

An executive-led system, with the executive, legislature and judiciary performing constitutionally designated roles

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The desperate attempt to try to latch on to a phrase or label without properly understanding what it entails is pathetic. The suggestion that the concept of “separation of powers” is a given in the constitutional order of the Hong Kong SAR (“HKSAR”) is an oversimplification. One must not lose sight that we are not looking at something in the abstract but at the constitutional structure of the HKSAR. An analysis of the constitutional order must not be based on what anyone has said or desired, but what is set out in the Constitution of the People’s Republic of China (“PRC”) and the Basic Law.

The concept of “separation of powers” is a term that has attracted multiple interpretations, expositions and understanding internationally by scholars, judges and academics. Very briefly, the French philosopher Montesquieu’s theory involved the separation of the executive, legislative, and judicial powers of government, and the balancing of the unequal power amongst them. Montesquieu viewed that judges are “no more than the mouth that pronounces the words of the law.” In contrast, the English philosopher John Locke’s exposition consists of the differentiation between the legislative power, executive power, and what he terms the “federative” power, which effectively are powers relating to foreign affairs, with no emphasis on the role of the judiciary. The English political theorist M.J.C. Vile’s “pure doctrine” separated the legislative, executive and judicial branches strictly, confining each branch to exercise its own function without encroaching upon the functions of others.

The United States Constitution aims to provide for separation of the executive, legislative, and judicial branches of government, each with separate institutions and personnel. Yet, the nomination of Supreme Court Judges is made by the President. Potential Supreme Court Judges have to attend nomination hearings before the US Senate Judiciary Committee to be questioned and to provide testimony before being confirmed by the US Senate. In the United Kingdom, the concept of parliamentary sovereignty, where Parliament is the supreme legal authority, means that it is free from

overruling by the Courts. There is also no clear separation between the executive and legislature, and indeed up until 2005, between the legislature and the judiciary either.

In discussing the doctrine of separation of powers, it is important to bear in mind two points. First, the political structure of a state is entirely a matter within the sovereign right of that state. Secondly, the PRC is a unitary state and all power comes from the Central Authorities. The people's congress system is China's political system. The HKSAR was established by a Decision of the National People's Congress ("NPC") under Article 31 of the Constitution of the PRC. The Basic Law was promulgated by the NPC in 1990 and applicable to HKSAR since 1997 when China resumed the exercise of sovereignty over Hong Kong. The political structure of HKSAR is set out in Chapter IV of the Basic Law and it lays down an executive-led system headed by the Chief Executive, the head of the HKSAR and the HKSAR Government. The Basic Law further provides for the division of powers and functions amongst the three branches the executive authorities, the legislature and the judiciary. The powers and functions of the executive authorities and legislature are set out in, *inter alia*, Articles 62 and 73 respectively. By Articles 80 and 82, the judiciary is authorized to exercise judicial power including that of final adjudication. The three branches are inter-related with delegated powers and functions to discharge their constitutional duty under the executive-led system. They complement each other with the common goal of "[u]pholding national unity and territorial integrity" and "maintaining the prosperity and stability of Hong Kong"¹. Their powers emanate from the Central Authorities, and their roles and duties are constitutionally designated under the Basic Law.

Hong Kong courts have referred to a concept of "separation of powers" from time to time. A proper reading of the judgments would reveal that the courts used the term to describe the division of labour or the different responsibilities of various institutions under the Basic Law without condescending to any detailed discussion of the concept. For example, the Court of Final Appeal ("CFA") referred to the doctrine of "separation of powers" in *Lau Cheong v HKSAR*², a case concerning, *inter alia*, the constitutional validity of life imprisonment as the mandatory penalty for murder; and in *Leung Kwok*

¹ Preamble of the Basic Law

² [2002] 2 HKLRD 612

*Hung v President of the Legislative Council (No. 1)*³, a case concerning filibustering. The Appeal Committee also referred to the doctrine in *Sixtus Leung Chung Hang & Yau Wai Ching v Chief Executive of HKSAR*⁴, a case concerning the validity of the Applicants' LegCo oaths. On none of these occasions did the CFA or the Appeal Committee attempt to embark on any in-depth discussion of the doctrine, such as its origin and its applicability in Hong Kong before and after 1 July 1997, probably because the matters before the court could be disposed of without such discussion.

The doctrine was also referred to by A. Cheung J (as he then was) in *Luk Ka Cheung v The Market Misconduct Tribunal & Anor*⁵. Citing the article of Sir Anthony Mason NPJ (the former Chief Justice of Australia), *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong* (2007) 37 HKLJ 299, A. Cheung J cautioned that the doctrine must be treated with great care in its application in Hong Kong.

Our courts have also affirmed in different cases that Hong Kong has an executive-led government. An example can be seen in the case of *Leung Kwok Hung v The President of the Legislative Council of the HKSAR and Another*⁶, where Hartmann J (as he then was) in the Court of First Instance acknowledged that HKSAR has an executive-led government, and while the term “separation of powers” was used, Hartmann J highlighted that the Basic 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.*”

More recently, the Court of Appeal affirmed in the case of *Kwok Wing Hang & Ors v Chief Executive in Council & Anor (No 5)*⁷ that, apart from the division of

³ (2014) 17 HKCFAR 689

⁴ (2017) 20 HKCFAR 300

⁵ [2009] 1 HKC 1

⁶ [2007] 1 HKLRD 387

⁷ [2020] 3 HKC 83

responsibilities among different branches of political structure, the Basic Law envisages an executive-led system in the administration of the HKSAR.

The doctrine of separation of powers is commonly used in the context of political structures of sovereign states. It is trite that this doctrine has no place in the political structure of HKSAR. When the term “separation of powers” is loosely used in the HKSAR it is prone to contribute to misinterpretation or misunderstanding of the constitutional order of HKSAR. One should not just refer to a label, but should objectively review the substance of the Basic Law in ascertaining what the political structure of HKSAR entails – an executive-led system, with the executive authorities, the legislature and the judiciary performing constitutionally designated roles with a division of work and complementing each other.