中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

立法會 LEGISLATIVE COUNCIL
葉劉淑儀 議員 GBS, 太平紳士 Hon Mrs Regina IP LAU Suk-yee GBS, JP

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立法會政制事務委員會
主席
張國鈞議員, JP

葉敬的張國鈞主席

有關「三權分立」的迷思

本人曾於 5 月 7 日的立法會大會上就財政預算案的修正案發言，指出香港從來沒有實行西方政治學家提出的「三權分立」，受殖民統治年代實施的是集行政和立法權於總督一身的「行政主導」模式。當英方得悉需要於 1997 年把香港歸還中國時才在香港推行「代議政制」，以制衡特區政府的「行政主導」能力。

事後本人收到不少迴響，很多人表示本人的發言與他們求學時獲取的知識不同，因此感到十分詫異。為了闡明「三權分立」是否真正於香港實行，本人撰寫文章一篇（見附件），探討「三權分立」的概念和香港的政制發展歷史，以及應如何了解《基本法》規範下的香港政制。歡迎各委員提出意見，並在政制事務委員會上討論。順頌

勛祺

委員 葉劉淑儀 謹啟

2020 年 5 月 14 日

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On "Separation of Powers"

Introduction

1. The western political doctrine of "separation of powers" is often referred to by legislators, politicians, academics, teachers, lawyers and even judges as the defining characteristic of Hong Kong's political system. In fact, nothing is further from the truth.

2. This paper aims to set out the actual political system in Hong Kong during the colonial era and the existing one as enshrined in our nation's Constitution and in the Basic Law, and to dispel widespread misunderstanding about the application of "separation of powers" to Hong Kong.

Hong Kong's political system before 1997

3. From 1843-1995, Hong Kong was governed under the classic colonial model, with executive and legislative powers firmly controlled by the colonial administration headed by the Governor. The *Royal Instructions* and the *Letters Patent* were the key constitutional instruments setting out the system of government of Hong Kong until the transfer of sovereignty in 1997.

The "executive-led" governance system in the colonial era

4. As the *Letters Patent* of 1843 made clear, under the classic colonial model, the Governor, in exercising power derived from the Crown, maintained a firm grip over the enactment of laws through a Legislative Council (LegCo) dominated by public officers and appointed members of the community. The relevant section of the *Letters Patent* reads as follows:

"And we do hereby grant and ordain, that the Governor for the time being, of the said Colony, with the advice of the said Legislative Council, shall have full power and authority to make and enact all such laws and Ordinances as may from time to time be required for the Peace, Order, and good government of the said Colony of Hong Kong; And that, in making all such laws and Ordinances, the said Governor shall exercise all such

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powers and authorities; and that the said Legislative Council shall conform to, and observe all such rules and regulations as We, with the advice of our Privy Council, shall make for his and their guidance therein".

5. Under this archetypal colonial system, there was no "separation of powers" between the executive and legislative branches. The Governor served as the President of the LegCo and the administration was able to control the LegCo proceedings through its firm majority in the LegCo.

6. Nor was there ironclad separation of individuals filling senior positions in the three branches of government. A prime example is Sir Denys Roberts (1923-2013) who served in Hong Kong as Attorney General, Colonial Secretary and Chief Justice from 1966-1988. Such an arrangement is unthinkable post-1997.

7. The Executive Council (ExCo) was intended to play no more than an advisory role. The *Letters Patent* says that "an Executive Council should be appointed to advise and assist the Governor ... in the administration of the Government". As more and more ordinances were enacted conferring the power to make regulations on the Governor-in-Council, the ExCo came to take on certain law-making role. Basically, it was intended that the agenda of the ExCo was to be set by the Governor who served as the Chairman of the ExCo.

8. Under this "executive-led" system, it was legitimate for the LegCo to debate government policies and legislation, but the government's initiatives were rarely challenged, let alone overturned. However, things started to change in the 1980s in the run-up to the transfer of sovereignty. With London's authorization, the administration took steps to replace the appointment system in the LegCo with an electoral system.

Changes to LegCo's composition since the 1980s

9. In 1984, after the British Hong Kong Government decided to push ahead with the "further development of representative government",[1] a series of changes were made to the *Royal Instructions* and the *Letters Patent* to permit the holding of elections to the LegCo and make consequential

[1] The Hong Kong Government published a green paper on "The Further Development of Representative Government in Hong Kong" in June 1984.

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changes to its composition. The changes are summarized as follows:

- In 1985, other than the Governor as the President of the LegCo, the LegCo would consist of three ex officio Members (the Chief Secretary, the Attorney General and the Financial Secretary); not more than 7 other Official Members; not more than 22 Appointed Members; and 24 Elected Members.

- In 1988, the number of Appointed Members were reduced to 20 and the number of Elected Members increased to 26.

- In 1992, the instruments were further amended to remove the Governor from the LegCo. John Swaine, Queen's Counsel, became the first Non-Official Member appointed as the LegCo President in 1993.

- In 1994, changes were made to remove all Official Members from the LegCo as from 1995. The LegCo would consist of 60 members, comprising 20 returned in geographical constituencies; 30 returned in functional constituencies; and 10 returned by an election committee.

Demise of "executive-led" government

10. It can be seen that until the removal of the last 10 Official Members from the LegCo in 1995, the colonial administration was able to control the LegCo business through its solid majority (10 Official Members plus 20 Appointed Members). The appointment of Christopher Patten, a seasoned politician hailing from the Westminster Parliamentary tradition, as Hong Kong's last governor, accelerated the separation of the executive from the legislative branch and the handing over power to an elected legislature. In 1993, Patten removed himself from the LegCo as President. In 1995, he removed the last 10 Official Members from the LegCo, thereby leaving the administration with no firm support in the LegCo. Many senior local officials, who were to inherit high positions in Hong Kong after 1997, were deeply concerned about the implications for maintaining good governance after the demise of the "executive-led" system. In Jonathan Dimbleby's

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memoirs on the last five years of British rule in Hong Kong, *The Last Governor*, he recorded how in 1995, prior to the LegCo elections in September, then Chief Secretary Anson Chan led "a powerful delegation of civil servants to Government House to urge Patten to redraft the constitution to reinforce the concept of an "executive-led government" by forbidding the introduction of any private member's bill without the prior approval of the governor".[2]

11. As the senior local civil servants had feared, the first fully elected LegCo did not fail to flex its fledgling muscle. In the last few months before the Reunification, the administration lost control of the legislative agenda. Many pieces of legislation embodying radical changes (such as the introduction of collective bargaining) not acceptable to the administration were rushed through. These had to be reversed by the Provisional Legislative Council which operated from 1997 to 1998 or not commenced by the first Chief Executive Mr. Tung Chee-hwa when he took over on 1 July 1997.

The concept of "Separation of Powers"

12. There is widespread misunderstanding that a system of government characterized by the "separation of powers" existed in Hong Kong before 1997 and that system emanated from the British political system. Although the doctrine stemmed from the English philosopher John Locke (1632-1704), the evolution of the political system in Britain since the Revolution of the seventeenth century was such that the actual practice of government was a far cry from Locke's ideas.

13. As the British philosopher Bertrand Russell (1872-1970) pointed out in his work *A History of Western Philosophy*, the doctrine that the legislative, executive and judicial functions of government should be kept separate arose in England in the course of the resistance to the reign of the Stuarts, and was clearly formulated by Locke, one of the most influential Enlightenment thinkers. The doctrine was meant to limit the power of the king, who until the Revolution, had complete control of the executive. Russell wrote that:

[2] Jonathan Dimbleby. 1997. *The Last Governor*, pp.366-367.

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"Gradually, however, the executive branch became dependent upon Parliament, since it was impossible for a ministry to carry on without a majority in the House of Commons. The executive became, in effect, a committee chosen in fact, though not in form, by Parliament, with the result that the legislative and executive powers became gradually less and less separate ... Thus the government is both legislative and executive, and its power is only limited by the need of occasional elections. This system is, of course, totally contrary to Locke's principles". [3]

Complete fusion of the executive and legislative powers through the British cabinet system

14. Unlike the US, England does not have a written constitution. Its constitutional system is the product of evolution over centuries. Walter Bagehot (1826-1877), a British journalist, businessman and essayist who had served as editor-in-chief of *The Economist* magazine, said in his classic work on the English political system, *The English Constitution*, that there is a disconnect between the "literary theory" of the British constitutional system and the "living reality". One of the myths about the British political system which he debunked is the idea that the legislative, the executive and the judicial powers are quite equally divided - "that each is entrusted to a separate person or set of persons - that no one of these can at all interfere with the work of the other". Bagehot pointed out, "[t]he efficient secret of the English Constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers", and that "[t]he connecting link is the cabinet. By that new word we mean a committee of the legislative body selected to be the executive body. The legislature has many committees, but this is the greatest".[4]

15. In Britain, not even the Judiciary was entirely separated from the executive and legislative branches. Until the Constitutional Reform Act of 2005, the Lord Chancellor, who was, by law, responsible for the efficient functioning and independence of the courts, was also the presiding officer of the House of Lords, the President of the Supreme Court of England and Wales (one of his many judicial positions) and a member of the Privy Council and of

[3] Bertrand Russell. 1945. *The History of Western Philosophy*, pp.637-639.

[4] Walter Bagehot. 2001. *The English Constitution*, p.11.

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the Cabinet. It was not until the election of a new Labour Government in the early 21st century that the government decided it was untenable to continue vesting all three political functions (executive, legislative and judicial) in the historical office of the Lord Chancellor.

The missing link in Hong Kong's political system post-1997

16. As the above account of the development of the British political system shows, there is no real separation of powers between the executive, the legislative and judicial branches of the Government. The cabinet of ministers, comprising Members of Parliament selected from the majority or coalition parties from Parliament, functioned as the linchpin between the executive and legislative branches.

17. After former Governor Christopher Patten made a wrenching change and forcibly separated the executive and the legislative branches in 1995, the first Chief Executive Mr. Tung Chee-hwa found himself coming into office without a linchpin which ensured the effective implementation of government business in the LegCo. He remedied this deficiency by appointing leaders of pro-establishment political parties in the LegCo, such as Jasper Tsang and James Tien, to the ExCo. Successive Chief Executives have continued this practice. The current ExCo has 7 members who also serve on the LegCo, representing different pro-establishment groups in the legislature.

"One Country, Two Systems" - the pivotal concept in the Basic Law

18. The ideas of John Locke or Montesquieu (1689-1755) did not play any direct part in the drafting of the Basic Law, notwithstanding that some members of the Drafting Committee of the Basic Law did try to foist some western ideas about democracy on to the constitutional framework in the Basic Law. They succeeded in persuading Beijing to accept universal suffrage-based elections for the Chief Executive and the legislature, subject to complying with the principles of "in the light of the actual situation in the Hong Kong Special Administrative Region" and "gradual and orderly progress". (Articles 45 and 68 of the Basic Law)

19. Since the commencement of the Basic Law in 1997, controversies about

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the pace of implementation of universal suffrage-based elections have erupted from time to time, and gave rise to the unlawful "Occupy Central" movement in 2014. Universal suffrage-based elections for both the Chief Executive and the entire legislature is one of the "five key demands" pressed by protesters who have taken part in widespread and prolonged anti-government protests since last June, and continuing to do so.

20. Notwithstanding the above controversies, Beijing has made it crystal clear from the outset that "One Country, Two Systems" is "the fundamental policy of the Chinese Government for bringing about the country's reunification" (proclamation by Mr. Ji Pengfei, Chairman of the Drafting Committee of the Basic Law, in his Address to the National People's Congress on 28 March 1990; the Preamble and Article 1 of the Basic Law). The HKSAR is to be established as a "local administrative region" directly under the Central People's Government (Article 12). As Mr. Ji explained in his address, "this stipulation defines that legal status of the Hong Kong Special Administrative Region and constitutes the basis for specifying the Region's limits of power and its relationship with the Central Authorities". The power to be exercised by, or the affairs which are the responsibility of the Standing Committee of the National People's Congress or the Central People's Government, as prescribed in the Basic Law, were declared to be "indispensable to maintaining the state sovereignty".

Conclusions

21. In the light of the above findings, the following conclusions can be drawn:

(a) The "separation of powers", as conceived by Locke and Montesquieu, did not exist in Hong Kong before 1997, nor in England. As Russell pointed out, "the country where Locke's principle of the division of powers has found its fullest application is the United States, where the President and Congress are wholly independent of each other, and the Supreme Court is independent of both".[5]

(b) Soon after his arrival in 1992, the last Governor Christopher Patten tried to tear the executive and legislative branches of government apart, and

[5] Bertrand Russell. 1945. *The History of Western Philosophy*, p.640.

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groomed a fully elected legislature to act as a check on the executive branch, and by extension, on the Central Government, without any consideration of the impact on effective governance. The fundamental flaw of Patten's strategy is that the Basic Law does not permit the establishment of a Parliamentary system. What the Basic Law permits is the establishment of a "local administrative region of the People's Republic of China" with a "high degree of autonomy and come directly under the Central Government". Any electoral reform which alters the stipulated constitutional relationship between the HKSAR and the Central Government goes against the Basic Law.

(c) After the establishment of the HKSAR, successive Chief Executives rebuilt the link between the executive and legislative branches by appointing political leaders in the pro-establishment bloc in the LegCo to the ExCo. The presence of these legislators helps to marshal support for the Chief Executive's agenda and helps the Chief Executive keep close tabs on public opinion.

(d) Despite the lack of a formal division of powers, the powers and functions of the Chief Executive, and those of the legislature, as set out in the Basic Law (Articles 48 and 73) provide the HKSAR with the **checks and balances** which prevent the abuse of power.

(e) **Judicial independence** is safeguarded by Article 85 of the Basic Law. The continued application of the judicial system in force in Hong Kong before 1997 is guaranteed by Articles 18 and 81 of the Basic Law.

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論「三權分立」

引言

1. 本港的議員、政客、學者、老師、律師以至法官，在論及香港政治體制時，經常指香港以西方政治概念「三權分立」為核心原則。這種論述明顯與事實不符，反映社會對本港的憲制安排及政治制度的理解，長期存在根本性誤解。

2. 本文旨在探討香港受殖民統治時期所實行的政治體制，及國家憲法和《基本法》中勾劃出的憲制安排，透過闡述歷史背景及相關政治理論，消除圍繞香港實行「三權分立」的誤解。

香港於 1997 年前的政治制度

3. 自 1843 年至 1995 年期間，英國在香港實行典型的殖民政府模式，行政和立法權力由香港總督統領的殖民政府牢牢掌控。直至 1997 年香港回歸祖國前，本港政治體制須根據《皇室訓令》（The Royal Instructions）和《英皇制誥》（The Letters Patent）兩份憲制文件制訂。

港英政府的「行政主導」管治制度

4. 1843 年的《英皇制誥》清晰規定，總督行使的權力源自於英皇，實行傳統的殖民地「行政主導」模式，行政機關全面控制立法機關，立法局由委任產生，成員為公務員和社區代表。相關條文如下：

> "And we do hereby grant and ordain, that the Governor for the time being, of the said Colony, with the advice of the said Legislative Council, shall have full power and authority to make and enact all such laws and Ordinances as may from time to time be required for the Peace, Order, and good government of the said Colony of Hong Kong; And that, in making all such laws and Ordinances, the said Governor shall exercise all such powers and authorities; and that the said Legislative Council shall conform to, and observe all such rules and regulations as We, with the advice of our Privy Council, shall make for his and their guidance therein"[1].

5. 由此可見，在此典型殖民管治模式下，並不存在行政及立法「權力分立」。總督既兼任立法局主席，同時在立法局內坐擁絕大多數議席，能夠全面控制立法機關審議條例的進度。

[1] LegCo InfoPack 2011 - 2012，Letters Patent，https://www.legco.gov.hk/general/english/library/infopacks/yr11-12/1112infopacks-lc-04-e.pdf

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6. 在殖民管治模式下，人事任命亦完全沒有分權可言，容許同一人出任行政、立法及司法三個機關內的重要職位。最明顯的例子就是曾分別出任律政司（Attorney General）、布政司（Colonial Secretary）及首席按察司（Chief Justice）的羅弼時爵士（Sir Denys Roberts，1923-2013），這種安排根本不可能出現於 1997 年後的香港。

7. 至於設立行政局（Executive Council, 現稱「行政會議」）的原意，則是發揮提供建議的職能。《英皇制誥》訂明「在政府的行政架構內……行政局的委任應該為總督提供建議及協助」（an Executive Council should be appointed to advise and assist the Governor ... in the administration of the Government）。隨著有更多授權「總督會同行政局」（Governor-in-Council）制訂規例的法例獲通過，逐漸奠定行政局日後所發揮的法定功能。總督作為行政局主席，行政局的議程基本上由總督制訂。

8. 在此「行政主導」的制度下，雖然由立法局辯論政府政策和法律條文有其正當性，但現實上，由行政機關提出的建議，甚少受到挑戰，更遑論被推翻。直至 1980 年代初，英國開始準備主權移交的工作，情況才出現改變。在英國政府允許下，港英政府才在立法局層面引入選舉，取代沿用多年的委任制度。

1980 年代立法局組成的轉變

9. 1984 年，在港英政府決定在香港推進代議政制發展後[2]，英方對《英皇制誥》和《皇室訓令》作出了一系列修訂，包括准許香港舉行立法局選舉，並對其組成作相應變更。相關變動總結如下：

a) 1985 年，除了由港督出任立法局主席外，立法局組成同時包括三名當然議員（ex officio Member）（分別為布政司、律政司和財政司）；不多於七名其他官守議員；不多於 22 名委任議員及 24 名由選舉產生的議員。

b) 1988 年，委任議員減至 20 名，而選舉產生的議員增至 26 名。

c) 1992 年，透過進一步修訂《英皇制誥》和《皇室訓令》，總督不再兼任立法局職務。施偉賢御用大律師（John Swaine）於 1993 年成為首名出任立法局主席的非官守議員。

d) 1994 年頒布修訂，於 1995 年取消官守議員制度。自此，立法局由合共 60 名議員組成，包括 20 名由地區直選產生、30 名由功能界別產生及 10 名由選舉委員會產生。

[2] 港英政府於 1984 年 6 月頒布《代議政制綠皮書 —— 代議政制在香港的進一步發展》

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逐漸消失的「行政主導」權

10. 直至 1995 年取消最後十名立法局官守議員席位前，港英政府在整個受殖民統治期間，一直善用在立法局中擁有大多數的優勢，確保立法局相關事務受控。在擁有豐富西敏寺傳統政治經驗的彭定康（Christopher Patten）上任最後一任港督後，加快了削減行政機關交出立法權力的步伐。彭定康先於 1993 年免去自身立法局主席的職務，並於 1995 年取消餘下的十名立法局官守議員席位，行政機關在立法局中不再享有昔日的穩固支持。

    不少在香港回歸祖國後擔當要職的本地資深官員，認為特區政府失去昔日的行政主導權，對保持良好管治水平將有深遠影響，更對此極度憂慮。由喬納森·丁布林比（Jonathon Dimbleby）撰寫的回憶錄"The Last Governor: Chris Patten and the Handover of Hong Kong"，記錄了港英政府最後五年的歲月，書中記錄了一件於 1995 年發生的事件：時任布政司陳方安生率領一群具影響力的公務員團隊前往政府總部，直接要求彭定康修改憲制文件，禁止議員在未獲港督批准下提出私人條例草案，確保「行政主導政府」的概念在憲制安排中獲充分反映[3]。

11. 正如本地資深政務官們所料，首個由直選產生的立法局致力展示其政治影響力。在回歸前的數個月內，立法局通過大量涉及極端內容及激進改革的法例（例如引入集體談判權），行政機關在過程中完全失去對立法局議程的主導權。相關法例在回歸後，部分需要由臨時立法會推翻，而部分在董建華 1997 年 7 月 1 日就任行政長官時未有執行。

「三權分立」的概念

12. 社會上一直有人誤以為香港在 1997 年前一直奉行「三權分立」，而相關制度沿襲自英國政治體制。雖然「權力分立」的概念由英國哲學家約翰·洛克（John Locke，1632-1704）提出，但自十七世紀英國光榮革命至今，當地政治體制的演化，實質上與約翰·洛克的分權理念南轅北轍。

13. 英國哲學家伯特蘭·羅素(Bertrand Russell，1872-1970)在其著作《西方哲學史》（A History of Western Philosophy）中，深入淺出地探討了約翰·洛克的《政府論》。他認為，分隔行政、立法及司法三個政府功能的方針於英國冒起，是沿於對當時斯圖爾特王朝統治的抵抗，在革命前，英國君主掌控一切權力，作為啟蒙時代其中一位最具影響力的思想家，洛克明確地提出「三權分立」論，目的是制約君主的權力。但根據羅素的分析，英國政治體制發展卻與「分權」越

[3] Jonathan Dimbleby. 1997. *The Last Governor*, pp.366-367

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走越遠：除非有下議院（House of Commons）的支持，否則任何英國政府部門均無法運作，令行政機關對議會日趨依賴，行政機關變相淪為由議會主宰的委員會，行政立法之間的分野不斷收窄。隨著政黨政治在英國的發展，政府既是行政機構，亦同時擁有立法權力，只有偶爾舉行的大選能夠稍為規範政府的權力。當代英國的政治體制，明顯與洛克的理想背道而馳[4]。

通過英國內閣制達致行政立法權力的完全結合

14. 有別於美國，英國並沒有一份訂明的憲法文件，其憲制是經由多個世紀演變而來。經濟學人前主編沃爾特·白芝浩（Walter Bagehot）在其關於英國政治體制的經典著作"The English Constitution"中提到，「文學理論」式的英國憲制與「現實生活」缺乏關鍵連結。他的著作更加打破英國民眾悠久以來對「三權分立」的迷思：行政、立法及司法擁有平等分配的權力，由各機關各自將權力委託於個別人士身上，而且不能干預各自的工作範疇。白芝浩反而認為，英國憲制成功的秘密，就是行政立法之間的緊密結合及完全融合，而內閣就是將兩者連繫的鑰匙。所謂「內閣」，即是指由一個在議會中被選擇成為行政機關的委員會（a committee of the legislative body selected to be the executive body）。內閣就是立法機關中眾多的委員會之一，但卻是最偉大的一個[5]。

15. 事實上，即使是英國的司法機構，也並非完全獨立於行政及立法機關。直至《2005 年憲制改革法令》（"the Constitutional Reform Act" of 2005）通過前，英國大法官（Lord Chancellor） 需負責法庭運作及確保司法獨立，同時出任最高法院院長，並兼任上議院院長、樞密院成員及內閣成員。直至 21 世紀初上場的工黨政府，認定歷史上由大法官一人坐擁行政、立法及司法制權力的做法無法持續，才作出改革。

1997 年後香港政治體制中失去了的連結

16. 上文關於英國政治體制演化的討論，闡述了英國政治體制當中，從來沒有真正實行過行政、立法及司法機關的「三權分立」。英國內閣成員由國會多數黨或管治聯盟的議員組成，在行政和立法機關之間發揮關鍵角色。

17. 由於前港督彭定康於 1995 年強行分拆行政和立法機關，首位特區政府行政長官董建華先生甫上任便發現，手上並無任何可以確保立法會有效推進政府事務的渠道。為加強行政立法之間的聯繫，董建華委任了各個建制派政黨領袖，包括曾鈺成及田北俊等為行政會議成員。此後，歷任行政長官均延續此做法。現時有七名行政會議成員兼任立法會議員，分別代表立法會內不同建制派別。

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[4] Bertrand Russell. 1945. *The History of Western Philosophy*, pp.637-639
[5] Walter Bagehot. 2001. *The English Constitution*, p.11

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「一國兩制」- 《基本法》的關鍵概念

18. 約翰·洛克及孟德斯鳩（Montesquieu，1689-1755）等傳統西方思想固然未有對《基本法》起草過程產生直接影響。然而，小部分《基本法》起草委員會成員曾試圖將西方民主概念，強行加諸於《基本法》的憲法框架上，並成功遊說中央政府接受以普選方式產生行政長官及立法會，但需要根據《基本法》第 45 條及第 68 條規定，符合「實際情況」和「循序漸進的原則」兩個原則。

19. 自《基本法》於 1997 年實施以來，關於落實普選的爭議不時出現，例如於 2014 年發生的 「違法佔中」運動。自 2019 年 6 月起，落實「雙普選」亦成為反修例示威的「五大訴求」之一。

20. 雖然與普選有關的爭議不斷，事實上，中央政府早在 1990 年代初已清楚說明特區政治體制的權力來源，基本法起草委員會主任委員姬鵬飛於 1990 年 3 月 28 日已明確表示，「一國兩制」是「我國政府為實現祖國統一提出的基本國策」[6]。《基本法》第 12 條規定，香港特別行政區屬「地方行政區域，直轄於中央人民政府」。姬鵬飛先生解釋，第 12 條「明確了香港特別行政區的法律地位，是草案規定特別行政區的職權範圍及其同中央的關係的基礎。」全國人大常委會及中央人民政府「行使的職權或負責管理的事務，都是體現國家主權所必不可少的。」[7]

總結

21. 基於以上論據，本文總結如下：

a) 由約翰·洛克和孟德斯鳩提倡的「三權分立」，從未存在於 1997 年前的香港或英國的政治體制中。正如羅素在書中指出，在不同國家當中，以美國的憲政安排最能體現洛克的「三權分立」原則，總統及議會之間完全獨立，美國最高法院亦獨立於行政立法機關[8]。

b) 1992 年，最後一任港督彭定康上任不久，決意將行政及立法機關強行分拆，企圖培植由選舉產生及向選民問責的立法會，制衡行政機關，甚至將這種制衡延伸至中央政府，卻未有考慮相關改革對管治效率所做成的打擊。但彭定康的策

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[6] 《基本法》附件 9，基本法起草委員會主任委員姬鵬飛〈關於《中華人民共和國香港特別行政區基本法(草案)》及其有關文件的說明〉，1990 年 3 月 28 日

[7] 《基本法》附件 9，基本法起草委員會主任委員姬鵬飛〈關於《中華人民共和國香港特別行政區基本法(草案)》及其有關文件的說明〉，1990 年 3 月 28 日

[8] Bertrand Russell. 1945. *The History of Western Philosophy*, p.640.

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略中出現根本性的錯誤，《基本法》並不允許香港設立議會制。根據《基本法》第 12 條規定，香港是 「中華人民共和國的一個享有高度自治權的地方行政區域，直轄於中央人民政府」，任何影響特區政府和中央人民政府憲制關係的選舉改革，均屬於違反《基本法》。

c) 香港特別行政區政府成立後，歷屆行政長官為了重新建立行政和立法機關之間的連結，均委任建制派內不同板塊的政治領袖為行政會議成員。這類身兼行會非官守成員的立法會議員，主要職責是集中支持行政長官施政，並協助行政長官緊貼民情民意。

d) 雖然香港的政治體制中沒有正式的「三權分立」，但是《基本法》第 48 條和第 73 條訂明行政長官及立法會可行使的權力，特區政府內有足夠制衡防止濫權。

e) 香港的司法獨立受《基本法》第 85 條保障，而第 18 條及第 81 條，則確保香港繼續奉行於 1997 年前實施的司法制度。

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