profession or business in the private sector after serving in the public service, there is another serious and legitimate concern over the conflict of interest over their post-government activities.

Economic and Demographic Changes

Last but not last, as the life expectancy of the population has significantly increased over the years, it is not unlikely that the government officials will remain professionally active after passing their retirement age in the civil service. Completely forbidding the retired civil servants to join the private sector may prevent them from utilizing their expertise to benefit society. With the arrival of the new economy, it is also likely that retired senior civil servants will seek their second “work life” in the private sector. Therefore, even without the politicalization issue mentioned above, the new demographic and economic changes will also put the issue of restrictions on their post-government service activities on the policy agenda.

Strong Arguments for the Restrictions

In general, there are three major arguments for establishing restrictions on activities of former heads of government and former senior members of government. Firstly and most importantly, it is the “conflict of interest” argument. An official may abuse their power during their term of office to benefit certain individuals or companies in order to exchange favor, such as employment opportunities, after he or she leaves government. This is the most serious problem created by the so-called “revolving door” issue as it is the public interest that is being compromised.

Secondly, following the first point, even if the official does not abuse his power, seeking employment opportunities in companies that he has dealt with will also create a serious doubt on the integrity of government and can significantly damage the public

trust and public confidence on government. Because of the importance of the values of accountability, transparency and openness in government, the appearance of propriety of the behavior of public officials are necessary and should never be overlooked.

Finally, it is the unfair advantage the former public officials may use to compete unfairly with other companies and individuals. This advantage can come from the information, connection and other resources they gain from their previous employment in government. This argument is based on the assumption that individuals should not “profit” from government service.

Among the three arguments for the establishment of restrictions, the first two are the strongest because the public interest and public trust that are being compromised and threatened. These also create very compelling reasons for the establishment of the restrictions, especially when the arguments against the establishment of restrictions are relatively weak.

Weak Arguments Against the Restrictions

Among the arguments against the establishment of restrictions, the most frequently quoted ones are the limitation on personal liberty and the negative impact on the attractiveness of public service opportunities. Both of them are considered to be weak arguments.

For the limitation on personal liberty argument, the limitation is considered to be very minimum when the public interest is considered. In addition, individuals not agreeing on the restrictions are free to choose not to join the government. Furthermore, restrictions are usually set with a time limit, therefore, the overall impact on personal liberty is again considered to be relatively small. Regarding the negative impact on the attractiveness of public service, it is not supported by experience in other countries. There is simply no good evidence to support that the restrictions will lead to the decrease in quality for the people who accept political appointment in the public service. In fact, to the opposite, the imposing of such restrictions can lead to better targeting of the talent pool for public service. As the restrictions will make sure that only those who have public spirit will join the public service. Consequently, the benefit should outweigh the cost in the establishment of restrictions.

No More Delay

Finally, it should be noted that there is an urgency in establishing such restrictions. Although it is expected that the Chief Executive will serve for a second term, some of the principal officials may not do so. Some of the principal officials who are serving under an agreement or contract term may step down in the second term of the Chief Executive. In fact, from the experience of many other countries, it is not uncommon for the politically appointed officials to serve for a shorter term than the executive who appoint them. Therefore, the problems created by the absence of restrictions will happen not at the end of the second term of the Chief Executive, but at any time. It is very necessary for the LegCo to act fast on this issue.

Responses to the Specific Concerns

(a). whether post-office restrictions for the Chief Executive should be introduced as in some of the countries and places studied:

Yes (please also see the reasons given in the overall comments). There is no doubt about it. The issues we should consider should be the degree of restriction (e.g., time limit of the restriction) and the form of restrictions (e.g., guidelines vs. laws).

(b). whether post-office restrictions should be underpinned by statute as in California and Ontario or laid down in the form of guidelines as in the UK or enforced by conventions as in France or the US:

I think both of them are necessary. In fact, many successful examples in other countries involve the use of both institutional restrictions (e.g., laws and regulations) as well as non-institutional restrictions (e.g., public pressure and the monitoring of the mass media). It should be important to support the restrictions by legal authority so as to ensure that they are being followed. However, it is not easy to cover all the loopholes in any law. It is also necessary to give the implementation some flexibility and discretion.

Consequently, it should be more advisable to use laws to forbid the concrete, clear-cut and serious cases of conflict of interest, such as to prevent former officials to work in companies they have dealt with during their government employment for a certain period of time. For other cases that are in-between, it is advisable to issue guidelines on them and let the public and the mass media be the monitoring agent on them. There should also be a periodical and frequent review of the laws and the guidelines too.

(c). whether the scope of post-office restrictions should cover the number of terms a head of government may serve and his freedom to seek employment after leaving office as in some of the countries and places studies, or whether it should cover other aspects:

As it is the Basic Law that decides the terms of the Chief Executive, I think it is impossible and also not necessary for the restrictions to limit on the number of terms the Chief Executive may serve. The similar case can be made for the principal officials that are going to be politically appointed by the Chief Executive under the ministerial system. It will also be a limitation on the power of the Chief Executive if we restrict the number of terms that can be served by the principal officials appointed by him. If we would like to limit the power of the Chief Executive, it should be dealt with more formally and effectively through other methods, such as amending the Basic Law. It should be recognized clearly that it is the conflict of interest that the restrictions are targeted at, not the limitation on the executive power.

For the same reasons above, the restrictions should focus mainly on the aspect of the employment and other commercial activities of the Chief Executive and his officials after leaving the office. The key is to ensure that the private interest the Chief Executive and his officials have represented or will represent will not conflict with the public interest they represent during their public service.

(d). whether there should be an independent authority to assess if any conflict exists between the proposed activity and the prior responsibilities of the Chief Executive, and whether the authority should be advisory only as in all of the five countries and places studied:

For the restrictions backed up by the legal authority, it should be the court that decide on the cases of conflict of interest. However, as mentioned in (b), there should be a combination of laws and guidelines in preventing the problem of conflict of interest. Therefore, I also support the set up of an independent authority. Its duties should include the power to enforce the guidelines, the power to investigate cases of conflict of interests, and the power to review the guidelines and laws, and make recommendations for the changes of the guidelines and related laws. The results of their investigation should be open to the public.

In order not to create a situation of conflict of power or competition for power between the authority and other branches of government, I would recommend the authority to be advisory. However, this should not comprise its influence. The lack of official power should be compensated by a wide representation its have and a direct assess to policy makers. This can be made by various means, including to appoint judges, LegCo members or their representatives in the membership of the authority. In order to avoid it to be “manipulated” by politics and be really independent, it should avoid having all the members coming from one source, such as having all members be appointed by the Chief Executive. It should have a good mix of memberships and members coming from different sources of power. It may also be a good idea to have members having terms different from the persons who appoint them so as to further enhance their independence. The election method of the US Senate and the US Federal Reserve Bank may be taken for reference in this aspect.

(e). what sanctions are to be imposed if there are violations of post-office restrictions:

This depends on the nature of the restrictions that are violated. If they are set out in law, legal prosecution and criminal charges will be necessary.