

COMM 2035

Communication, Ethics and Law

Lecture 1 Ethics and Law : Part II -- Law and Key Concepts

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- **Law and key concepts**
- **The Rule of Law**



Two fundamental facets of the rule of law.



1. Principle of Legality

- Its principal meaning is that the power of the government and all of its servants shall be derived from law as expressed in legislation and the judicial decisions made by independent courts.
- At the heart of the HKSAR's system of government lies the principle that no one, including the Chief Executive can do an act which would otherwise constitute a legal wrong or affect a person's liberty unless he or she can point to a legal justification for that action.

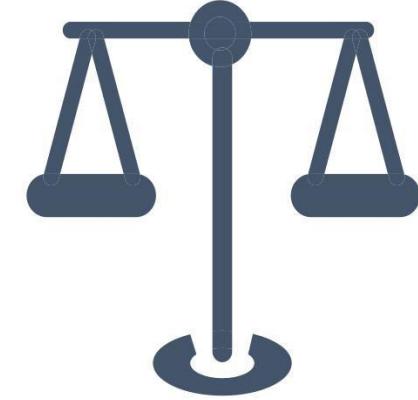
Two fundamental facets of the rule of law.

1. Principle of Legality

- If he or she cannot do so, the affected person can according to the law resort to a court which may rule that the act is invalid and of no legal effect.
- Compensation may be ordered in the affected person's favor.
- This aspect of the rule of law is referred to as the principle of legality.



Two fundamental facets of the rule of law.



2. Principle of Equality

- before the law.
- It is fundamental that all persons, regardless of race, rank, politics or religion, are subject to the laws of the land.
- Further, the rule of law requires that the courts are independent of the executive.
- This independence is crucial if impartial rulings are to be given when the legality of acts of government falls to be decided.

- A further meaning of the rule of law is to be found in a system of rules which restrict discretionary power.
- To this end the courts have developed a set of guidelines aimed at ensuring that statutory powers are not used in ways which the legislature did not intend.
- These guidelines relate to both the substance and the procedures relating to the exercise of executive power.
- The government, businesses, as well as individuals, are bound to obey the law, and a court decision on the law in a particular case is binding unless overturned or set aside by a higher court.

Rule of Law and Rule by Law

- In contrast with Rule of Law, Rule by Law is a concept that sees the governing authority as somehow being above the law, and has the power to create and execute law where they find it to be convenient, despite the effect it has on larger freedoms that people enjoy.
- To expand on this idea, rule by law is a method that governments and people in power use to shape the behavior of people, and in terms of governing a country, mass groups of people.
- This usually has the end goal of psychologically or forcefully persuading people to agree with policy decisions they otherwise would not agree with.



Separation of Powers or The Executive Led Model ?

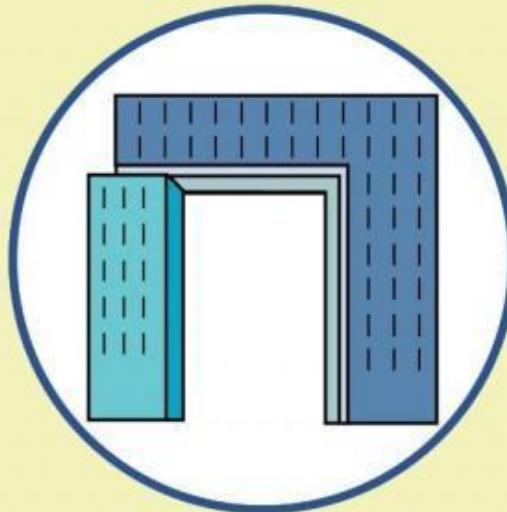
- Constitutional order of the Hong Kong SAR (“HKSAR”) is an oversimplification.
- One must not lose sight that we are not looking at something in the abstract but at the constitutional structure of the HKSAR.
- The concept of “separation of powers” is a term that has attracted multiple interpretations, expositions and understanding internationally by scholars, judges and academics.



separation of powers



JUDICIARY

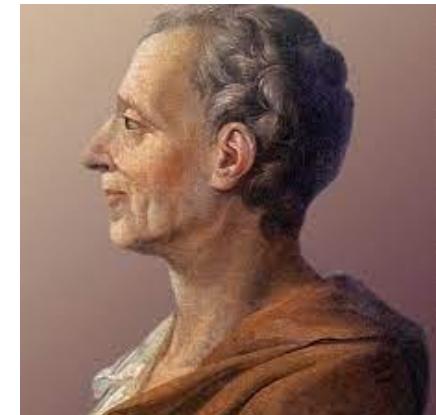


EXECUTIVE
GOVERNMENT

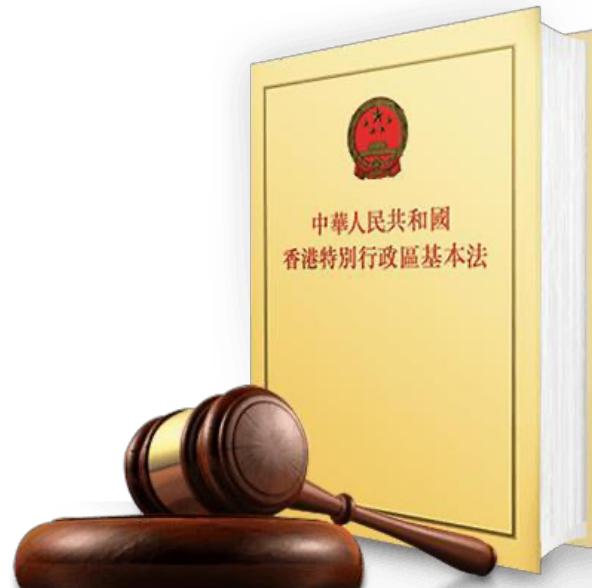


PARLIAMENT

- 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.
- 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 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.
- Above from " An executive-led system, with the executive, legislature and judiciary performing constitutionally designated roles " , by Teresa Cheng, SC, Secretary for Justice.



Basic Law and the Common Law

The [Basic Law](#) ensures that the legal system in the HKSAR will continue to give effect to the rule of law, by providing that the laws previously in force in Hong Kong (that is, the [common law](#), [rules of equity](#), [ordinances](#), [subordinate legislation](#) and customary law) [shall be maintained](#), save for any that contravene the Basic Law, and subject to subsequent amendment by the [HKSAR legislature](#).

Common Law

- The most distinguishing feature of common law is the reliance on the doctrine of precedent when making court judgments.
- It is not restricted to judicial decisions generated within Hong Kong but case law from all jurisdictions throughout the common law world.
- Article 84 of the Basic Law provides that the Hong Kong courts may refer to case precedents from other countries under common law jurisdictions.
- In addition, the Court of Final Appeal and the Hong Kong Judiciary are given the power to invite judges from other common law jurisdictions to participate in the judicial processes.

Legislation -- How do laws get changed ?

- The Legislative Council is the law-making body of the HKSAR .
- Under Article 73(1) of the Basic Law, the Legislative Council has the power and function to enact, amend or repeal laws in accordance with the provisions of the Basic Law and legal procedures.
- This power and function includes passing new laws and amending or repealing existing laws.
- These laws include principal ordinances and subsidiary legislation.

- The statute law (i.e. legislation) of Hong Kong is published in the loose-leaf edition of the Laws of Hong Kong which comprises ordinances (being primary legislation) and subsidiary legislation (being subordinate legislation).
- the Legislative Council is conferred upon it by Article 73(1) of the Basic Law, the power to make subsidiary legislation is given to delegates that include the Chief Executive and other public officers by provisions contained in individual ordinances.
- Under the Basic Law, both the Government and Members of the Legislative Council may introduce legislative proposals to the Legislative Council in accordance with relevant provisions in the Basic Law.
- The Legislative Council scrutinizes the proposed legislation and passes it into law in accordance with the legislative procedure set out in the Rules of Procedure.



Functions of the court system -- What kind of cases do different courts handle ?

- The Judiciary of the Hong Kong Special Administrative Region is responsible for the administration of justice in Hong Kong.
 - It hears all prosecutions and civil disputes, including disputes between individuals and the Government.
 - In the Basic Law, the Hong Kong Special Administrative Region has been authorized by the National People's Congress to exercise independent judicial power, including the power of final adjudication.
- It has also been stated in express terms that the courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference.
 - As reflected in their judicial oath, in exercising their judicial power, judges are constitutionally required to determine and handle cases strictly in accordance with the law and legal principles.

The courts of justice in Hong Kong comprise :

- The Court of Final Appeal
- The High Court (which comprises the Court of Appeal and the Court of First Instance)
- The Competition Tribunal
- The District Court (which includes the Family Court)

The courts of justice in Hong Kong comprise

:

- The Lands Tribunal
- The Magistrates' Courts (which include the Juvenile Court)
- The Coroner's Court
- The Labour Tribunal
- The Small Claims Tribunal, and
- The Obscene Articles Tribunal.

The Court of Final Appeal :

- It was established on July 1, 1997 upon the commencement of the Hong Kong Court of Final Appeal Ordinance .
- The Court, when sitting, will comprise five judges — usually the Chief Justice, three permanent judges and one non-permanent judge from another common law jurisdiction.
- When the Chief Justice is not available to sit, one of the three permanent judges will preside and an additional Hong Kong non-permanent judge will sit.
- When a permanent judge is not available to sit, again a Hong Kong non-permanent judge will sit in his place.
- There is, at present, a panel of four non-permanent Hong Kong judges and 10 non-permanent judges from other common law jurisdictions.

- The Chief Justice of the Court of Final Appeal is the head of the Judiciary and is assisted in his administrative duties by the Judiciary Administrator.
- A bilingual court system in which either or both Chinese and English can be used has been put in place, in accordance with the requirement of the Basic Law.



Jury System -- How is a jury trial different from a judge trial ?

- One of the most important features of Hong Kong's legal system is trial by jury, i.e. trial in court by fellow members of the community of the person on trial.
- Jurors are Hong Kong residents who have been sworn to hear and pass verdict on an accused person in a criminal case (and in some civil actions).
- Deliberating together and with no other persons present, they decide on the facts in a case on the basis of the evidence brought forward in court.

- Jurors are not legal experts and so they are given clear directions on points of law by the trial judge.
- The personal responsibility of each juror is to ensure that justice is done.
- This responsibility extends not merely to the person on trial but also to the whole community.
- In a criminal case, the foreman of the jury informs the trial judge in open court, before all other members of the jury and in the presence of the accused, whether the jury has found the accused guilty or not guilty.
- In a death inquest, the jury decides the cause of and the circumstances connected with a death.

- The most serious criminal offences (such as murder, manslaughter, rape, armed robbery, certain drug offences and commercial fraud offences) are tried by a judge of the Court of First Instance, sitting with a jury of seven people or, where a judge so orders, nine.
- In some civil cases, such as actions for defamation or malicious prosecution, a party may elect to have the issues of fact tried by a jury.
- A jury is empanelled in some death inquests held by the Coroner's Court. In a coroner's inquest, a jury of five is appointed.



Pros and Cons of Jury Trials

- At a jury trial, the outcome of a case is decided by a group of law-abiding citizens.
- This is different from a judge trial where the judge makes all decisions.



Pros and Cons of Jury Trials

Trial by Jury : Pros

- Jurors have more compassion than judges
- Juries tend to be easier audiences than judges

Trial by Jury : Cons

- Jurors can be too emotional
- Jurors can be unpredictable

Pros and Cons of Judge Trials

Trial by Judge : Pros

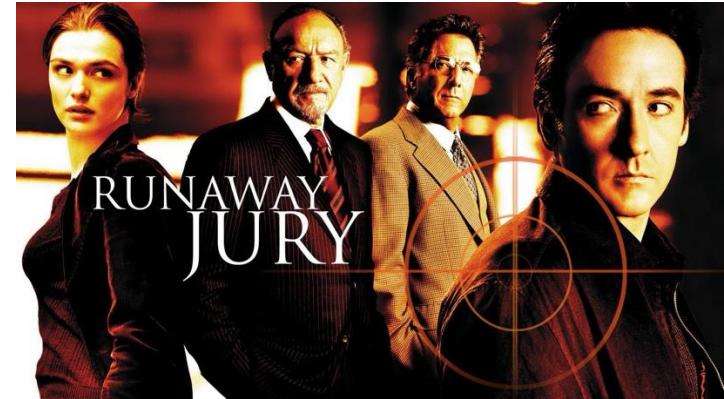
- Judges are unbiased
- Judges have a full understanding of the law
- Judge trials are often quicker

Trial by Judge : Cons

- Only the judge decides
- The judge knows all the evidence

Movie : Runaway Jury

<https://youtu.be/c80vGyzA0LI>



- Runaway Jury Official Trailer #1 - Gene Hackman, Dustin Hoffman Movie (2003)
- A juror on the inside and a woman on the outside manipulate a court trial involving a major gun manufacturer. A hot, muggy New York City ... Twelve white-male jurors try to reach in a murder trial – a case involving a Puerto Rican teenager from the slums who is accused of knifing his father to death.

Movie : 12 Angry Men (1957) Official Trailer,MGM

<https://youtu.be/TEN-2uTi2c0>



- A hot, muggy New York City ... Twelve white-male jurors try to reach a verdict in a murder trial – a case involving a Puerto Rican teenager from the slums who is accused of knifing his father to death.
- Eleven jurors agree that the defendant is guilty ... but one man, believing the boy is innocent, sets out to convince the other jurors he's right by building a case for acquittal.
- Based on a television play by Reginald Rose.

Relationship between law and ethics

- There is an ongoing debate about the relationship of ethics and the law.
- In 1958 the Harvard Law Review published the famous Hart Fuller Debate, which addressed the relationship of law and ethics (Harvard Law Review, 1958).
- Hart stated morality and law are separate, and Fuller opined that morality is the source of laws' binding power.
- Ethics and law both address similar issues .

- It has been said that the relationship of ethics and law considers that conscience is the guardian in the individual (ethics) for the rules which the community has evolved for its own preservation (law).
- There are limits to the law. The law cannot make people honest, caring, or fair.
- For example lying, or betraying a confidence, is not illegal but it is unethical.
- While not every physical therapy practice act requires adherence to a code of ethics, all do require adherence to the law.

Similarities between Ethics and Law

- a. They are both an instrument of order in the society
- b. They are both concerned with preventing immoral and unlawful acts in the society
- c. They are both aimed at creating and having a better society
- d. They both regulate the conduct and behavior of individuals in the society
- e. Ethics and law create guiding principles for professional groups such as social workers, doctors, lawyers, et cetera.
 - a. Both ethics and law work hand in glove to establish a moral boundary for all people in the society

Differences Between Ethics and Law

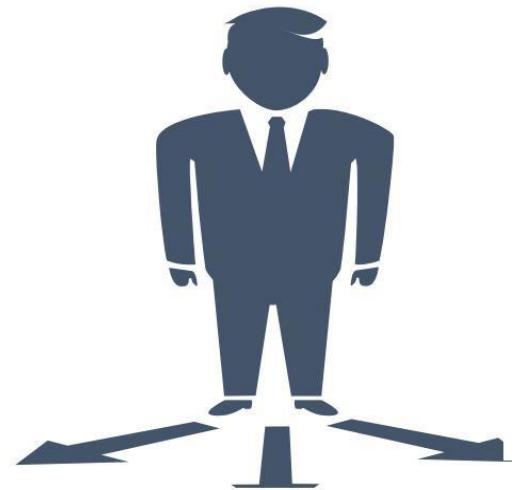
- a. Law is the set of rules and regulations which direct and govern the behavior of individuals in the society, Ethics on the other hand is the moral principles which control the behavior of individuals in the society.
- b. Law is objective and assertive, while Ethics is flexible and subjective.
- c. While both Law and Ethics govern the behavior of individuals in the society, Law imposes a punishment or penalty for defaulters of the provision of the law, while Ethics does not impose any penalty or punishment for its breach as they are just religious, social, and moral beliefs and guiding principles.
- d. Law requires Enforcement through Regulatory bodies and Enforcement agencies, while Ethics does not require any enforcement through Enforcement agencies.

Differences Between Ethics and Law

- e. Law has a legal binding on a country or state, and the citizens therein, whereas Ethics has no legal binding whatsoever.
- f. Law is usually written, while Ethics is not usually in written form (?)
- g. Law is restrictive. That's to say that it is specific to a State or country and only applicable therein. However, Ethics is universal. That is to say that it is applicable anywhere and anytime.
- h. Law is usually published, but Ethics is not (?)
- i. Law governs the society as a whole, while Ethics governs individual and some professional conduct.
- j. Ethical decision making comes from the moral sense of an individual, while the Law decision making comes from the codification of certain Ethical values, breach of which may result into a penalty.

Ethical dilemmas

- Ethical dilemmas are situations in which there is a difficult choice to be made between two or more options, neither of which resolves the situation in a manner that is consistent with accepted ethical guidelines.
- When faced with an ethical dilemma, a person is faced with having to select an option that doesn't align with an established code of ethics or societal norms, such as codes of law and religious teachings, or with their internal moral perceptions of right and wrong.



The Moral Threshold and Moral Potency

- Each of us should have a moral threshold, a bar below which we will not compromise.
- To compromise below your moral threshold is to compromise your personal integrity (Janoff-Bulman, 2009).
- Hannah and Avolio (2010) proposed that there is a key element missing from ethical leadership, which they refer to as moral potency. The basis of their work stems from the question: Why do leaders who know what the right ethical decision is fail to take action, even when action is clearly necessary? (Schaubroeck, 2010).

- Ethical behavior is not as strongly influenced by judgment as it is by acting on a moral judgment.
- Hannah, Avolio, and May (2011) define moral potency as “the capacity to generate responsibility, and motivation to take moral action in the face of adversity and to persevere through challenges.”

Moral potency is built on

- (1) moral ownership, a sense of responsibility to take ethical action when faced with ethical issues;
- (2) moral efficacy, the beliefs of individuals that they can organize and mobilize to carry out an ethical action; and
- (3) moral courage, the courage to face threats and overcome fears to act. (Hannah, Avolio, & Walumbwa, 2011; Hannah et al., 2009; Goud, 2005).

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