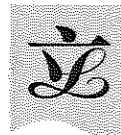




中華人民共和國香港特別行政區

Hong Kong Special Administrative Region of the People's Republic of China



立法會 LEGISLATIVE COUNCIL

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香港中區立法會道一號
立法會綜合大樓
政制事務委員會
主席
周浩鼎議員

尊敬的周浩鼎主席

有關三權分立與司法獨立

在 10 月 28 日舉行的資深司法任命建議小組委員會上，議員就「三權分立」進行一場小型辯論。有部分前議員指假如「三權分立」不存在便會影響「司法獨立」。當時本人回應「三權分立」實為政治概念，並非「司法獨立」必須的元素。事實上，終審法院首席法官馬道立於 9 月 23 日發表的聲明裡提及有關香港司法制度的基本原則(essential principles)，當中亦沒有提及「三權分立」。因此，本人於會後就上述問題撰文“Why are Hong Kong’s judges so obsessed with the ‘separation of powers’?”。此文已於平台 Medium 發表，現隨信附上，敬望 主席閣下將此文傳閱委員。專此函達，並頌勛祺。

委員 葉劉淑儀

葉劉淑儀

謹啟

二零二零年十一月十六日

Why are Hong Kong's judges so obsessed with the 'separation of powers'?

Hong Kong politicians who oppose any suggestion that the 'separation of powers' does not exist in Hong Kong often cite references to this concept in court judgments as evidence that it is an integral system of our constitutional system.

Hong Kong's court judgments are indeed replete with references to the 'doctrine of separation of powers'. Take, for example, the following references:

- In *Lau Cheong and HKSAR* (FACC No. 6 of 2001) (concerning the legal and constitutional validity of two aspects of the offence of murder), taking the doctrine of the separation of powers as gospel truth, the Court of Final Appeal commented that 'The Basic Law enshrines the principle that there must be a separation of powers between the executive, the legislature and the judiciary' (para. 101). However, in that context, the Court was more concerned with asserting its authority to determine whether legislation enacted is consistent with the Basic Law and the Bill of Rights. The court was describing the different responsibilities of the three branches of government rather than making a case for the three branches as three distinct and separate institutions.

- In *Leung Kwok Hung v President of the Legislative Council* (HCAL 87/2006) concerning the power of members of the Legislative Council to propose amendments to bills with charging effect, Judge Hartmann said -

66. **'The Basic Law enshrines the separation of powers. A reading of the Law makes it evident that the executive, the administration and the legislature are each to perform their constitutionally designated roles in a co-ordinated and co-operative manner for the good governance of Hong Kong. Mr. Thomas described it as the 'workability principle'.**

67. **Hong Kong has an executive-led government.** It is the function of the Chief Executive to lead the government, to decide on government policies and to approve the introduction of motions regarding revenues or expenditure to the Legislative Council: art 48. It is the function of the Government; that is, the executive authorities (led by the Chief Executive) to formulate and implement policies, to conduct administrative affairs and to draw up and introduce (into LegCo) budgets and final accounts: art 62. LegCo does not exercise executive or administrative functions of the kind I have just described. To put it plainly, it does not run any 'mirror' Ministry of Finance. It is instead the function of LegCo to enact, amend or repeal laws, to examine and approve budget introduced by the executive

authorities and to 'approve'(not create or decide upon) taxation and public expenditure: art 73.

68. **What the Basic Law defines is the method of inter-action:** that is, the nexus, both introductory and consequential, which connects the executive and administration on the one part and with the legislature on the other. To put it another way, who carries responsibility for this inter-action, the manner in which it is to be executed and how the consequences are to be managed are fundamental matters defined in the Basic Law.'

From the above, it can be seen that although Judge Hartmann upheld the separation of powers as an underlying constitutional principle, he fully understood that, under the Basic Law, the three branches of government are not meant to be separate institutions unconnected with one another. They are meant to work in a 'co-ordinated and co-operative manner for the good governance of Hong Kong'. How they 'inter-act' with each other for this purpose is spelt out in the Basic Law.

- In **Leung Kwok Hung v President of the Legislative Council** (HCAL 64/2012) concerning the right of a member of the Legislative Council to filibuster, following antecedent comments of judge Li, Hartmann and others, judge Lam said -

32. **'There are good practical reasons for this principle which is a facet of the doctrine of separation of powers** (the principle in this context is "the integrity of the legislative process")...
33. The second general principle is that **the courts recognize that Parliament has exclusive control over the conduct of its own affairs.** The courts will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions...The principle is essential to the smooth working of a democratic society which espouses the separation of power between a legislative Parliament, an executive government and an independent judiciary. The court must be ever sensitive to the need to refrain from trespassing, or even appearing to trespass, upon the province of the legislators...'

Judge Lam further explained that he cited the doctrine of separation of powers to drive home **'the constitutional role of the Legislative Council as the master of its own practice and procedure** in the application of the doctrine of separation of powers which underlies the Basic Law.'

While I fully subscribe to judge Lam's view that the legislature should be autonomous in making its own rules, conducting its own affairs and in making laws (unless it infringes any local laws or the Basic Law), I am not clear what

the learned judge actually means when he refers to "the doctrine of separation of powers which underlies the Basic Law".

Judge Hartmann made a similar comment about Hong Kong's constitutional system in a judgment *Lau Kwok Fai Bernard v Secretary for Justice* (HCAL177/2002) and *Government Park and Playground Keepers Union Shum Man Lai, Leung Tat Wah v Secretary for Justice* (HCAL180/2002) concerning judicial challenges of a newly enacted law to reduce civil service pay scales. Judge Hartmann re-iterated that 'the Basic Law is founded on what is commonly called the Westminster model', and that 'the principle (of separation of powers) is woven into the fabric of the Basic Law'.

With the greatest respect, I don't think it is correct to say that 'the Basic Law is founded on what is commonly called the Westminster system'. The Basic Law was drafted in the 1980s and enacted in April 1990. At that time, Hong Kong did not have a Westminster-style parliamentary system. As I have said before, Hong Kong was governed under the classic colonial model with the Governor serving as LegCo President and officials and appointed members constituting the dominant majority. That's how the executive branch managed to get its agenda through the legislature without too much hassle, and that's the essence of the 'executive-led government' which Beijing thought it would be taking over in 1997. However, between the signing of the Sino-British Joint Declaration on the future of Hong Kong in 1984 and 1997, the British rulers in Hong Kong decided to implement a different political system - representative democracy. At that time, it was an entirely new, unprecedented political experiment. When Chris Patten became Hong Kong's governor in 1992, he decided to push forward the development of Hong Kong's representative government, whether Beijing liked it or not. There was a big row between China and the United Kingdom over Hong Kong's constitutional development. Because the UK never secured Beijing's agreement to the institution of Westminster-style parliamentary system in Hong Kong, it cannot be said the the Basic Law is founded on the Westminster model.

I believe what the learned judges had in mind was actually the principle of "checks and balances", which was not explicitly mentioned in the US Constitution, but definitely woven into it. In the course of taking advice on the drafting of the Basic Law, i believe the powers-that-be in Beijing agreed to incorporate many 'checks and balances' features into the constitutional system embodied in the Basic Law. For example, the Chief Executive could be impeached by the legislature (art.73(9)); must resign if the legislature, after dissolution, returns and passes by a two-thirds majority a bill that the Chief Executive had refused to sign (art. 52(2)); and needs the endorsement of the Legislature Council in appointing or removing judges of the Court of Final Appeal and the Chief Judge of the High Court (art. 90).

Needless to say, the executive branch needs the legislature's approval for passing any piece of legislation or expenditure proposal. Its inability to secure the approval of the highly fractious legislature for the enactment of legislation with national implications (prominently the national security law mandated by article 23 of the Basic Law (2003) and the fugitive offenders (amendment) legislation (2019)), and the drastic slowdown of government business because of filibuster by the opposition in LegCo, became a major source of angst to the government.

On the separation of powers, although many frequently refer to it as a salient characteristic of the British system, a closer study reveals that that description is a gross over-simplification. The UK does not have a codified, written constitution. There is certainly a division of responsibility between the three branches of government, but there was no clear, institutional separation until the Constitutional Reform Act of 2005 entered into force in 2009. Until 2009, the Lord Chancellor was a high-ranking member of the Cabinet, Speaker of the House of Lords and head of the judiciary of England and Wales. The 2005 Act introduced more formal separation between the executive authorities and the judiciary. The legislature has always been fused with the executive branch through the cabinet system, as Walter Bagehot observed in his classic work *The English Constitution*.

To conclude, in my opinion, many judges have simply fused and confused the 'the separation of powers' with 'checks and balances'. The 'separation of powers' is a political doctrine traceable to Aristotle, but not a judicial doctrine. Judges have come to refer to it as part of the common law system because the division of responsibility of the three branches of government is well accepted in the common law system. Our judges' independent power of adjudication is alive and well without a 'separation of powers' in the pure, Lockean sense. I think Henry Litton, a retired judge of our Court of Final Appeal, best summed up the problem in a recent video. He said that that the 'doctrine of separation of powers', often bandied by Hong Kong judges and politicians, is just 'a label'. The three branches of government have different functions. There is a clear division of work and checks and balances. But there is no total separation. The three branches are not separate units, not linked at their roots to the other branches. That view of the three branches operating in spheres of their own, unattached to each other or to the reality on the ground, is a total misunderstanding and a myth - "a sterile debate". But misconceptions peddled by opposition legislators to confound the public and to undermine the Basic Law must be put right.