

Why the Political System of the Macao SAR is not One of “Separation of Power”?

– Speech at the Graduation Ceremony of the Advanced Seminar for Macao Basic Law Studies

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I. Introduction

I feel deeply honored to have been invited to attend the Graduation Ceremony of the Advanced Seminar for Macao Basic Law Studies and inauguration of the Phase IV of the program, co-sponsored by the Public Administration and Civil Service Bureau of the Government of Macao Special Administrative Region (SAR), the One Country Two Systems Research Center of the Macao Polytechnic Institute, and the Associação de Divulgação da Lei Básica de Macau. I would like to pay tribute to the program organizers, extend congratulations to all program participants on the successful completion of their studies, and wish participants of the new program rewarding outcome of their studies.

The achievements and progress of Macao over the past 12 years after its return to the motherland are evident to all. One important accomplishment is the in-depth implementation and promotion of the *Basic Law of the Macao Special Administrative Region of the People's Republic of China* (hereinafter as “the Macao Basic Law”). As President Hu Jintao commented in his speech at the Ceremony Celebrating 10th Anniversary of Macao's Return to the Motherland and the Inauguration of the Third-term Government the Macao SAR, “the government and various non-governmental organizations in the Macao SAR have made unremitting efforts to promote the Macao Basic Law and apply it to the exercise of executive, legislative and independent judicial power and handling of major issues such as political institutional development.” The “One Country, Two Systems” concept and awareness of the Macao Basic Law have been gaining increasing public support. The systematic training for middle and senior level civil servants of the SAR government, in particular, is a visionary and critical move, reflecting the great importance that the two successive Chief Executives of Macao SAR, Mr. Edmund Ho Hau Wah and Mr. Fernando Chui Sai On, have attached to the study and promotion of the Macao Basic Law. This is of great significance and profound and far-reaching impact, enhancing SAR government's commitment to governing Macao according to law and its capacity and effectiveness of governance, to the continued correct, comprehensive and in-depth implementation of the “One Country, Two Systems” principle and the Macao Basic Law in the Macao SAR, and to leading the Macao public in its commitment to the study of, compliance with and safeguard of the Macao Basic Law.

One of the topics of the seminar program concerns the political system of the Macao SAR, which is also of interest to me. I would like to take this opportunity to discuss a specific issue

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related to this, i.e. why the political system of the Macao SAR is not one of “separation of three powers”?

To answer this question, we need to address two issues: a) Conceptually, what is the precise definition of “separation of powers”? Is it that as long as executive, legislative and judicial powers are exercised by three different branches with mutual checks and balances, such a system can be called one of “separation of powers”? b) What are differences between the political system of the Macao SAR and a system of separation of powers? I have heard questions from friends as to why the political system of the Hong Kong and Macao SARs, with executive, legislative and judicial powers being exercised by different branches of government with checks and balances and judicial independence, are not called a system of “separation of powers.” I believe that this is not only an important theoretical issue, but also an important practical problem impacting the correct implementation of the “One Country, Two Systems” policy and the Macao Basic Law, and the operational direction of the SAR’s political system.

II. The evolution of Western theories and systems of “separation of powers”

To address the first question, I would like to start with a short review of evolution of the Western theories and systems of “separation of powers”. Their theoretical origin could be traced to ancient Greece and Roman era. Aristotle in ancient Greece divided functions of government into the deliberative, administrative (magistracies) and judiciary, calling them “three factors of constitutional form”. Polybius of Ancient Greece further elaborated that each of the three branches of government while being separated should each check the powers of the other two, namely powers of the consuls, the Senate and the popular assembly being mutually checked and balanced so that their unchecked powers could be abated and stasis achieved. This is the beginning of the ideology for separation and balance of powers. In the 17th century, the British philosopher and political thinker John Locke proposed an idea of separation of powers in the modern sense, laying the theoretical foundation of modern Western forms of national government. He divided powers of the government into the legislative, executive and federative, with the legislative having supremacy and being separated from and checked and balanced by the executive. The federative power, i.e. the right to act internationally, was in fact part of the executive power. Thus, his theory is also described as one of “separation of two powers”. The evolution of British political system was later directly influenced by his theory. It was not until the mid-18th century was the theory of separation of tripartite powers fully articulated by Montesquieu, a French Enlightenment thinker and legalist, on the basis of Locke’s idea on separation of powers and the practice of British constitutional system.

Montesquieu combined the ideas of “separation of powers” and “checks and balances” into a holistic scheme. On the one hand, he believed that state power should be divided into legislative, executive and judicial powers with all three being equal and exercised by different institutions. On the other hand, he proposed that there should be checks and balances among the three powers to prevent excessive concentration of power that might infringe on citizens’ liberty. He also believed that there should be checks and balances within each branch of power. For example, the legislative institution should be bicameral with houses of commons and aristocracy. The legislative power should belong to all people and be exercised by a popularly elected house of commons. There

should also be a senate with the aristocracy participating in legislative process to maintain checks and balances within legislative branch, and prevent infringement of their interests by the commons through use of legislative power. He also accepted the role of monarchy in exercising executive power which required promptness and swiftness, since indecisiveness would reduce executive efficiency and capacity. He emphasized that monarch should not be elected by the legislative body, so that the power of the former would not be constrained by the latter. The judiciary should consist of judges elected by the people in accordance with law and not attached to any particular group so that judicial impartiality and independence could be maintained. The judges should also follow the principle of avoidance in the event of conflict of interest.

In short, Montesquieu thought contains two important elements: a) the division of government powers into the executive, legislative and judiciary to be exercised by different institutions; b) the separation of tripartite powers with checks and balances to prevent any one power becoming dominant over the other two. The original intention of Montesquieu in proposing “separation of powers” was to advocate the establishment of British style constitutional monarchy in France. However, the ensuing French Revolution brought about a more democratic French Republic. Montesquieu thinking on “separation of powers” is undoubtedly an important contribution to political civilization of the world. It not only provided important ammunition for the bourgeois revolution in the historical context of the demise of French feudalism and monarchy, but also had significant impact later on government forms and power exercise of Western countries including the United States. In particular, its proposition of institutional divisions of executive, legislative and judicial powers became a structural basis for political systems widely referenced by modern states.

It should also be noted, however, that the notion of absolute division and balances of the executive, legislative and judicial powers proposed by Montesquieu is too idealistic and rigid. Not all political systems in major Western capitalist states can meet his criteria for “separation of powers”. For example, in the British political system with “parliamentary supremacy”, the role of prime minister is served by the leader of the majority party in the House of Commons with his/her cabinet ministers being nominated from majority party members of the Parliament. The cabinet is accountable to the Parliament and must resign if it loses support of parliamentary majority. A new cabinet will be formed following a general election. The stature and powers of the British Parliament was once summed up with the adage “Parliament can do anything it wants except change a man into a woman or a woman into a man.” In France, the legislature consists of the National Assembly and Senate. The executive branch is the government led by the Prime Minister. The Supreme Court is the court of final appeal in its judiciary system. The President is the center of state power with powers to appoint Prime Minister and other members of the government, preside over the Assembly of Ministers, and sign ordinances and decrees of the government. The government is accountable to the National Assembly and the assembly is dependent to a considerable extent to the President. This system of government is often described as “semi-presidential and semi-parliamentary” in which the independently elected President, and the Prime Minister, who represents the majority party of the parliament, and his cabinet, share the day-to-day administration of the state.

Of all political systems in practice in countries around the world, only the U.S. political system defined by the *United States Constitution* of 1787 follows the Montesquieu model of “separation of powers” to the greatest extent. In the U.S. system, not only are the congress as the legislature, the President with executive power and the court system as the judiciary clearly defined,

but also there is a special emphasis on checks and balances of the three powers. Specifically, a) the Congress has legislative power to enact laws. The Congress has a bicameral structure with members of both Senate and House being directly elected by the electorate. In addition to legislative power, Congress also has authority over financial and budgetary policy, the right to appoint or impeach executive and judicial officials, and to regulate commerce; b) the President exercises executive power. According to the *United States Constitution*, the President is elected for a term of four years by the voters through an indirect electoral process whereby electors of each state formally elect the President. The *United States Constitution* grants the President executive power. As the President is elected by the citizens rather than decided by the Congress, he is held accountable by the *United States Constitution* to the voters, rather than to the Congress; c) judicial power is exercised by the court system. The U.S. court system consists of the Supreme Court and inferior courts which exercise independent judicial power. Federal judges are nominated by the President and confirmed by the Senate. They are appointed for life while serving during good behaviour and can only be removed by impeachment by the Congress.

The Checks and balances among the executive, legislative and judicial powers in the U.S. system are reflected in the following:

(1) Between the executive and legislative, the President has veto right to block any congressional bills that he deems improper, although he does not have the power to dissolve the Congress. The President can issue executive orders and agencies of Federal Administration can promulgate regulations within the scope of Congressional authorization. At the same time, the executive power is not unchecked. The Congress may hold legislative hearings to ensure implementation of laws by the executive branch.

(2) Between the executive and judicial branches, courts have the power of judicial review to prevent infringement of citizens' liberty and private property rights due to violations of laws by the executive branch of the government. Judges receive compensations that may not be diminished during their continuance in office. In order to ensure that the judiciary can check both the executive branch and the legislative branch, maintain judicial independence and equality of three powers, the Supreme Court also has an important power of judicial or "constitutional" review, a precedent established in the 1803 case of *Marbury v. Madison*. This power, though not written into the *United States Constitution*, has been extensively invoked in practice.

(3) The judicial power in turn is subject to checks by the executive and legislative powers. The Congress and the states, for example, can jointly initiate constitutional amendments to undo Supreme Court decisions and rewrite laws that the U.S. Supreme Court declares unconstitutional. The Congress may exercise its impeachment power over federal judges.

Still, there are gaps between the U.S. constitutional system as described above and the requirements of Montesquieu design. The most obvious is that federal judges are not elected but rather nominated by the President who has a critical and decisive role in the appointment of judges and cannot be entirely free from political inclinations.

It is evident therefore not all Western capitalist states practice the system of separation of powers in the strict sense of its definition, even though they may be relatively well-developed nations and have been influenced by the ideas for separation of powers and check and balances proposed by early bourgeois political thinkers. The most fundamental reason for this is that the formation and evolution of the political system of any country or region are inseparable from their specific socio-economic conditions, historical traditions, political culture and contemporary

situations. There is a sense of inevitability in historical evolution. A political system is the outcome of evolution and political game, not entirely the creation based on some predetermined design. For political rulers and constitutional framers, the choice for a political system and constitutional model will inevitably be made in consideration of realities at the given time and political interests and values. There can be no universal model or absolute criteria for a political system that can be applied to every country. Commenting on the “semi-presidential and semi-parliamentary” system instilled by the *Constitution of the Fifth Republic* in 1958, Charles de Gaulle said, “I fully understand that those who are fond of interpretations are not happy about the (French) Constitution not closely fitting either of the two models. According to them, there can only be two models for French political system, either the parliamentary or the presidential. But I cannot see why the French system we have established will necessarily be unstable, indecisive and weak. What reasons do we have for France to have to adopt the rules applicable to North America? I can say that our constitutional form is both parliamentary and presidential. Our French equilibrium and temper has determined our so doing.”

The review and comparison above are intended to show that the system of “separation of powers” has its specific meaning and implication. Merely dividing the state powers into executive, legislative and judicial categories to be exercised by three different branches of government does not constitute a system of “separation of powers” in the strict sense. Only when a certain level of checks and balances and a degree of equilibrium among executive, legislative and judicial powers are attained, with complete institutional, functional and personnel separations of the three branches, each being not accountable to the other two and roles of officers of each branch not overlapping those of the others, can the system be described as truly that of “separation of powers”. This is also the reason for the phenomenon that of all major nations of the world today only the U.S. can regard its constitutional system as a typical example of “separation of powers”, while no others can claim the same.

III. The executive-led political structure as a design of the Basic Law

We all know that the Macao SAR has adopted an executive-led political system in accordance with the design and provisions of the Macao Basic Law. A common description of this system is an executive-led structure with mutual checks and cooperation between the executive and legislature, and an independent judiciary. The key feature of this political system is the great extent of executive power with a predominant position in the Macao SAR political system, and specifically the relatively high stature and extensive powers of the Chief Executive at the core of government structure and administration. In order to achieve accurate understanding of the political system of the Macao SAR, we need a good grasp of the following viewpoints and distinguishing features.

First, the political system of the Macao SAR is one for a local region. This is a basic perspective for our observation and analysis. China is a unitary state and the Macao SAR is a local administrative region directly under the Central Government and enjoys a high degree of autonomy. Its political system is lawfully mandated by the Central Government rather than determined by the Macao SAR on its own. Moreover, it is subordinate to the country’s political system and organs of state power, including the National People’s Congress (NPC) and its Standing Committee, the State Council and the President, in accordance with the constitutional provisions. In terms of source of

authority, the high degree of autonomy enjoyed by the SAR, including executive, legislative and independent judicial powers including the power of final adjudication, comes from authorization of the Central Government. The scope of the autonomy and distribution and relations of these powers are defined by the Macao Basic Law enacted by the NPC. Thus, all powers essential to the expression of state sovereignty are retained by the Central Government. At the same time, the exercise of executive, legislative and independent judicial powers by the SAR is also subject to checks and supervision of the Central Government. Laws enacted by its Legislative Assembly shall be reported to the Standing Committee of the NPC for record. If the courts of the SAR, in adjudicating cases, need to interpret the provisions of the Macao Basic Law concerning affairs which are the responsibility of the Central Government, or concerning the relationship between the central authorities and the SAR, they shall seek an interpretation of the relevant provisions from the Standing Committee of the NPC through the Court of Final Appeal of the SAR. In other words, although the Macao SAR under the "One Country, Two Systems" policy enjoys unique and much greater powers than those of other mainland provinces, autonomous regions and municipalities directly under the Central Government, its political system by definition and attributes is nonetheless one of the local region, albeit a unique one. It is subordinate to the national political system and under the Central Government, and is therefore not simply comparable to the political system of a state. This also determines that the Macao SAR cannot practice a system of "separation of powers" structured for the complete range of powers of a sovereign state.

Second, the Chief Executive is at the core of the SAR government structure and operation. This is the most prominent feature of the executive-led system of the Macao SAR. In accordance with the provisions of the Macao Basic Law, the SAR Chief Executive is both the head of government, being responsible for leading the SAR Government, and head of the Region, representing the Region. Such "dual leadership" roles, with the latter role being particular significance, give the Chief Executive, being the core of the SAR power structure and leadership, a high stature practically transcending the executive, legislative and judicial organs of the SAR. Internally, the Chief Executive is responsible for leading the SAR Government, enjoying extensive powers in decision-making and appointment of officials. Externally, only the Chief Executive can act on behalf of the SAR in handling external affairs and other matter authorized by the Central Government. Vertically, only the Chief Executive can report to the Central Government on his work on behalf of the SAR, liaise directly with the Central Government, and implement directives issued by the Central Government concerning related matters as defined by the Macao Basic Law. Such core status and powers of the Chief Executive are necessary for the fulfillment of his/her obligations to the Central Government. Given all this, Professor Xiao Weiyun proposed that the term "Chief Executive System" for the political system of the SAR.

Third, the executive is in an active and precedent position in relation to legislative and judicial powers. For example, the executive authorities have the power to introduce bills and motions and to draft administrative regulations, and have exclusive power to introduce bills for public finances, political structure and government operations. The power of members of the Legislative Assembly to introduce bills is restricted in that bills concerning government policies are subject to prior written consent of the Chief Executive. Bills and motions introduced by the SAR Government should be given priority on the agenda of the Legislative Assembly. All bills passed by the Legislative Assembly shall be signed and promulgated by the Chief Executive before taking effect. The Chief Executive may dissolve the Legislative Assembly under circumstances and per

procedures prescribed by law.

Fourth, In addition to independence of the judiciary, the relationship between the executive authorities and the legislature is one of mutual regulation and coordination, with emphasis on cooperation. In accordance with provisions of the Macao Basic Law, the executive authorities and legislature maintain a system of checks and balances. The executive authorities enjoy greater decision-making power. However it is not dominant and is subject to checks and supervision of the legislature. The Legislative Assembly is vested with legislative power and the executive authorities are held accountable to, but not led by, the legislature. Article 65 of the Macao Basic Law clearly stipulates the specific areas of this accountability, i.e. implementing laws passed by the Assembly or already in force; presenting regular policy addresses to the Assembly; and answering questions raised by members of the Assembly. The Macao Basic Law also stipulates that under certain conditions and procedures, the Chief Executive must resign and the Legislative Assembly has the power to impeach the Chief Executive. These provisions allow the legislature to check on the power of the executive authorities.

It should be noted however that the intention of these provisions is not to create opposition between the executive and legislative, but rather to enhance rational distribution of powers and their effective operation, so as to achieve better governance of the SAR. Moreover, the Macao Basic Law also contains certain specially designed mechanisms to improve communication, coordination and cooperation between the executive and legislative. The Executive Council is one of such mechanisms. It has a role for assisting the Chief Executive in policy making. Members of the Executive Council are appointed by the Chief Executive from among the principal officials of the executive authorities, members of the Legislative Council and public figures. Except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Assembly, formulating administrative regulations, or dissolving the Legislative Assembly. The purpose of establishing such a mechanism was on the one hand to enhance the executive-led process, and on the other to provide a channel for the Chief Executive to promptly hear views of the legislature when making important policy decisions and handling important issues. The communication and coordination in the Executive Council are also conducive to legislative support to and smooth implementation of government-introduced bills and major decisions. Moreover, the Chief Executive of the Macao SAR also has the power to appoint part of the members of the Legislative Assembly, which is different from the arrangement in Hong Kong. This is provided for not only in Annex II of the Macao Basic Law, but also in item (7) of Article 50 of the Macao Basic Law itself. It is therefore not a temporary, transitional arrangement.

It should also be noted that not adopting the system of “separation of powers” was an important guiding principle for drafting the Basic Law. Mr. Deng Xiaoping commented during his meeting with members of the Drafting Committee of the Hong Kong SAR Basic Law on 16th April 1987, “Hong Kong’s system of government should not be completely westernized; no Western system can be copied in total. For a century and a half Hong Kong has been operating under a system different from those of the Great Britain and the United States. I am afraid it would not be appropriate for its system to be a total copy of theirs with, for example, the separation of the three powers and a British or American parliamentary system. Nor would it be appropriate for people to judge whether Hong Kong’s system is democratic on the basis of whether it has those features.” “We must be realistic and determine our system and our methods of administration in light of our

own specific conditions.”

For the Macao Basic Law, the Drafting Committee also followed this line of thinking in its design of the political system of the Macao SAR. The Committee reached a consensus on three principles to be applied in relevant provisions. They are: (a) compliance with the “One Country, Two Systems” principle and the spirit of *Joint Declaration of the Government of the People’s Republic of China and the Government of the Republic of Portugal on the Question of Macao*, upholding national unity, sovereignty and territorial integrity while providing for a high degree of autonomy in the Macao SAR; (b) maintaining the capitalist system in Macao while accommodating interests of all sectors of the society; (c) with the prerequisite of proceeding from Macao’s realities, taking into consideration the unique conditions of Macao’s existing political system and its problems, with a view to the long-term stability and development of Macao. Accordingly, the design of the Macao SAR political system has retained effective elements of the pre-existing system, chiefly the executive-led process, in order to ensure administrative efficiency.

I would also like to add comments on two incidental points. First, there is a view by people who believed that as the courts in the Macao SAR in accordance with the Macao Basic Law have power to interpret the Macao Basic Law, they are thus empowered for judicial review, which is different from the situation before Macao’s return. Such judicial review is a feature of the U.S. system of “separation of powers”. However, as discussed earlier, the right to judicial review as an important right of the Federal Supreme Court was established as legal precedent following the 1803 case of *Marbury v. Madison*. It was not a result of the practice of “separation of powers” and the principle of judicial independence, but rather an outcome of power game between the judiciary on the one hand and the legislative and executive branches on the other in judicial practice. It was an outcome of the gradual expansion of judicial power. The judicial review mechanism was not expressly written into the Constitution or any subsequent amendments. Therefore, it is inappropriate to use judicial review mechanism to prove that the SAR political system is one of “separation of powers”.

Second, even under the U.S. system of “separation of powers”, relations between different branches are dynamic and there has been a steady increase of presidential executive powers. For example, the Executive Office of the President which was created in 1939 by President Franklin D. Roosevelt has seen continuous expansion. While providing the President with the support that he or she needs to govern effectively, the office also helps effectively balancing the congressional power. The presidential veto which has been used with increasing frequency has constrained the exercise of legislative power. The flexible use of presidential power in concluding international agreement, substituting treaties with executive agreements, has helped enhancing presidential leverage in foreign affairs bypassing congressional monitoring and restriction. The right for recess appointments by the President to bypass congressional opposition has also clarified and strengthened presidential power in appointment and removal of federal officials. In fact, the expansion of executive powers has become a worldwide trend in the development of political systems.

IV. Conclusion

Practice is the sole criterion for testing truth, and also an objective criterion for validating

political systems. Since the establishment of the Macao SAR, its executive authorities, legislature and judiciary, by fulfilling their respective responsibilities in accordance with provisions of the Macao Basic Law, have put into practice the executive-led system with the Chief Executive at its core, maintained high efficiency in decision-making and implementation, supported rapid economic development and continuous social progress of Macao, effectively protected the rights and freedoms of Macao residents provided for by laws, and achieved good governance in Macao. The successful practice of the “One Country, Two Systems” policy in Macao has won universal recognition. It has been proven in practice that the political system of Macao mandated by the Macao Basic Law is in keeping with the particular conditions in Macao, consistent with the legal status of the Macao SAR and conducive to its long term prosperity, stability and development. Of course, there have also been issues in the practice of the executive-led system. They include for example communication and cooperation between the executive authorities and legislature which can be made more effective and smoother with specific arrangement and coordination; the role of supervision by the legislature which can be improved upon within confines of the Macao Basic Law provisions; the role and functions of the Executive Council which can be more vigorous. In my view, these issues concern operational processes which require continuous alignment anyway. By proceeding from Macao realities, acting in strict accordance with the Macao Basic Law, continuously exploring and gaining experience in practice and improving our work, we will be able to enhance and optimize the Macao SAR political system in its practice, with its strength being fully brought into play.