

The separation of powers in the hong kong legal system essay sample

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“ There should be mutual understanding and support amongst the Executive, the Legislature and the Judiciary institutions.” Xi Jinping Vice-President of the People’s Republic of China during his visit to the Hong Kong SAR on July 7th, 2008 made the above statement that hit a raw nerve in the public. In response to concerns in the fundamentals of Hong Kong’s legal system, Hong Kong Bar Association issued a statement to clarify that the judiciary independence is “ firmly guaranteed” by the Basic Law, which is to “ remain separate and independent from the Executive and the Legislature” and shall not be “ regarded as a part of the governance team” (Hong Kong Bar Association, 2008).

This paper examines related Articles of the Basic Law, legislatures and ordinances to understand how the separation of powers comes in to play in Hong Kong SAR and identifies the relations of the three powers while reviewing relevant cases that have impacted the system.

The concept of separation of powers had rooted in Hong Kong from its colonial past but it was not until July 1st, 1997 had the system been put into practice with a codified constitution that laid down the legal foundations. One of the most important general principles of the Basic Law is the authorization of the region to maintain a system of executive, legislative and independent judicial power (BL 2), which concept is very different from the centralized governing power of the mainland political system. The structure of the Basic Law provides for the clear separation of powers. Under Chapter IV, the provisions for political structure are divided into sections according to the governmental bodies, in which the institutions and power of the executive, legislative and judiciary branches are distinctively outlined.

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Headed by the Chief Executive (BL 43), Government is the executive authority of the Hong Kong SAR (BL 59), while the Legislative Council is the legislature (BL 66) and the judicial power is exercised by the courts at all levels (BL 80).

A simple way of putting the three powers into perspective: “ law is created by the legislature, enforced by the executive and interpreted by the judiciary.” (McInnis, 2007) In order to avoid abuse of powers by any individual or any cohesive group, no branch should exercise the power(s) of other branches and no individual should be a member of more than one branch at the same time.

“ There seems to be no current constitutional system which adopts this complete separation of powers. Some of the early American States and the French constitution of 1791 tried to strictly give effect to this doctrine but failed. The strict doctrine is only a theory and it has to give way to the realities of government where some overlap is inevitable. But while permitting this overlap to occur, a system of checks and balances has developed (and needs to continue to develop).” (Carney, 1993) Thus, it is noted that in practice, overlaps do occur and it is the checks and balances scheme inherent in the doctrine of separation of powers that ensures procedures are in place to allow one branch to limit the powers of another, thus, a balanced governance system can be maintained.

Executive-Legislative relationship The executive-legislative relationship in Hong Kong is political in nature. While the executive branch represents the interests of the Government and is responsible to the Central People’s

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Government, the legislative branch is represented by the Legislative Council (LegCo) which is comprised of 30 members from geographic constituencies and 30 from functional constituencies with backgrounds of various political parties. While there are formal distinctions between the legislative and executive branches, the two are delicately connected.

The LegCo's main functions are to enact, amend or repeal laws; examine and approve budgets, taxation and public expenditure and monitor the work of the Government, including debating the policy addresses of the Chief Executive or other issues of public interests. Although the LegCo cannot dismiss the Chief Executive with a vote of no confidence, it is given the power to impeach the Chief Executive under the conditions set out in the Basic Law (BL 73).

The government is, in turn, accountable to the legislature (Article 64). Headed by the Chief Executive, the government implements and enforces laws passed by the LegCo and presents regular policy addresses to the LegCo. Legislative Council (Powers and Privileges) Ordinance, enacted in 1985, grants LegCo the " powers to summon public officials, call for documents and evidence, and investigate matters of public concern through a select committee." (Cheung, 2007)The executive-legislature relationship is not one directional and is subject to the checks and balances. The Basic Law provides the Chief Executive the power to decide whether government officials should testify before the LegCo or its committees. The Chief Executive signs bills and budgets passed by the LegCo and promulgates

laws, approves the introduction of motions regarding revenues or expenditure to the LegCo (BL 48).

The Basic Law also grants limited veto power to the Chief Executive to return a bill to LegCo for reconsideration if he determines that such bill passed by the LegCo is not compatible with the overall interests of the Region. If the original bill is passed by the LegCo the second time, the Chief Executive must sign and promulgate it within one month, otherwise, he may dissolve the LegCo. However, if the original bill is passed again by not less than two-thirds majority of all the new LegCo Members, the Chief Executive must sign and promulgate it, or resign (BL 49 & 50). "The new powers of the LegCo are to ensure that there are adequate checks and balances between the executive authorities and the legislature of the Region." (Hong Kong SAR Legislative Council, 2004) However, the extent of the legislature's power of policy initiatives is greatly restricted. As prescribed in the Basic Law, the legislature may only introduce bills that are unrelated to public expenditure or political structure or the operation of the government (BL 74). The introduction of bills involving government policies requires the Chief Executive's written consent and are usually proposed by the Executive Council.

Judiciary Power exercised by the Legislature? Applying the doctrine of power separation, judicial power may be exercised only by courts, and courts may exercise only judicial power. However, it is noted that LegCo has possesses certain judicial powers of its own. The Legislative Council (Powers and Privileges) Ordinance (Cap 382) conferred LegCo the admittance of

persons other than its members and staff to precincts (s 8) order or summon anyone, call for witness and evidence (s 9-10), by the issue of warrants if necessary (s 12), examine witnesses on oath (s 11) and compel them to answer questions or produce evidence (s 13). (Ghai, 1999) Additionally, the powers to impeach the Chief Executive also involves apparent judiciary procedures by way of summoning persons concerned to testify or give evidence and mandating the Chief Justice to form and chair an independent investigation committee (BL 73). These procedures, however, are in place as the Legislature exercises its function to monitor the government and are essential for the checks and balances among the three branches.

Judiciary Independence” Unless the Judiciary is truly independent, it cannot fulfill its role of ensuring that the Government is acting in accordance to law. Nor can it discharge its function of ensuring that the legislation passed by the Legislature is consistent with the Basic Law and the international legal obligations of the HKSAR.”(Hong Kong Bar Association, 2008)Judiciary independence is one of the most important aspects of Hong Kong’s fundamental value. Article 2 of the Basic Law provides the general principle of the judiciary’s independence from the executive and legislative branches. Article 85 further clarifies that the courts’ authority to exercise judicial power independently, is free from any interference. Judges are also given the immunity from legal action in the performance of their judicial functions (BL 85) so they can “ apply the law equally without fear or favor while maintaining the rule of law.” It is, the duty and obligation for judges uphold the rule of law and remain faithful to the laws enacted by the legislature but

they should avoid being influenced by any individual including members of the legislature.

In general, the Basic Law provided for the of a judiciary system that continue from before the handover, upholding common law subjectivity and independence traditions such as reference to precedents of common law jurisdictions including regions outside of the SAR” (BL 85), “ trial by jury” (BL 86) and the “ presumption of innocence until proven guilty” (BL 87). Judges from other common law jurisdictions based on judicial and professional qualities are recruited (BL 92). Provisions for local lawyers and lawyers from outside Hong Kong to work and practice in the Region can be made (BL 94).

The courts continue to have jurisdiction over all cases while adopting the restrictions applicable before the handover (BL 18, 19 & 84); with the exception of the Court of Final Appeal (CFA) which is established after the changeover. The power of final adjudication is vested in the CFA (BL 82), which also plays an important role in the interpretation of the basic law, although the final power is vested in the NPCSC (BL 158).

While the legislature is given the power to endorse the appointment and removal of the judges of the CFA and the Chief Judge of the High Court (BL 73), and the Chief Executive is responsible for the appointment and removal of Judges at all levels (BL 48), the judiciary is to remain independent and judges receive no instructions from either executive or the legislation branch. Appointments are subject to the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors (BL 88). With the Secretary of Justice

being the only representative from the executive branch, its voting power is limited and is unlikely to have any deliberate influences in the passage of commission resolution. Again, removal of a judge by the Chief Executive is subject to the recommendation of a tribunal appointed by the Chief Justice of the CFA which consists of not fewer than three local judges and judges cannot be removed unless they become unable to discharge their duties or in the case of misbehaviour.

Judicial Review An independent Judiciary, upholding the rule of law and safeguarding the rights and freedoms of the individual, is a cornerstone of Hong Kong's society. Judges are entrusted by the community with the exercise of independent judicial power; and liberty, property and reputation are at stake in the decisions they make when adjudicating cases between citizens and between citizen and government.

(Judiciary, Hong Kong Special Administrative Region, 2004) In essence, the role of the judiciary is to apply the principles and parameters of the laws, including the Basic Law as well as other laws as prescribed (BL 8 & 18), within the jurisdiction allowed by the Basic Law (BL 18 & 19). The courts' power to "review the constitutionality of legislation is regarded as inherent in the process of the enforcement of the law." (Ghai, 1999) The basic law confers the courts the power of judicial review. The courts are authorized to interpret on their own, in adjudicating cases, the provisions of the Basic Law within the limits of the autonomy of the Region as well as other provisions of the Basic Law (BL 158).

However, Judiciary power is exposed to executive challenge. In April 1999, the government made an unprecedented request for a ‘clarification’ from the CFA and seek National People’s Congress Standing Committee (NPCSC) for an official interpretation of certain provisions of the Basic Law, with the intention to upend the CFA ruling in the case of Ng Ka Ling v. Director of Immigration (1999) 2 HKCFAR.

This case put two important issues of judicial independence on the line: the courts’ constitutional jurisdiction and the right of abode of the mainland-born children of HKSAR permanent residents’, and those born out of wedlock or born before a parent qualified as a permanent resident. The CFA held that it had the jurisdiction to ‘examine whether any legislative acts of the NPC or its Standing Committee were consistent with the Basic Law and the duty to declare such acts to be invalid if found to be inconsistent,” by making reference to the Basic Law (BL 158). The judgment also held that Article 24 (3) confers the right of abode to permanent residents, including children born out of wedlock or born before a parent qualified as a permanent resident and people as described in Article 22 (2) do not have the right to abode in the first place, permit must be obtained for entering Hong Kong.

Nevertheless, that the court did not have to make a reference to the NPCSC for an interpretation (1999) 2 HKCFAR. The judgment caught many people by surprise and created a major constitutional crisis. Leading law practitioners and scholars praised the judgment and recognized its significance in upholding Hong Kong’s rule of law while pro-Beijing critics and Basic Law Committee members criticized the CFA’s interpretation of Article 22(4). The

Chief Executive believed the judgments were unfortunate and the sudden inflow of people with the right to abode would overwhelm the scarce social service resources. NPC expressed displeasure and saw the judgment unwise.

The incident devastated the legal community when the Secretary for Justice made a formal application to the CFA for ‘ a clarification of the part of its ruling in which a power of judicial review over legislative acts of the NPCSC was asserted.’ Such request jeopardized the judicial independence of the SAR with political agenda.

The legal community was shocked again when the Chief Executive resorted to the NPCSC for an interpretation of Article 22(4) and 24 (3) according to their true legislative intents. This alleged act is seen by many as unconstitutional since Article 185 of the Basic Law clearly indicated that such request should be made by the courts, not by the government. The Executive branch has crossed the line and jeopardized judiciary independence (BL 185).

Conclusion” The executive power lies with the Hong Kong SAR Government; the law making power lies with the legislators and the judicial power lies with the courts, therefore, each power is totally separated from each other in the Hong Kong SAR legal system and does not and will not overlap.” The statement above, though idealistic, cannot withstand external forces. Hong Kong is ruled under a unique political environment of ‘ One Country, Two System.’ Although there is a seemingly complete constitution that clearly laid out the boundaries for the powers of the three branches, with calculated emphasis on checks and balances, the rule of law is subject to distortion. In

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the right-of-abode case, some mainland scholars went as far as to question CFA's power to judiciary review and reasoned that SAR is not a sovereign entity.

Just a week ago, the future leader of China made a bold statement urging the three branches of the SAR to be more supportive of each other. It is noted that China, a completely different political system with the absolute rule of a centralized government, is governed by national policies in the socialist regime. When they make remarks on Hong Kong issues, such political culture-shock will likely to continue. In analyzing the three powers, however, it is not difficult to realize that Hong Kong is indeed an executive-led political structure. While the legislature and judiciary enjoy certain degrees of independence, executive influences still cloud the practice of the rule of law and the development of democracy, which are granted by the Basic Law.

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