



PM/86/060

THE PRIME MINISTER

Hong Kong: The Governor and the Chief Executive

1. Our Private Secretaries corresponded earlier in the year about the future position of the Governor of Hong Kong. Powell's letter of 18 July recorded your agreement that we should take as a planning assumption that a British Governor, appointed from London, should be retained until 1997. You also agreed that planning work should go ahead on the linked question of the possible introduction of a Chief Executive (Designate) into the Government structure of Hong Kong before 1997. The aim of this would be to facilitate a smooth transition and the maximum practicable continuity in 1997: our planning envisages that the individual concerned would, by agreement between the British and Chinese Governments, span the change of sovereignty and become the first Chief Executive of the Hong Kong Special Administrative Region (SAR).
2. You will recall that the Governor and members of the Executive Council referred approvingly to this idea when they called on you on 10 September. You commented that it was a matter which would require careful handling.

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3. The outcome of our planning work in London and Hong Kong is the enclosed paper on the Governor and the Chief Executive. The covering note highlights the points for decision at this stage. It also explains why it would be tactically advantageous to take now a decision of principle on the creation of a post for the Chief Executive (Designate) before 1997. Although the events in question appear to lie some way in the future, it is essential that we form our own ideas, and seek to influence Chinese thinking, during the crucial period up to 1988 when the Basic Law for the Hong Kong SAR is being drafted. The subsidiary issues connected with the exact functions of the Chief Executive (Designate) before 1997 can be considered in the months to come, although the enclosed paper seeks to identify the main areas and makes a number of preliminary observations. I should emphasise in particular that the annex to the paper is purely illustrative. The timing of the introduction of a Chief Executive (Designate) and the question of the delegation of powers to him will need particularly careful consideration in due course.

4. At your meeting with the Governor and ExCo you suggested that it might be helpful if, during my forthcoming visit to China with The Queen, I handed over further papers on points connected with the drafting of the Basic Law which continued to give us concern. We have in hand the preparation of papers on a number of constitutional points. I propose that on that occasion I should also pass to the Chinese Foreign Minister a paper discussing in very general terms the possible creation of a post for the Chief Executive (Designate) before 1997 and explaining why we believe this would facilitate a smooth transition.



5. When you discussed this issue with the Governor and ExCo you commented that, if the Chinese Government were to accept the principle of continuity in the person of a Chief Executive (Designate), they might subsequently try to insist that a candidate of their own be appointed before 1997. Formally speaking, any appointment to such a position before 1997 would ultimately be one for the British Government, although the candidate would evidently have to be acceptable to the Chinese Government, as well as to HMG and to the people of Hong Kong, if he was going to be able to stay in office after 1997. Given our responsibility for the administration of Hong Kong up to 1997, which is explicitly upheld by the Joint Declaration, the Chinese would not be in a position to insist on the appointment before 1997 of a candidate to whom we were opposed although they might well press hard for a candidate whom they favoured. We would in my view gain considerable advantage from the establishment of a Chief Executive before 1997 - as regards both the office and its holder - because of the influence that would give us over both aspects in the early years after 1997. The price of consulting the Chinese about this before 1997 (which I believe is anyway unavoidable) will be worth paying because of the influence it will give us after 1997.

6. I should be grateful for your confirmation that we may proceed on the basis outlined in the papers.

7. I am copying this minute and enclosures to members of OD(K) and to Sir Robert Armstrong.

CR Budd (Private Secretary)

for (GEOFFREY HOWE)

(Approved by the
Foreign Secretary and signed
in his absence)

Foreign and Commonwealth Office

24 September 1986

*Non should
we be likely
to oppose
nominees they
deliberately
opposed*

HONG KONG: THE GOVERNOR AND THE CHIEF EXECUTIVE

Summary and points for decision

/ 1. The attached paper has been prepared by the Hong Kong Government in collaboration with the Foreign and Commonwealth Office. It discusses the transition between the structure of government in Hong Kong before 1997, under a British Governor, and that after 1997 under a local Chief Executive.

2. The paper identifies and discusses two broad options for transition and convergence:

(A) The powers and role of the Governor would remain unchanged until 30 June 1997, after which a Chief Executive would take over.

(B) A Chief Executive (Designate) would be introduced into the government structure before 1997. The powers which he would exercise after that date would be gradually delegated or devolved to him in advance of the change of sovereignty.

3. The balance of advantage strongly favours Option (B), which would greatly facilitate a smooth transition in 1997. The relationship between the Governor and the Chief Executive (Designate) would however need to be defined, handled and presented with care as it evolved in the years up to 1997.

4. The paper gives preliminary consideration to a number of subsidiary issues:

(a) the position of the post in the Hong Kong Government:

- (b) whether the Governor's powers should be devolved or delegated to the Chief Executive (Designate). The latter is preferred:
- (c) the need to discuss our intention with the Chinese Government and agree on a method of selection. The identification of the Chief Executive (Designate) before 1997 would have to be a matter for mutual agreement:
- (d) the need for a progressive delegation of powers to the Chief Executive (Designate):
- (e) the method of selection of the Chief Executive (Designate):
- (f) differences between the powers and obligations of the Governor and the Chief Executive:
- (g) a possible timetable (beginning in 1992) for the establishment of a position for the Chief Executive (Designate).

5. All these subsidiary issues will need further examination with the Hong Kong Government. At the present it is recommended only that Ministers decide in principle that our policy should be to create a post for the Chief Executive (Designate) in advance of 1997.

6. It is essential that we should broach discussions of this general issue with the Chinese Government at an early stage. Their ideas on the content of the Basic Law are already taking shape, and a first draft will be published in 1988. They recently told the Governor that they planned to select the first Chief Executive before 1997; but they do not seem to envisage him being incorporated into the Government structure until 1997. In this scenario he would be a dangerous alternative focus of political power

in advance of 1 July 1997. We need moreover to exert our influence on the drafting of the Basic Law to secure its compatibility with our own plans for the transition period up to 1997. Incompatibility would seriously affect the acceptability of the draft Basic Law in Hong Kong and hence stability. We should act soon, before Chinese ideas harden.

7. The Foreign and Commonwealth Secretary will be holding discussions with the Chinese Foreign Minister in mid-October, during the State Visit to China. He has already launched a fruitful dialogue with him on issues relating to the transition and the structure of government. This is based on a series of informal British papers addressing constitutional issues. It is recommended that a paper should be passed to Foreign Minister Wu in October introducing and discussing in general terms the possible creation of a post for a Chief Executive (Designate) within the Hong Kong Government in advance of 1997.

8. Ministers will be consulted further, in due course and in the light of the Chinese reaction, on the detailed arrangements to be made for the Chief Executive (Designate) and the delegation of powers to him.

HONG KONG: THE GOVERNOR AND THE CHIEF EXECUTIVEINTRODUCTION

1. Under the terms of the Joint Declaration, the British and Chinese Governments have agreed to cooperate in order to ensure a smooth transfer of government in Hong Kong in 1997. A particular question which will arise in bringing about the necessary convergence between government structures before and after 1997 is how the transition can be best effected between the office of the Governor and that of Chief Executive of the Hong Kong Special Administrative Region (SAR).

PRESENT POSITION

2. At present the administration of Hong Kong is the responsibility of the Governor of Hong Kong, appointed by The Queen and exercising his powers under the Letters Patent and Royal Instructions. Ministers have adopted the planning assumption that a resident British Governor, appointed from London, should be retained up to 1997.

3. From 1 July 1997 onwards the HKSAR will enjoy a "high degree of autonomy" under the Joint Declaration. There will be a Chief Executive and the executive authorities will abide by the law and will be accountable to the legislature. The Joint Declaration says very little about the responsibilities of the Chief Executive. The Chinese see the Chief Executive as replacing the Governor but not enjoying such a wide range of powers. There are likely to be many areas where the powers of the Governor and those of the Chief Executive will be the same and some areas in which there will be differences. Some of the differences will arise from the limits specified in the Joint Declaration within which Hong Kong will exercise autonomy. Other differences will arise from the fact that the HKSAR

will have a high degree of autonomy in local matters: although in practice Hong Kong already exercises a high degree of autonomy the Governor is constitutionally subject to the directions of HMG. We shall not know for certain what the powers and responsibilities of the Chief Executive are to be until we see the relevant drafts of parts of the Basic Law.

THE OPTIONS

4. In general terms there are two possible courses of action:

Option (A) The powers and the role of the Governor would remain as they are now until 30 June 1997. A Chief Executive would then take over.

Option (B) A post which would in effect be that of Chief Executive (Designate) would be created before 1997. The powers which will be exercised by the Chief Executive after 1997 would be gradually delegated or devolved to him, starting at a point in the time before 1997. The Governor would retain ultimate authority and specific responsibility for security, defence and foreign affairs.

5. Option (A) has the advantage that HMG is seen to be unequivocally responsible for the governing of Hong Kong until 1997. This would be the clearest way of upholding the commitment to this effect in the Joint Declaration (although it can also be effectively upheld under option (B)).

6. The disadvantages of option (A) are obvious: the handover in 1997 would be abrupt, and militate against a smooth transition. The Chinese regard it as essential that the Chief Executive be chosen before 1997. If he took office only in 1997, the new Chief Executive would have no experience of high authority and responsibility. As we move closer to 1997, the people of Hong Kong, and the

legislature, and other representative institutions, will have made increasingly close contact with the Chinese and be increasingly looking to them for approval, if not instructions, in their approach to public business. The existence of a Chief Executive (Designate) not formally recognised and not integrated into the Government structure would mean that there would be alternate focus of political power waiting in the wings. Such an alternative focus of power outside the Government machine would accentuate the inevitable erosion of the Governor's authority in the years running up to 1997. It would be less likely to prove divisive if institutions and the community could direct themselves to an appropriate alternative locus of authority within the Government structure.

7. Option (B) would meet the need to converge with the post-1997 structure and would indicate to the Hong Kong people in advance the way in which the transition would be handled. It would reduce apprehension and would enable the important middle and managerial classes to understand what the changes in government will mean and how such changes may affect them.

8. The creation of a post for the Chief Executive (Designate) would provide the necessary time and a focus for the constitutional and legislative changes which must be made in order to provide for the transition. It would give him time to understand the processes of governing, to establish his authority and manage the institutional alignments which will be required before 1997.

DEFINITION OF POWERS

9. The installation of a Chief Executive before 1997 would require a careful definition of the relationship at all stages between the Governor and the Chief Executive over the period from when the latter post is created. This relationship and its development would require not only precise definition, but careful presentation and handling.

POSITION OF THE POST IN THE HONG KONG GOVERNMENT

10. There will be a need post-1997 for posts in the Hong Kong SAR approximating to Chief Secretary, Financial Secretary and Attorney General in order to carry out the functions of these posts not subsumed in those of the Chief Executive. On the planning assumption in para 2 above there will be a resident British Governor until 1997. A Chief Executive (Designate) might be brought into office under Clause XVIIIA of the Letters Patent by the creation of the post of Deputy Governor.

DELEGATION OR DEVOLUTION OF POWERS

11. The division of effective power between the Governor and the Chief Executive (Designate) could be done by delegation or devolution. Delegation is the allocation of powers with the right retained to withdraw them or to issue instructions over-riding them at any time, without amendment of the basic instruments under which power is delegated. Devolution involves a more substantive transfer of power. To allow the Governor to resume the exercise of powers in the event of crisis the constitutional instruments providing for the devolution would have to allow for the abrogation of those instruments in the case of emergency.

12. Delegation would probably be the more acceptable method to HMG and the Chinese as retaining ultimate responsibility in, and allowing for an easier resumption of power by, the Governor.

THE NEED FOR AGREEMENT WITH THE CHINESE

13. The introduction of a Chief Executive (Designate) some years before 1997 could be achieved successfully only in agreement with the Chinese Government. The method by which he was selected would also need to be agreed with them. The Chinese would need to understand clearly the processes

of endowing a Chief Executive (Designate) with power under British law.

PROGRESSIVE DELEGATION OF POWERS

14. The Chief Executive (Designate) could be endowed with his powers on a progressive basis so that there was no abrupt change, and he was given time to establish his position: and he would be in full enjoyment of the powers of the office of Chief Executive of the HKSAR by the date on which he was required to assume them under the Basic Law. A progressive delegation would substantially improve the prospects of a transfer of government in conditions of stability.

ISSUES REQUIRING FURTHER EXAMINATION

15. The issues which need further examination in regard to the position and powers of the Governor, and of the Chief Executive (Designate) in the 1990s, are of three kinds:

- (A) the method of selection of the Chief Executive (Designate):
- (B) the difference in the powers of the Governor today and of the powers of the Chief Executive of the HKSAR: and
- (C) the duties of the Governor in terms of the constitutional instruments now, as compared with the duties of the Chief Executive after 1997.

METHOD OF SELECTION

16. In regard to the first issue (A), the Governor is chosen and appointed exclusively by London, whereas the Chief Executive of the HKSAR will be chosen in Hong Kong, and appointed by Peking. The Chinese position at the present time is that the first Chief Executive must be

Relationship to representative + further steps and by whom

chosen by consultation, whatever the method to be used subsequently. The Chinese have not yet considered who should be consulted (eg whether HMG would be involved) or the extent of the mechanism for consultation in Hong Kong.

17. On the other hand there would, in terms of confidence in Hong Kong, be great advantage in testing out before 1997, while Hong Kong is still under British administration, the main features of the method to be used post-1997. (The procedures before and after 1997 could not be identical, as before 1997 the candidate, however selected, would ultimately be appointed by HMG.) If the Chief Executive is to manage the transition successfully he will need a marked and demonstrable degree of support in Hong Kong as well as the full support of HMG and of the Chinese Government.

RECONCILIATION OF DIFFERENCES IN POWERS AND OBLIGATIONS

18. The second and third issues (paragraph 15(B) and (C) derive from the difference in the powers and obligations of the two posts. Under the Joint Declaration, the Government of the HKSAR will enjoy a high degree of autonomy except in foreign and defence affairs which will be the responsibility of the Central People's Government after 1997. The Governor has in some areas more powers than will fall to the Chief Executive. He has additional responsibilities in regard to foreign affairs and defence vis-a-vis HMG in the United Kingdom. On the other hand, in some areas, eg in relation to legislation affecting banking, the currency and divorce, the Royal Instructions impose reservations on the Governor's powers which will not apply to the Chief Executive after 1997. The prospect of installing a Chief Executive (Designate) before 1997 therefore requires clear specification of which powers, now exercised by the Governor, are to be exercised by the Chief Executive after 1997 and which will not. All powers now the responsibility of the Governor but not appropriate to

the Chief Executive after 1997 would have to be exercised separately by the Governor until 1997.

19. The third issue (paragraph 13(C)) concerns obligations. The Governor is obliged to carry out Royal Instructions and instructions given by the Secretary of State. It is for consideration to what degree HMG should be ready to relinquish its power to instruct the Chief Executive (Designate) before 1997, and whether this should be a formal relinquishment or an understanding that powers which remained formally in existence would not be used. It can be argued that to maximise Hong Kong's autonomy the Chief Executive ought to be left free to act upon his mandate in the best interest of Hong Kong. But on the other hand any arrangement would need to be visibly consistent with the commitment in the Joint Declaration that until 30 June 1997 HMG "will be responsible for the administration of Hong Kong".

20. The annex to this paper sets out a possible timetable for the creation and entrustment of powers to a Chief Executive (Designate) occupying the post of Deputy Governor. It should be emphasised that this is purely illustrative. There are problems in the timetable: growing pressure for the creation of a Chief Executive (Designate) is to be expected from about 1990 when the Basic Law is promulgated. (There are already suggestions to this effect.) Once created, he must have a real function. The relationship between the Governor and the Chief Executive would need careful definition and public presentation, bearing in mind that the community may as time progresses perceive their respective powers as deriving from different sources of political authority. The powers of the Chief Executive (Designate) would need to be increased steadily, but not at such a pace as would give the appearance of withdrawing the British influence to an extent which would affect confidence.

But he would probably have to consult those in different issues

21. Further consideration will need to be given to the period of office of a Deputy Governor appointed on this basis. It would be conducive to a smooth transition if the incumbent destined to occupy the post in 1997 could have a term of office which comfortably spanned that date (perhaps 1994-2000). If the post of Deputy Governor was created as early as 1992 it would probably have to be filled by straight appointment. It might well need to be envisaged that there would be an initial appointee who would initiate the process of establishing the devolution of power, but that the Chief Executive (Designate) would not be appointed until later. Nearer 1997 there might thus be provision for the appointment or re-appointment of the Deputy Governor, on the basis of a selective process, for the term extending beyond 1997. This could provide the "dry run" of the post-1997 selection system (see para 17 above): it would permit the candidate identified in 1992 to be re-confirmed in office, if he had demonstrated his ability to take on the job, or alternatively replaced by a more suitable candidate.

why?

PRESENT CHINESE INTENTIONS

22. The present intention of the Chinese is apparently to establish first the content of the Basic Law, and this process is proceeding rapidly in the special groups of the Basic Law Drafting Committee (BLDC). Thereafter they would consult HMG, possibly in the Joint Liaison Group, on the Basic Law, and then on the means of arranging a "smooth transition of government" in the JLG. It is encouraging that they seem ready to share with HMG their thinking on the Basic Law. But they are unlikely to be willing to change the content of it substantially once their representatives in the BLDC are committed to it.

23. It will be obvious from the above that, if it is accepted that a Chief Executive (Designate) must, in order to ensure a smooth transition, be in place by 1997 his installation would require action by HMG during this period

of responsibility. If the governmental systems set out in the Basic Law to which HMG will be asked to arrange convergence are not acceptable to HMG, the problems of transition will become insuperable and profoundly destabilising. The two issues - the content of the Basic Law, and the methods to be adopted to achieve transition - have thus become inseparable and need to be addressed before the content of the Basic Law is fixed.

CONCLUSIONS

24. The introduction of a Chief Executive (Designate) before 1997 and the gradual delegation to him before that date of some or all the powers which he will enjoy after that date is a feasible option for arranging a smooth transition without an abrupt change and possible destabilisation. No other feasible option has been identified.

25. The method by which the Chief Executive (Designate) might be chosen will have to await discussions with the Chinese on the Basic Law.

26. The Chinese preference seems to be to establish first the content of the Basic Law, and then to discuss with HMG how Hong Kong institutions should be brought into line with it during the transition. This would tie HMG's hands during the process of transition to an unacceptable degree.

27. No final decisions can be taken on these matters until discussions have been held with the Chinese and understanding reached with them on how the smooth transition is to be achieved. But if the entrenchment of positions is to be avoided these discussions will have to be instituted before the content of the Basic Law is too firmly set.

SECRET

A POSSIBLE TIMETABLE FOR THE CREATION OF A CHIEF EXECUTIVE
AND ENTRUSTMENT OF CERTAIN POWERS AND RESPONSIBILITIES
TO HIM

- 1992 Post of Chief Executive is created, in hierarchy between the Governor and the Chief Secretary, ex-officio a member of Executive Council. He is appointed in the form of the Letters Patent Clause XVIIIA (see Appendix), that is, as Deputy to the Governor. He becomes involved in the processes of Government at the highest level, and is closely consulted by the Governor on all important matters, including appointments of Members of Executive Council (MECS), Members of Legislative Council (MLCS), significant committees, and the formulation of policies before presentation to Executive Council.
- 1993 Entrustment to Chief Executive of specific responsibilities, such as:
- (a) oversight and responsibility on behalf of the Governor for specified areas of Government;
 - (b) formal involvement in appointments of MECS, MLCS, reflected in formulae of appointment;
 - (c) dealing with appeals/petitions to the Governor;
 - (d) appointments to boards/committees (from Governor);
 - (e) appointment of Justices of the Peace;
 - (f) statutory powers from Governor.
- Begins to take on some ceremonial, consular engagements.
- 1994 Assumes Presidency of Executive Council and thereby:
- (a) assumes executive responsibility for all areas of Government activity except defence and foreign affairs reserved to the Governor;
 - (b) becomes responsible for subsidiary legislation made by the Governor-in-Council, except on reserved subjects;

SECRET

- (c) deals with appeals/petitions to the Governor-in-Council.

Notes:

- (a) To create the Chief Executive in the form of Deputy to the Governor permits maximum flexibility in the allocation of duties to the Chief Executive by the Governor.
- (b) It is assumed the Chief Executive would act as Governor in the latter's absences - useful in the transition process.

(2) Before assuming the functions of the office of Governor for the first time, any person as aforesaid shall make the oaths directed by Article III of these Our Letters to be made by the holder thereof.

(3) Any such person as aforesaid shall not continue to perform the functions of the office of Governor after the holder thereof, or some other person having a prior right to perform those functions, has notified him that he is about to resume, or assume, those functions.

(4) The holder of the office of Governor or any other person as aforesaid shall not, for the purposes of this Article, be regarded as absent from the Colony or as unable to perform the functions of that office at any time when there is a subsisting appointment of a Deputy under Article XVIIIA of these Our Letters.

XVIIIA. (1) Whenever the Governor—

- (a) has occasion to be absent from the Colony for a period which he has reason to believe will be of short duration; or
- (b) is suffering from any illness which he has reason to believe will be of short duration; or
- (c) considers for any reason that the public interest so requires,

Deputy to
Governor.
(Amended on
17.11.67.)

he may by instrument under the Public Seal appoint a person to be his Deputy and in that capacity to perform on his behalf such of the functions of the office of Governor as may be specified in such instrument.

(2) The powers and authority of the Governor shall not be abridged, altered or in any way affected by the appointment of a Deputy under this Article and a Deputy shall comply with all instructions which the Governor may address to him, but the question whether a Deputy has in any matter complied with such instructions shall not be enquired into by any court.

(3) Any appointment under this Article may be revoked at any time by Us by instructions given by Us through one of Our Principal Secretaries of State or by the Governor by instrument under the Public Seal, and subject thereto a person appointed under this Article shall hold that appointment for such period as may be specified in the instrument by which he is appointed.

XVIII. And We do hereby require and command all Our officers and ministers, civil and military, and all other the inhabitants of the Colony, to be obedient, aiding and assisting unto the Governor and to any person for the time being administering the Government of the Colony.

Officers and
others to obey
and assist
Governor.

XIX. In these Our Letters Patent the term "the Governor" shall include every person for the time being administering the Government of the Colony.

Term "the
Governor"
explained.



10 DOWNING STREET

LONDON SW1A 2AA

From the Private Secretary

29 September 1986

*Dear Tony,***HONG KONG: THE GOVERNOR AND THE CHIEF EXECUTIVE**

The Prime Minister has seen the Foreign and Commonwealth Secretary's minute of 24 September and accompanying paper about the possible introduction of a Chief Executive (Designate) into the Government structure of Hong Kong before 1997. She has commented that the proposal is far too flabby and could be one of those famous expedients which land us in real difficulty at the time. She does not think that we can sensibly take a decision of principle about this or put a paper to the Chinese government until we have a much clearer idea of how the proposal would work in practice. She would therefore like a discussion in OD(K) on the basis of a fuller paper. This might also cover the question of what we want in Hong Kong by way of representative government.

I am copying this letter to the Private Secretaries to members of OD(K) and to Sir Robert Armstrong.

Yours sincerely,
Charles Powell

(Charles Powell)

A.C. Galsworthy, Esq., C.M.G.,
Foreign and Commonwealth Office.