

THE JUDICIAL PERSPECTIVE OF “SEPARATION OF POWERS” IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA

PY Lo* and Albert HY Chen**

Abstract: Hong Kong, a former British colony, has been a Special Administrative Region (SAR) of the People’s Republic of China since 1997 with its own highly autonomous legal and judicial systems based on English common law. Applying common law principles, the HKSAR courts have conceptualised “separation of powers” as a feature of the Basic Law — the HKSAR’s constitutional instrument — and the Rule of Law in Hong Kong. This article demonstrates how HKSAR courts have used “separation of powers” to describe and regulate the relationship among the institutions of government and as an operating valve of judicial non-intervention or deference *vis-à-vis* other branches of government. Towards the end of this article, the judicial narrative that embraces “separation of powers” is contrasted with a political narrative promoted by mainland Chinese officials and scholars that doubts the “separation of powers” in the HKSAR’s political system and advocates instead “executive-led government”.

Keywords: *Hong Kong; People’s Republic of China; Basic Law; separation of powers; courts; non-intervention; legislative proceedings; deference; political system; executive-led government*

I. Introduction

Hong Kong was a British colony or dependent territory between 1842 and 1997. Since 1 July 1997, Hong Kong reverted to the People’s Republic of China (PRC), which resumed the exercise of Chinese sovereignty over the territory through the establishment of a Special Administrative Region (SAR) and the specification of the economic, political, social and legal systems of the SAR by the enactment of a law known as the Basic Law of the HKSAR¹ pursuant

* Barrister-at-law (England and Wales and Hong Kong) and a Visiting Fellow of the Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong (2017–2018).

** Cheng Chen Lan Yue Professor in Constitutional Law, Faculty of Law, The University of Hong Kong.

1 Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (adopted at the Third Session of the Seventh National People’s Congress on 4 April 1990; promulgated by the President of the People’s Republic of China on 4 April 1990) (1990) 29 ILM 1511.

to art.31 of the Constitution of the PRC.² The reversion of Hong Kong from British administration to Chinese sovereignty was based upon the Sino-British Joint Declaration 1984 that the two parties negotiated between 1982 and 1984.³ The Joint Declaration 1984 sets out the basic policies of the PRC regarding the HKSAR upon the resumption of exercise of sovereignty. In particular, the HKSAR would be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws in force in the HKSAR would remain basically unchanged. The social and economic systems in Hong Kong “will remain unchanged, and so will the life style”. These basic policies “and the elaboration of them ... in the Joint Declaration will be stipulated, in a Basic Law ... by the National People’s Congress of the People’s Republic of China, and they will remain unchanged for 50 years”.⁴

The Basic Law, which was enacted by the National People’s Congress of the PRC on 4 April 1990,⁵ came into effect on the date of the reversion of 1 July 1997. The Basic Law provides that the National People’s Congress authorises the HKSAR to exercise a high degree of autonomy. It also provides that the HKSAR is vested with executive power, legislative power and independent judicial power (including that of final adjudication), which the HKSAR shall enjoy in accordance with relevant Basic Law provisions.⁶ Chapter IV of the Basic Law then sets out in sections the political structure of the HKSAR, including the Chief Executive of the HKSAR; the executive authorities or Government of the HKSAR; the legislature or Legislative Council of the HKSAR; and the judiciary or courts of the HKSAR.⁷ The Basic Law’s disposition of notionally separated powers with discretely separated institutions animates the understanding — to be discussed below — that the Basic Law has provided for a “separation of powers” within the political system of the HKSAR.

This article demonstrates how an understanding of a “separation of powers” has germinated and evolved in the HKSAR through a survey of the judgments of the courts of the HKSAR. In adjudicating cases, the HKSAR’s courts are authorised by the Standing Committee of the National People’s Congress (NPCSC) to interpret

2 Constitution of the People’s Republic of China (adopted at the Fifth Session of the Fifth National People’s Congress and promulgated for implementation by the Proclamation of the National People’s Congress on 4 December 1982; as last amended on 11 March 2018).

3 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong (adopted 19 December 1984) 1399 UNTS 33; (1984) 23 ILM 1366, paras.1–2.

4 *Ibid.*, paras.3(3), 3(5) and 3(12). For elaboration thereof, see Annex I Sections I–II as well. The principle or concept behind these basic policies is known as “One Country, Two Systems”, which was first conceived by the Central Authorities of the PRC as a principle for the reunification with Taiwan.

5 Basic Law. The National People’s Congress decided on the same date to establish the HKSAR on 1 July 1997; see the Decision of the National People’s Congress on the Establishment of the Hong Kong Special Administrative Region of the People’s Republic of China (adopted at the Third Session of the Seventh National People’s Congress on 4 April 1990).

6 Basic Law arts.2, 11, 16, 17 and 19.

7 *Ibid.*, arts.43–48, 59–65, 66–79 and 80–96, respectively.

the provisions of the Basic Law on their own, except that the Court of Final Appeal (CFA) is required to make a reference to the NPCSC regarding the interpretation of a Basic Law provision which is concerned with an affair that is the responsibility of the Central People’s Government or concerned with the relationship between the Central Authorities and the HKSAR.⁸ The judicial system of the HKSAR is self-contained with its own power of final adjudication vested in the CFA which sits in Hong Kong.⁹ The laws applicable in the HKSAR are: the Basic Law, the laws previously in force in Hong Kong (including the common law and rules of equity), the laws enacted by the legislature of the HKSAR¹⁰ and a number of national laws of the PRC made applicable to the HKSAR.¹¹ Judicial independence is expressly guaranteed under the Basic Law.¹² The courts are authorised to refer to precedents of other common law jurisdictions.¹³ The CFA is empowered to invite judges from other common law jurisdictions to sit on the Court as non-permanent judges.¹⁴ All these features have enabled the courts of the HKSAR to continue to function as common law courts within socialist China.¹⁵

The survey in this article confirms the continuing relevance and application of an understanding of the concept or doctrine of “separation of powers” that is familiar to and indeed “common” with many common law jurisdictions. At the same time, the article also shows that HKSAR courts have adapted this doctrine to the SAR’s peculiar constitutional environment. Such adaption is relevant to both sides of the notion of “separation of powers”: (1) judicial “activism” in safeguarding judicial power, which, in the context of the HKSAR, includes the power of interpretation and application of the Basic Law against undue infringement by other branches of government; and (2) judicial “self-restraint” as demonstrated by the courts’ approach of non-interference or deference in matters thought to be within the functions and powers of the “governmental/political” institutions of government.

This article concludes by contrasting this judge-made jurisprudence of “separation of power” with the political narrative promoted by mainland Chinese officials and scholars that casts doubt on the “separation of powers” in the political system of the HKSAR, and instead advocates the concept of “executive-led government”. Indeed, this has been a matter that has divided

8 *Ibid.*, art.158.

9 *Ibid.*, arts.2, 19, 82 and 85.

10 *Ibid.*, art.8.

11 *Ibid.*, art.18.

12 *Ibid.*, art.85.

13 *Ibid.*, art.84.

14 *Ibid.*, art.82.

15 For detailed discussions of the courts of the HKSAR, see PY Lo, “Hong Kong: Common Law Courts in China” in Jiunn-rong Yeh and Wen-chen Chang (eds), *Asian Courts in Context* (Cambridge: Cambridge University Press, 2014) pp.183–227; Albert HY Chen and PY Lo, “Hong Kong’s Judiciary under ‘One Country, Two Systems’” in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge: Cambridge University Press, 2018) pp.131–168.

political opinion between the Central Authorities and a significant portion of politicians in the HKSAR, as well as among different factions of politicians in the HKSAR itself.¹⁶

II. Judicial Recognition of “Separation of Power” as a Principle Underlying the Basic Law and the Rule of Law

The courts of the HKSAR have referred to “separation of power” as an underlying principle in the Basic Law and of the system of Rule of Law in the SAR. The CFA has recognised that the Basic Law enshrines or incorporates the principle that there must be a separation of powers “as between the executive, the legislature and the judiciary”.¹⁷ In the CFA’s opinion, a “constitutional separation of powers”¹⁸ is implicit in the provisions of the Basic Law. The Court has attributed the success of Hong Kong’s transition from a British colony to an SAR of the PRC to “the fact that this is a society with a strong commitment to the rule of law and its concomitants of an independent judiciary and *respect for the separation of powers*”.¹⁹ The Court of Appeal had also described the HKSAR as “a society based upon the rule of law and the *separation of powers*”.²⁰ The contexts in which the courts have made such pronouncements include cases concerning the rights of Hong Kong residents,²¹ the legality of executive decisions²² and the constitutionality of legislation.²³

The HKSAR courts have affirmed the principle of “separation of power” in the context of Hong Kong continuing as a common law jurisdiction under art.8 of the Basic Law. A particular notion of “separation of powers” of British

16 For descriptions of the public debate on the nature of the political system of the HKSAR, see PY Lo, *The Judicial Construction of Hong Kong’s Basic Law* (Hong Kong: Hong Kong University Press, 2014) pp.37–51; Danny Gittings, “Separation of Powers and Universal Suffrage” (3 June 2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2499417 (visited 9 July 2018). We acknowledge that in writing this article, reference has been made to Chs.3 and 21 of PY Lo, *The Judicial Construction of Hong Kong’s Basic Law*.

17 *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, [101].

18 *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689, [27] (which referred to Basic Law art.2 and Ch.IV Sections 1–4).

19 *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95, [181] (emphasis added).

20 *Kong Yunming v Director of Social Welfare* [2012] 4 HKC 180, [103] (CA); *PCCW-HKT Telephone Ltd v Secretary for Commerce and Economic Development* [2016] 6 HKC 568, [9.9] (CA) (emphasis added), both of which endorse Lord Hoffmann’s statement in *R (ProLife Alliance) v British Broadcasting Corp* [2004] 1 AC 185, [75] (HL).

21 *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237, [67].

22 See, for example, *Ch’ng Poh v Chief Executive of the HKSAR* (HCAL 182/2002, [2003] HKEC 1441) (CFI) (exercise of prerogative of mercy provided under the Basic Law).

23 See, for example, *Lau Cheong v HKSAR* (n.17), [101] (consistency of legislation prescribing criminal offence and related punishment with the Basic Law).

origins has apparently been adopted in the HKSAR. In several judgments,²⁴ HKSAR courts pointed out that “separation of powers” is implicit in the separate structural prescription in the chapter on “Political Structure” in the Basic Law regarding the executive authorities, the legislature and the judiciary. At the same time, the courts cited with approval Lord Diplock’s statement in *Hinds v R* regarding the “Westminster model” constitution²⁵ that applies “the basic principle of separation of legislative, executive and judicial powers”.²⁶ *Hinds v R* was cited before the CFA in *Lau Cheong v HKSAR* in which the Court considered the constitutional role of the legislature and invoked the principle of “separation of powers”.²⁷

As a leading scholar of Hong Kong’s constitutional law has pointed out, the text of the Basic Law has left out important questions relating to the principle of “separation of powers” especially as it is “almost impenetrably obscure in relation to courts and judiciary”.²⁸ It is therefore natural and not surprising that when the HKSAR courts embarked on the tasks of the interpretation and application of the Basic Law, they have looked to principles and doctrines that they are familiar with. This dovetails with the theme of “continuity” that is implicit in various provisions of the Basic Law.²⁹ In this respect, the Basic Law as a constitutional instrument may be regarded as one among what Lord Diplock in *Hinds v R* referred to as constitutions nurtured “in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom. As to their subject-matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government

24 *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, [35] and [38] (CFI); *Leung Kwok Hung v President of the Legislative Council* [2007] 1 HKLRD 387, [79] (CFI); *Lee Yee Shing Jacky v Board of Review (Inland Revenue Ordinance)* [2011] 6 HKC 307, [65]–[67] (CFI). The Court of Appeal did not regard what *Yau Kwong Man* stated as controversial in 2012: *Koon Wing Yee v Secretary for Justice* [2013] 1 HKLRD 76, [48] (CA).

25 However, Sir Anthony Mason, formerly a non-permanent Judge of the CFA, had recognised that the “text and structure” of the Basic Law’s system of government necessarily indicate departures from the “Westminster model”: Anthony Mason, “The Role of the Common Law in Hong Kong” in Jessica Young and Rebecca Lee (eds), *The Common Law Lecture Series 2005* (Hong Kong: Faculty of Law, The University of Hong Kong, 2006) pp.1, 25.

26 [1977] AC 195, 212D–H and 225G–H (PC). Although Lord Diplock wrote for the majority of the Privy Council, the minority, consisting of Viscount Dilhorne and Lord Fraser of Tullybelton, acknowledged at 238H that the written terms of the Jamaican Constitution gave effect to the principle that “there should be a separation of powers between the three organs of government”.

27 *Lau Cheong v HKSAR* (n.17), [101].

28 Peter Wesley-Smith, “Judges and Judicial Power under the Hong Kong Basic Law” (2004) 34 HKLJ 83.

29 *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761 (CA); *Secretary for Justice v Lau Kwok Fai Bernard* (2005) 8 HKCFAR 304; *Catholic Diocese of Hong Kong v Secretary for Justice* [2007] 4 HKLRD 483 (CFI); *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKLRD 114 (CFI); *Kong Yun Ming v Director of Social Welfare* [2009] 4 HKLRD 382 (CFI).

was carried on, the legislature, the executive and the courts, reflected the same basic concept”.³⁰

III. “Separation of Powers” as Applied by HKSAR Courts

Although HKSAR courts have acknowledged the “separation of powers” as a principle that underlies the legal system of the HKSAR, the question remains as to the concrete circumstances in which the application of the principle does matter. In this section, we tackle this question by analysing the jurisprudence of “separation of powers” developed by HKSAR courts. Roughly speaking, such jurisprudence may be divided into three branches: (1) the jurisprudence on the respective roles of different branches of government and particularly the judicial role; (2) the jurisprudence of judicial non-intervention in certain matters; and (3) the jurisprudence of judicial deference in certain circumstances. Each of these will be discussed below.

A. *Different branches of government and the judicial role*

The case law of the HKSAR has recognised the principle of “separation of powers” in the sense that “the primary functions of law-making, law-executing and law-adjudicating are to be distinguished from each other”.³¹ This expression of the principle tracked a similarly worded statement of Lord Templeman: “Parliament makes the law, the executive carry the law into effect and the judiciary enforce the law”.³² The distinction leads to the principle that “the legislature and the judicature are separate and independent of one another”,³³ so that each would not trespass on the province of the other.³⁴ Generally speaking, HKSAR courts have used the

³⁰ The analysis in *Hinds v R* was examined in *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411 by the Privy Council, which, in a unanimous opinion delivered by Lord Bingham of Cornhill, affirmed at [13] that the former case gave effect to the “very important and salutary principle [of] the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other ... Such separation, based on the rule law, was recently described by Lord Steyn as ‘a characteristic feature of democracies.’” Later, Lord Steyn gave his own confirmation of the principle in *State of Mauritius v Khoiratty* [2007] 1 AC 80, [12] (PC): “The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive and the judiciary is necessary.” The HKSAR courts have not referred to the above statements in their judgments thus far.

³¹ *Lau Kwok Fai v Secretary for Justice* (HCAL 177, 180/2003, [2003] HKEC 711) [17].

³² *Re M* [1994] 1 AC 377, 395B (HL).

³³ *R v Her Majesty’s Treasury, ex p Smedley* [1985] 1 All ER 589, 593B–C (Sir John Donaldson MR).

³⁴ Thus, a promise on the part of the executive authorities to repeal existing legislation is not inconsistent with its enforcement pending repeal, since the power of repeal of primary legislation lies with the legislature: *Dragon House Investment Ltd v Secretary for Transport* (2005) 8 HKCFAR 668, [55].

principle of “separation of powers” to assert judicial power, safeguard judicial independence and maintain public confidence in the certainty, predictability and non-arbitrariness in the operation of the judicial system.³⁵

Article 83 of the Basic Law provides that the powers and functions of the courts “shall be prescribed by law”. The courts of the HKSAR had no difficulty in reaching the view that this does not exclude the implication of powers and functions from the Basic Law itself. Accordingly, the CFA has held that the grant of judicial power or the investing of jurisdiction in a court carries with it all those powers that are necessary to make effective the exercise of judicial power and jurisdiction so granted.³⁶

The HKSAR courts have stressed that the interpretation of laws is a matter for the courts.³⁷ In one case, the Court of First Instance (CFI) indicated that the principle of “separation of powers” would be directly offended if the judiciary, having embarked upon the hearing and determination of a case, had its jurisdiction over the related matter undermined or effectively removed. This would arise, for instance, if there was legislation that removed the Court’s jurisdiction so that it was prevented from making a determination of a matter before it according to the law applicable at the time the cause arose.³⁸ In another case, the CFI directly applied the doctrine of “separation of powers” in holding that only the courts themselves can exercise judicial power, and that the legislature cannot place judicial power in the hands of the executive.³⁹ In this case, the court struck down a statutory provision that empowered the Chief Executive to determine, upon the Chief Justice’s recommendations, the minimum term of sentence for young offenders (under the age of 18 years) who had previously been convicted of murder and sentenced by the court to life imprisonment — which was in effect an indeterminate term.

To be sure, HKSAR courts, like their counterparts in other common law jurisdictions,⁴⁰ have acknowledged the amorphous nature of judicial power.

35 *Dupont Steels Ltd v Sirs* [1980] 1 WLR 142, 169C–D (Lord Scarman).

36 *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, [68]–[71] and [78] (Sir Anthony Mason NPJ, holding that the concept of judicial power in the context of the Basic Law “necessarily includes the making of remedial interpretations”).

37 *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 223F–H. See also *Leung TC William Roy v Secretary for Justice* [2005] 3 HKC 77 (CFI).

38 *Lau Kwok Fai v Secretary for Justice* (n.31), [120].

39 *Yau Kwong Man v Secretary for Security* (n.24). *Cf R v Secretary of State of the Home Department, ex p Venables* [1998] AC 407, 526C–G (Lord Steyn).

40 See, for example, James Stellios, *The Federal Judicature: Chapter III of the Constitution* (Chatswood, New South Wales: LexisNexis Butterworths, 2010) para.4.1, where Stellios reads the High Court of Australia’s decision in *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 as illustrative of the complication of the multifaceted concept of judicial power: “it has been defined by subject matter, process, purpose of exercise and consequences”. On the other hand, Benny Tai had sought to analyse the content of judicial power as the power to adjudicate by reference to Lon Fuller’s work on the concept of adjudication: Benny Tai, “The Jurisdiction of the Courts of the Hong Kong Special Administrative Region” in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: HKLJ, 1998) pp.65–117.

It has been recognised that there “is an infinite series of gradations, with a large area of overlap” between what is plainly the function of the judiciary and what is plainly legislation or administration.⁴¹ However, some specific functions of HKSAR courts have featured in the case law concerning separation of powers. They include, among others, (1) the power of constitutional review; and (2) the power of final adjudication.

Given that HKSAR courts have been authorised by the Basic Law to interpret its provisions,⁴² it follows as a matter of common law principles that it is the courts and not any other institutions of the government of the HKSAR that have the final say on questions of consistency with the Basic Law.⁴³ The courts thus assert and exercise their power of constitutional review to examine the consistency of an administrative decision or a legislative provision with the Basic Law. If any inconsistency is found, the court may make a declaration that in effect invalidates the relevant decision or provision (to the extent of its inconsistency with the Basic Law),⁴⁴ or remedy such an inconsistency through adoption of a range of measures or techniques — including even a strained construction of the provision,⁴⁵ and invalidation of a related provision that is not itself inconsistent with the Basic Law.⁴⁶ The case law of the HKSAR suggests that “separation of powers” considerations are relevant to the question of what remedies the court should grant when it exercises the power of constitutional review. In particular, awareness of such considerations — such as the notion that it is not the constitutional function of courts to legislate — has led the courts to be more cautious or restrained when they considered whether to develop more prescriptive remedies, such as temporary validity orders and prospective overruling.⁴⁷

Turning to the power of final adjudication granted to the HKSAR judiciary under the Basic Law,⁴⁸ it is noteworthy that legislative restrictions of access by litigants to the CFA’s power of final adjudication have been the subject of sustained judicial scrutiny. The CFA has declared to be invalid, on two occasions, a legislative provision that prescribed that a lower court’s judgment on a matter to be final; the impugned provisions were considered disproportionate restrictions of the right to

41 *Lau Kwok Fai Bernard v Secretary for Justice* (n.31), [20], where Hartmann J borrows the observations of William Wade in *Administrative Law* (Oxford: Oxford University Press, 7th ed., 1995) p.860.

42 Basic Law art.158(2)–158(3).

43 This is, however, subject to the overriding power of the NPCSC to issue an interpretation of the Basic Law under art.158 of the Basic Law. See generally *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4; *Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141; *Director of Immigration v Chong Fung Yuen* (n.37); *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, [28].

44 *Ng Ka Ling v Director of Immigration (No 2)* (n.43), 25G–J; *Lau Cheong v HKSAR* (n.17), [101].

45 *HKSAR v Lam Kwong Wai* (n.36).

46 *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170.

47 *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441, [61]; *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614, [28]–[33]. See, further, Andrew Li, “Reflections on the Retrospective and Prospective Effect of Constitutional Judgments” in Jessica Young and Rebecca Lee (eds), *The Common Law Lecture Series 2010* (Hong Kong: Faculty of Law, The University of Hong Kong, 2011) pp.21–55.

48 Basic Law arts.2 and 82.

appeal to the CFA.⁴⁹ On the other hand, the CFA has upheld legislation prescribing finality of the Court of Appeal’s refusal to grant leave to appeal from a judgment or order of the District Court.⁵⁰

The doctrine of “separation powers” has been invoked by litigants seeking to challenge the jurisdiction of statutory tribunals that adjudicate on alleged breaches of legislative prohibitions, or the sanctions for such breaches imposed by such tribunals. It has been suggested that the notion of “separation of powers” entails that “no person or agency in the government system may legitimately exercise more than one of the three functions (legislative, executive and judicial) of government”, and that the “independence of each agency of government” has been provided for in the Basic Law.⁵¹ Australian courts have maintained a line of jurisprudence regarding “judicial power” residing only with the courts of judicature — a proposition that is arguably applicable to Hong Kong’s Basic Law.⁵² However, HKSAR courts have not so far been persuaded that the powers exercised by statutory tribunals which are not formally part of the judiciary are unconstitutional by reason of the principle of “separation of powers”.

For example, in *Luk Ka Cheung v Market Misconduct Tribunal*,⁵³ a Divisional Court of the CFI held that while the judicial power of the HKSAR was exclusively vested in the judiciary, the Market Misconduct Tribunal, established to perform a regulatory and protective role in Hong Kong’s financial markets, did not exercise the judicial power of the SAR; hence, neither the jurisdiction of the criminal courts had been ousted nor had their function been usurped. The court referred to a journal article by Sir Anthony Mason NPJ reminding that great care should be taken in

49 *Solicitor v Law Society of Hong Kong* (2003) 6 HKCFAR 570; *Mok Charles Peter v Tam Wai Ho* (2010) 13 HKCFAR 762.

50 *Sam Woo Marine Works Ltd v Incorporated Owners of Po Hang Building* (2017) 20 HKCFAR 240. The legislative provision concerned was one feature of the civil justice reform initiated by the judiciary itself.

51 Peter Wesley-Smith, “The Hong Kong Constitutional System: The Separation of Powers, Executive-Led Government and Political Accountability” in Johannes MM Chan and Lison Harris (eds), *Hong Kong’s Constitutional Debates* (Hong Kong: HKLJ, 2005) pp.3–7. See also Peter Wesley-Smith, “The Separation of Powers” in Peter Wesley-Smith (ed), *Hong Kong’s Basic Law: Problems and Prospects* (Hong Kong: Faculty of Law, The University of Hong Kong, 1990) pp.71–84, quoting *R v Kirby, ex p Boilermaker’s Society of Australia* (1956) 94 CLR 254, 279 (Dixon CJ).

52 For the relevant doctrinal discussions, see Peter Wesley-Smith, “Judges and Judicial Power under the Hong Kong Basic Law” (n.28); Berry Hsu, “Judicial Independence under the Basic Law” (2004) 34 HKLJ 279. Reliance was placed on Australian cases like *Huddart, Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330 (HC); *British Imperial Oil Co v Federal Commissioner of Taxation* (1925) 35 CLR 422 (HC); *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245 (HC); *Albarran v Companies Auditors and Liquidators Disciplinary Board* (n.40). *Cf Hinds v R* (n.26), 212F–G, where Lord Diplock enunciated a “rule of construction” that the absence of express words to that effect in a “Westminster model” constitution does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the Legislature, the Executive and by the Judicature, respectively.

53 *Luk Ka Cheung v Market Misconduct Tribunal* (n.29). The Court of Appeal found the reasoning of the Divisional Court highly persuasive in *Koon Wing Yee v Secretary for Justice* (n.24), [51].

importing overseas judicial decisions on the separation of powers.⁵⁴ It also took into account the long history in Hong Kong of establishing administrative tribunals for regulatory, protective and disciplinary functions. The court concluded that the Basic Law permits “the continued existence and development of administrative tribunals and bodies” in the HKSAR. In another case, the statutory scheme for appeals to a board of review against tax assessments was challenged as unconstitutional, but the challenge also failed on similar grounds.⁵⁵

Generally speaking, HKSAR courts have recognised both the principle of “separation of power” and the “continuity” of Hong Kong’s legal institutions after 1997. An indigenous Hong Kong exposition of “separation of powers” has been developed on the basis of both the previous legal and administrative systems⁵⁶ and the Basic Law’s preservation of English common law, including the latter’s public law component.⁵⁷ At the same time, the Basic Law provision regarding “judicial power” being vested in “the courts” has been interpreted purposively, flexibly, realistically and in context.⁵⁸

B. Separation of powers as a principle of judicial non-intervention

A corollary of the principle of separation of power is that HKSAR courts should delineate the limits of the province of the judiciary, for example, in respect of matters of the executive or legislative branch of government that the judiciary would not rule on. Apart from matters concerning the transactions between sovereign states,⁵⁹ which operate on a different dimension and are generally not matters for judicial determination, separation of powers considerations “may deny jurisdiction to courts when the function involved is exclusively the province of the legislature or the executive”.⁶⁰ The cognate point has been pithily stated:

“[judges] are not appointed to administer Hong Kong. ... Boundaries, therefore, exists between the executive, the legislature and the judiciary

54 Anthony Mason, “The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong” (2007) 37 HKLJ 299. See also Anthony Mason, “The Role of the Common Law in Hong Kong” (n.25) pp.21–25.

55 *Lee Yee Shing Jacky v Board of Review (Inland Revenue Ordinance)* (n.24) (affirmed on appeal in [2012] 2 HKLRD 981 (CA)).

56 *Koon Wing Yee v Secretary for Justice* (n.24), [51]–[59].

57 See, for example, in *Lee Yee Shing Jacky v Inland Revenue Board of Review* (CA) (n.55), where the Court of Appeal referred to *Abdul Raouf Jauffur v Commissioner of Income Tax* [2006] UKPC 32 approvingly.

58 Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (Hong Kong: Sweet & Maxwell, 2nd ed., 2015) paras.11.023–11.030.

59 *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743, [43].

60 *C v Director of Immigration* (2013) 16 HKCFAR 280, [81]. Limitations stemming from separation of powers considerations can overlap with limitations arising out of questions of justiciability because of the broadness, political character or the lack of judicially manageable competence or standards relating to the issue involved; *Ibid.*

and it is ... imperative that in cases of this kind which excite public interest the courts must be careful not to overstep those boundaries.⁷⁶¹

Considerations of separation of powers have sometimes led to judicial “self-restraint” in the exercise of judicial power, as demonstrated by the courts’ approach of non-intervention in certain matters or deference in certain circumstances in the belief that the executive or legislative branch of government (or some other organ or authority other than the court) is in a better position to make a particular judgment, or that it is not within the constitutional function of the courts to “supervise” the decision-making and proceedings of a coordinate branch of government.⁶² Judicial non-intervention will be discussed in this section and judicial deference in the next.

The case law developed by HKSAR courts suggests that the common law principle governing the relationship between the legislature and the courts is “an outcome of the application of the doctrine of the separation of powers” — a doctrine which is reinforced in the HKSAR by the provisions of the Basic Law.⁶³ Proceedings of the Legislative Council (LegCo) — the legislature of the HKSAR — have been the subject of numerous applications for judicial review.⁶⁴ These applications include attempts by individuals, LegCo Members and even the Chief Executive of the HKSAR to challenge as unconstitutional:

- (1) the introduction and deliberation in LegCo of a Bill or Government motion intended to have legal effect;⁶⁵
- (2) the LegCo’s exercise of its power to censure or relieve the duties of one of its Members;⁶⁶
- (3) the power of a LegCo select committee to issue a summons to a Hong Kong resident as witness to give testimony;⁶⁷

61 *Society for Protection of the Harbour Ltd v Chief Executive in Council* [2003] 3 HKLRD 960 (CFI). See also *Raza v Chief Executive in Council* [2005] 3 HKLRD 561 (CFI).

62 For a discussion of the distinctions between the CFI’s “original” and “supervisory” jurisdictions, see *Lee Yee Shing Jacky v Board of Review (Inland Revenue Ordinance)* (n.24), [73]–[74].

63 *Leung Kwok Hung v President of the Legislative Council (No 1)* (n.18).

64 A broad approach is taken in the understanding of “proceedings of the Legislative Council” in this article, though “proceedings” has been defined in the Legislative Council (Powers and Privileges) Ordinance (Cap.382) and explained by the courts of the HKSAR; see *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555 (CFI); *HKSAR v Leung Kwok Hung* (DCCC 546/2016, [2017] HKEC 1583).

65 張德榮訴政制及內地事務局局長 (HCAL 45/2011, [2011] CHKEC 543) (CFI) (*Cheung Tak Wing v Secretary for Constitutional and Mainland Affairs*); *Leung Kwok Hung v President of the Legislative Council (No 2)* [2015] 1 HKC 195 (CFI); *Leung Lai Kwok Yvonne v Chief Secretary for Administration* (HCAL 31/2015, [2015] HKEC 1034) (CFI); *Kwok Cheuk Kin v Chief Executive of the HKSAR* [2017] 5 HKC 579 (CFI); 郭卓堅訴香港行政長官 [2018] HKCFI 133, [2018] HKEC 498.

66 *Chim Pui Chung v President of the Legislative Council* [1998] 2 HKLRD 552 (CFI); 張德榮訴立法會 (CACV 61/2010, [2010] CHKEC 409) (*Cheung Tak Wing v Legislative Council*).

67 *Cheng Kar Shun v Li Fung Ying* (n.64).

- (4) the power of the President of LegCo to rule against a Member's proposed amendment to a Government Bill that has a charging effect;⁶⁸
- (5) the authority of the LegCo President to curtail a prolonged debate (or filibuster) at the Committee Stage of the legislative process of a Bill;⁶⁹
- (6) the authority of the Chairman of the Finance Committee of the Legislative Council to stop dealing with or refuse to put forward motions raised by members of the committee;⁷⁰
- (7) the vote of the Finance Committee to approve funding for an infrastructure project;⁷¹
- (8) the presence of officials of the HKSAR Government in the precincts of LegCo to "monitor the activities" of LegCo Members;⁷² and
- (9) the LegCo President's decision to allow a Member to retake the Oath where the latter had failed to take the Legislative Council Oath properly upon assumption of office.⁷³

Also, the courts have had to rule on the proper manner for the taking of the Legislative Council Oath of several newly elected Members, and the validity thereof; the extent of the constitutional and statutory protection and privileges conferred on Members;⁷⁴ as well as on the regulation of the conduct of members of the public attending the meetings of LegCo.⁷⁵

In adjudicating these cases, HKSAR courts have drawn on the principles developed in other common law jurisdictions relating to the independence and autonomy of legislatures and the general inclination of the courts against intervening in matters concerning the internal processes or operation of the

68 *Leung Kwok Hung v President of the Legislative Council* (n.24) (leave to appeal out of time refused: [2008] 2 HKLRD 18 (CA)).

69 *Leung Kwok Hung v President of the Legislative Council* [2012] 3 HKLRD 470 (CFI), [2013] 2 HKC 580 (CA), (2014) 17 HKCFAR 689 (CFA). See Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (n.58) paras.9.073–9.084.

70 *Wong Yuk Man v Ng Leung Sing* [2015] 2 HKLRD 606 (CFI) (leave to appeal out of time refused: (HCMP 3217/2015, [2016] HKEC 159) (CA)); *Tsang Kwong Kuen v Chairman of the Finance Committee of the Legislative Council* (HCAL 44/2015, [2017] HKEC 1113) (CFI).

71 *Chan Kai Wah v HKSAR* (CACV 126/2010, [2011] HKEC 412) (CA).

72 郭卓堅 v 立法會主席梁君彥 [2018] HKCFI 983, [2018] HKEC 1146 (CFI).

73 *Leung Kwok Hung v Legislative Council Secretariat* (HCAL 112/2004, [2004] HKEC 1203) (CFI); *Chief Executive of the HKSAR v President of the Legislative Council* [2016] 6 HKC 417 (CFI), [2017] 1 HKLRD 460 (CA), (2017) 20 HKCFAR 390 (CFA); *Chief Executive of the HKSAR v President of the Legislative Council* [2017] 4 HKLRD 115 (CFI); 郭卓堅 v 梁君彥 [2018] HKCFI 156, [2018] HKEC 492 (CFI). For commentaries of the series of cases lodged by the Chief Executive, see Po Jen Yap and Eric Chan, "Legislative Oaths and Judicial Intervention in Hong Kong" (2017) 47 HKLJ 1; PY Lo, "Enforcing an Unfortunate, Unnecessary and 'Unquestionably Binding' NPCSC Interpretation: The Hong Kong Judiciary's Deconstruction of Its Construction of the Basic Law" (2018) 48 HKLJ 399.

74 See *HKSAR v Leung Kwok Hung* (n.64); *HKSAR v Leung Kwok Hung* (ESS 16969/2017, 5 March 2018), available at <https://news.mingpao.com/ins/1803051520224790765> (visited 9 July 2018).

75 *HKSAR v Fong Kwok Shan* [2017] 2 HKLRD 225 (CFI), (2017) 20 HKCFAR 425; *HKSAR v Leung Hiu Yeung* (2018) 21 HKCFAR 20.

legislature. Generally speaking, HKSAR courts have respected LegCo’s autonomy in the management of its own internal processes and in the conduct of its business. Thus, the courts will not intervene in LegCo’s operation on grounds of alleged irregularities in the conduct of the legislature’s business, subject to the exceptions or qualifications mentioned below.

The following two cases illustrate the operation of the principles that “the courts will recognise the exclusive authority of the legislature in managing its own internal processes in the conduct of its business”, and that “the courts will not intervene to rule on the regularity or irregularity of the internal processes of the legislature but will leave it to determine exclusively for itself matters of this kind (the non-intervention principle)”.⁷⁶ In *Cheng Kar Shun v Li Fung Ying*,⁷⁷ the CFI declined to review whether a LegCo select committee’s proposed course of inquiries by summoning witnesses to testify on particular matters was outside the committee’s terms of reference as specified in a resolution of LegCo. In *Leung Kwok Hung v President of the Legislative Council*,⁷⁸ the CFA held that once it had been established that the President of LegCo has the power to terminate a legislative debate in which a filibuster takes place, the court will not inquire into the manner in which this power has been exercised in particular circumstances.

The CFA has reasoned that this “non-intervention principle” was intended to ensure that LegCo would be free from the possible disruption, delays and uncertainties which could result from judicial intervention into LegCo’s business — including the discharge of its lawmaking function. Freedom from such judicial intervention is both desirable and necessary in the interest of the orderly, efficient and fair disposition of the legislature’s business.⁷⁹

Nonetheless, the Basic Law, which enjoys constitutional supremacy within the HKSAR together with the constitutional role of the courts to interpret and apply its provisions,⁸⁰ qualifies the application of the common law-based principle of judicial “non-intervention” in the conduct of the legislature’s business. Thus, HKSAR courts have held that where a constitutional requirement under the Basic Law is in issue, it is both the power and responsibility of the courts to determine whether that constitutional requirement has been complied with or breached by the legislature and its members.⁸¹ For instance:

“The provisions of a written constitution may make the validity of a law depend upon any fact, event or circumstance they identify, and if one so identified is a proceeding in, or compliance with, a procedure in the

⁷⁶ *Leung Kwok Hung v President of the Legislative Council* (n.18), [28].

⁷⁷ *Cheng Kar Shun v Li Fung Ying* (n.64).

⁷⁸ *Leung Kwok Hung v President of the Legislative Council* (n.18).

⁷⁹ *Ibid.*, [27]–[30].

⁸⁰ Basic Law arts.11(2) and 158(2).

⁸¹ *Leung Kwok Hung v President of the Legislative Council* (n.18), [32]; *Chief Executive of the HKSAR v President of the Legislative Council* (CA) (n.73), [22]–[25].

legislature the courts must take it under its cognizance in order to determine whether the supposed law is a valid law.”⁸²

In one of the most famous cases decided by the HKSAR courts in recent years, they have held that the taking of the Legislative Council Oath by newly elected LegCo Members upon assumption of office is a constitutional requirement under the Basic Law; and that given the general duty of the courts to enforce and interpret the Basic Law, it is the duty of the court to inquire into whether this oath-taking requirement has been complied with, and into the legal consequences of failure to comply with it.⁸³ In *Chief Executive v President of the Legislative Council*, the Court held that both the taking of the Legislative Council Oath by Members and the LegCo President’s decision to allow two Members to “re-take” the oath after their first attempt to take the oath failed due to non-compliance with legal requirements, were not matters of the internal operation of LegCo that came within the “non-intervention principle”. This was because the Basic Law (particularly art.104 thereof and the NPCSC’s Interpretation of art.104 issued in November 2016) and the Oaths and Declarations Ordinance (Cap.11) require LegCo Members to take the oath in order to assume office, and further provide that failure to take the oath would result in their being disqualified from holding office. It was up to the courts to determine whether the relevant oaths had been validly taken and whether the relevant LegCo Members were still LegCo Members as a matter of law after failure to take the oath or had been disqualified by operation of law.⁸⁴

Furthermore, the general principle of judicial non-intervention into the operation of the legislature does not mean that the courts cannot rule on the extent or scope of the legislative power.⁸⁵ Although it has been said that “it is generally no part of a court’s function to restrain the legislature from making unconstitutional laws, as distinct from declaring such laws invalid after enactment,”⁸⁶ the courts do reserve a discretion to entertain exceptionally a challenge at the pre-enactment stage of the legislative process, for example, where the consequences of the proposed provision

82 See *Leung Kwok Hung v President of the Legislative Council* (n.18), [32], citing *Clayton v Heffron* (1960) 105 CLR 214, 235 (HC); *Bribery Commissioner v Ranasinghe* [1965] AC 172, 197–198 (PC); *Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong* [1970] AC 1136, 1156–1157 (PC); *Cormack v Cope* (1974) 131 CLR 432, 452 and 473 (HC).

83 *Chief Executive of the HKSAR v President of the Legislative Council* (n.73), [21]–[24]. See also, in relation to other requirements in the Basic Law impinging on the Rules of Procedure of the Legislative Council, *Leung Kwok Hung v President of the Legislative Council* (n.68); *Cheung Tak Wing v Legislation Council* (n.66).

84 *Chief Executive of the HKSAR v President of the Legislative Council* (n.73).

85 See *Secretary for Justice v Lau Kwok Fai Bernard* (n.29), where Sir Anthony Mason NPJ opined at [42] that the separation of the legislative from the executive power, effected by the Basic Law, would militate against any suggested basis for implying a contractual term in civil service contracts against introducing legislation to reduce pay.

86 *Kwok Cheuk Kin v Chief Executive in Council* (n.65), [31].

in question may be immediate and irreversible, and give rise to substantial damage or prejudice.⁸⁷

As regards the relationship between the courts and the Chief Executive of the HKSAR or its executive authorities, there is some case law in the context of judicial review of the Government’s decisions to prosecute or not to prosecute suspected offenders. HKSAR courts have accepted that while prosecutorial decisions, including decisions not to prosecute, are subject to judicial review, courts may only intervene to ensure that the prosecutorial power has been exercised within constitutional and legal limits. This is because art.63 of the Basic Law recognises the independence of the Department of Justice to control criminal prosecutions. This acceptance is on grounds of separation of powers and the Rule of Law under both the common law and the Basic Law. For example, the court may exercise its powers of judicial review to ensure that a prosecutorial decision was made on an independent assessment of the merits and not in obedience of a political instruction, that the responsible officer(s) making the decision has not been dishonest or acted in bad faith and that the decision was not made under a rigid approach fettering the prosecutorial discretion.⁸⁸

The courts have adopted a similar approach to judicial review of the exercise of the power conferred by art.48(12) of the Basic Law on the Chief Executive of the HKSAR to grant pardons or commute sentences. Thus, this power must be exercised within the scheme of the Basic Law, which looks to the protection of the rights of Hong Kong residents according to law. While the merits of a decision of the Chief Executive in this regard are not subject to judicial review, the lawfulness of the decision-making process is.⁸⁹

C. Separation of powers as a principle of judicial deference

As mentioned above, “separation of powers” considerations may lead to judicial deference to another branch of government in certain circumstances. Such

87 *Cheung Tak Wing v Secretary for Constitutional and Mainland Affairs* (n.65), [13]–[16]; *Television Broadcasts Ltd v Communications Authority (No 1)* [2013] 5 HKC 593 [24] (CFI); *Leung Lai Kwok Yvonne v Chief Secretary for Administration* (n.65), [41]; *Kwok Cheuk Kin v Chief Executive in Council* (n.65), [31]–[33]. Other reasons for entertaining an otherwise premature challenge on an exceptional basis continue to apply; see *Birmingham Care Consortium v Birmingham City Council* [2011] EWHC 2656 (Admin) [31]; *R (Garden Leisure Group Ltd) v North Somerset Council* [2004] 1 P & CR 39, [35] and [56]; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, [171] (HL).

88 *Re C (A Bankrupt)* [2006] 4 HKC 582 (CA); *RV v Director of Immigration* [2008] 4 HKLRD 529 (CFI); 曹元緒訴羅君偉 (CACV 143, 159/2009, [2010] CHKEC 309) (CA); *Ma Pui Tung v Department of Justice* (CACV 64/2008, [2008] HKEC 1590) (CA); *D v Director of Public Prosecutions* [2015] 4 HKLRD 62 (CFI). *Cf Chiang Lily v Secretary for Justice* [2009] 6 HKC 234 (CA), (2010) 13 HKCFAR 208 (which concerned the prosecution’s authority to choose the venue of trial).

89 *Ch’ng Poh v Chief Executive of the HKSAR* (n.22). Similar separation of powers considerations apply to the exercise of the statutory discretion vested on the Chief Executive under s.83P of the Criminal Procedure Ordinance (Cap.221) to refer a criminal case to the Court of Appeal for hearing: *HKSAR v Chang Wai Hang Alab* [2017] 1 HKLRD 163 (CA).

deference is practised by HKSAR courts where, in scrutinising the consistency of legislation with fundamental rights guaranteed under the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap.383), the courts accord due weight to the “judgment” or choices of the legislature in enacting the impugned legislation.⁹⁰ The case law shows that HKSAR courts have from time to time deferred to the legislature on the grounds of its representation of the population, its political accountability to the society it serves and its mode of deliberation. The context of the case may be such that the court should accord deference to the “discretionary area of judgment” of the legislature.⁹¹ But “[the] weight to be accorded to the legislative judgment by the court will vary from case to case depending upon the nature of the problem, whether the executive and the legislature are better equipped than the courts to understand its ramification and the means of dealing with it”.⁹²

Judicial deference in certain circumstances to the judgment of the legislature or the executive authorities is not unusual among the common law jurisdictions that HKSAR courts usually look to for guidance in human rights jurisprudence. Such deference is based on “separation of powers” considerations, but the doctrine of separation of powers also requires the courts to faithfully perform their role and function to decide on legal questions arising from alleged infringement of constitutional rights.⁹³ As McLachlin J said:

“To carry judicial deference to the point of accepting Parliament’s view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.”⁹⁴

The question of deference and the overseas jurisprudence thereon have been considered by HKSAR courts as they developed the Hong Kong jurisprudence of “proportionality analysis” applicable to the determination of the constitutionality of a legislative or administrative restriction on a fundamental right guaranteed by or under the Basic Law.⁹⁵

90 See *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 ; *Lau Cheong v HKSAR* (n.17). For an account of the development of the fundamental rights jurisprudence of the courts of the HKSAR, see PY Lo, *The Judicial Construction of Hong Kong’s Basic Law* (n.16) pp.281–311; Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (n.58) Ch.17.

91 See, for example, *Lau Cheong v HKSAR* (n.17), [101]–[105].

92 *HKSAR v Lam Kwong Wai* (n.36), [45] (Sir Anthony Mason NPJ).

93 For examples, see *R (ProLife Alliance) v British Broadcasting Corp* (n.20), [75]–[76] (Lord Hoffmann); *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199, [129] (SC) (McLachlin J, as she then was).

94 *RJR MacDonald Inc v Canada* (n.93), [136].

95 Examples include *HKSAR v Lam Kwong Wai* (CACC 213/2003, [2005] HKEC 26) [34]; *Dr Kwok Hay Kwong v Medical Council of Hong Kong* [2008] 3 HKLRD 524, [25] (CA); *Kong Yunming v Director of Social Welfare* (n.20), [101] and [192].

Following several iterations,⁹⁶ the CFA has developed a “proportionality analysis” consisting of four structured steps for the purpose of testing the validity of a restriction imposed by legislation or government on a non-absolute fundamental right guaranteed by the Basic Law (whereas “absolute” fundamental rights, being rights that cannot be restricted at all, need not call for proportionality analysis).⁹⁷ These four steps deal with issues that are familiar to scholars of comparative constitutional law:

- (1) whether the intrusive measure (that is, the measure alleged to be a violation of a constitutional right) is intended to pursue a legitimate aim;
- (2) whether there exists a rational connection between the measure and the advancement of that aim;
- (3) whether the measure is “no more than necessary” for that purpose (or is “manifestly without reasonable foundation”); and
- (4) whether a “reasonable balance” has been struck between the interests of the individual or group concerned and the “societal benefits” flowing from the restriction on the relevant constitutional right of the individual or group, “asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual”.⁹⁸

It is in the third step where “separation of powers” considerations are particularly relevant. This is demonstrated by the CFA’s calibration of the standard of review to be adopted at this step as between that of “necessity” and of “manifestly without reasonable foundation”. The standard adopted depends on how wide a “margin of discretion” or how much deference should be accorded to the judgment of the legislature or executive:

“If assessment of the proportionality of the measure calls for the application of purely legal principles and an assessment which the Court is the expert to make, the primary decision-maker having no special competence or expertise, it is likely that the margin of discretion will have little role to play and that the Court will simply adopt a standard of reasonable necessity. On the other hand, a decision-maker’s views resulting in the promulgation of the impugned measure may be given much weight and thus afforded a wide margin of discretion reflected by use of a ‘manifest’ standard where the decision-maker is likely to be better placed than the Court to assess what is needed in the public interest. ... A broad margin of discretion

96 *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335; *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409; *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950.

97 *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372.

98 *Ibid.*, [73], [76], [78], [134] and [135]. *Cf R v Oakes* [1986] 1 SCR 103; *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945 (SC); Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012).

might also be mandated by separation of powers principles and recognition of the different institutional roles played by the Court and the relevant decision-maker. Thus, a wide margin of discretion may be permitted to the legislature in respect of enactments allocating public resources on the footing that such distributive decisions are properly the responsibility of the legislature for which it makes itself politically accountable, rather than for the courts on a constitutional review.”⁹⁹

In a subsequent case, the CFA developed an approach that enables deference to be accorded to legislative judgment on “political questions”. The Court in this case agreed with the submission that “political decisions or legislative provisions reflecting political judgments are often precisely those areas where the courts are likely to afford a large margin of appreciation”. This is an “area of discretion which the Court will accord to a decision-maker, or, in the case of legislation, to the legislature. It reflects the separate constitutional and institutional responsibilities of the judiciary and other organs of government.”¹⁰⁰

Judicial deference on the basis of “separation of powers” considerations is also evident in the HKSAR’s immigration law. Here, the courts have recognised the specific responsibilities of the Director of Immigration in the administration of immigration policies and practices. The courts have also acknowledged that the Director has necessarily wide discretion in making decisions “in the light of the macro circumstances and needs of Hong Kong based on matters and information which could not be fully explained to or understood by the general public”.¹⁰¹ It “is not appropriate for the court to usurp the role of the Director”, because the court does not have the said “macro picture”, expertise and access to information relating to immigration policy.¹⁰²

The doctrine of “separation of powers” has also been referred to in the context of the law on “legitimate expectations” in the domain of the common law-based administrative law of the HKSAR. Here, the CFA has recognised that, to conform with the doctrine of separation of powers, the doctrine of legitimate expectations should be developed in such a manner as to avoid any dislocation of

99 *Hysan Development Co Ltd v Town Planning Board* (n.97), [114]–[118] (emphasis added), where the Court also referred to the English authorities of *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* (n.98); *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] 3 All ER 1; *Bank Mellat v Her Majesty’s Treasury (No 2)* [2014] AC 700. Specific reference was made to the earlier and similar view taken in *Lau Cheong v HKSAR* (n.17).

100 *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353, [40], [42] and [44]–[46]. In this case, the applicant for judicial review challenged a law that restricted the right to stand as a candidate in a LegCo by-election on the part of a LegCo Member who deliberately resigned his office in order to trigger a by-election, intending to use the by-election as a “*de facto* referendum” on a particular political issue. The impugned legislation was upheld by the courts.

101 *BI v Director of Immigration* [2016] 2 HKLRD 520, [92(2)] (CA).

102 *Ibid.*, [92(3)].

the constitutional arrangements by which executive policy is left to the executive, and decision-making is left to the officers in whom it is reposed by statute.¹⁰³

Furthermore, in the domain of criminal law, it has been argued by the prosecution before the CFA that in deciding whether there should be a retrial of a criminal case after the appellate court allows a criminal appeal, the court should “attach the greatest importance to the views of the prosecution as part of the executive” because of the principle of separation of powers. In the case concerned, the CFA did not adopt such an approach and accorded the greatest weight instead to the fact that the defendant had already undergone one trial. However, the court did indicate, on a slightly different basis, that the prosecution “is entitled to have weight attached to its views because not only is it the prosecuting authority, but also in adversarial proceedings, it is best qualified to present the views of the public to which importance has to be attached when determining what justice requires”.¹⁰⁴

IV. “Separation of Powers” or “Executive-Led Government”?

The discussion above demonstrates that according to the case law of the HKSAR, the doctrine of separation of powers is woven into the fabric of the Basic Law and the legal and judicial systems of the HKSAR. The doctrine has been both an indicator and calibrator for the HKSAR courts, the former for identifying their position and arena as between the coordinate branches of government, and the latter for limiting the potential of their check on and supervision of them. In this section, we introduce the political narrative of “executive-led government” in the HKSAR, which stands in sharp contrast with the judicial discourse and application of “separation of powers”. This political narrative has been promoted by mainland Chinese officials and scholars, who have argued that the Chinese phrase for “separation of powers” (*sanquan fenli* 三權分立), which is more accurately translated as “separate existence/establishment of three powers”, is not an apt description of the political system of the HKSAR.

The discussion of the proper designation or characterisation of the political system of the HKSAR can be traced back to the time of the drafting of the Basic Law in the 1980s. Deng Xiaoping, the then paramount leader of China and mastermind behind the “One Country, Two Systems” policy for the reunification of Hong Kong with China, said on 16 April 1987 in a meeting with members of the Basic Law Drafting Committee that “it would not be appropriate for [Hong Kong’s system] to copy those of Britain and the United States with, for example, separation of the three powers”.¹⁰⁵ Since then, mainland officials and scholars have taken care not to use the term “separation of the three powers” to characterise the political system

103 *Ng Siu Tung v Director of Immigration* (2002) 5 HKCFAR 1.

104 *Ting James Henry v HKSAR* (2007) 10 HKCFAR 632, [50]–[52] (Lord Woolf NPJ).

105 Deng Xiaoping, *Deng Xiaoping on the Question of Hong Kong* (Hong Kong: New Horizon Press, 1993) p.55.

established by the Basic Law. The official characterisation was enunciated in 1990 by Ji Pengfei, Chairman of the Basic Law Drafting Committee, when he explained the draft Basic Law to the session of the National People's Congress that enacted the Basic Law in April 1990: "The executive authorities and the legislature should regulate each other as well as co-ordinate their activities". The Chief Executive of the HKSAR, as the head of the SAR and its Government who is accountable to the Central People's Government and the SAR, "must have real power which, at the same time, should be subject to some restrictions".¹⁰⁶

Nevertheless, as enacted, arts.2, 3, 16, 17 and 19 and the provisions in Ch.IV of the Basic Law do impress upon scholars and lawyers trained in the Western or common law tradition as reflecting or implying an institutional and functional separation of powers vested in the separate institutions of the executive authorities, the legislature and the judiciary. Yash Ghai has given the matter a thorough discussion:

"There is a clear and sharp separation between the executive authorities and the legislature ... The separation (which owes more to the presidential than the parliamentary system) is reflected in the method for their appointment or election, in their personnel, and in their relationship ... The separation of the judiciary from the executive and the legislature (and its independence) is secured through various devices ... The doctrine of separation of powers can accommodate many configurations of the relationship between the institutions. *Therefore the interesting question is not whether there is a separation of powers, but the balance and the relationship between the institutions.* The separation of powers is supplemented by what is sometimes seen as its negation — checks and balances. These are particularly evident in Hong Kong ..."¹⁰⁷

In the 1990s and particularly after the handover in 1997, mainland Chinese legal scholars and members of the former Basic Law Drafting Committee advocated that the key term that would correctly characterise the political system of the HKSAR is "executive-led government" (*xingzheng zhudao* 行政主導, also translated as "executive dominance").¹⁰⁸ The term highlights the pivotal role of

106 Ji Pengfei, "Explanations on 'The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)' and Its Related Documents" (Third Session of the Seventh National People's Congress, China, 28 March 1990), available at http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc8.pdf (visited 10 July 2018).

107 Yash Ghai, *Hong Kong's New Constitutional Order* (Hong Kong: Hong Kong University Press, 2nd ed., 1999) pp.262–264 (emphasis added).

108 Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Beijing and Hong Kong: Law Press China and Joint Publishing (HK) Co Ltd, 2nd ed., 2009) pp.345–350; Xiao Weiyun, *On the Hong Kong Basic Law* (Beijing: Peking University Press, 2003) pp.640–644; see Albert HY Chen, "'Executive-Led Government', Strong and Weak Governments and 'Consensus Democracy'" in Johannes MM Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (n.51) pp.9–13.

the Chief Executive of the HKSAR, who not only has many gubernatorial powers under the Basic Law but, more importantly, is also expressly required by the Basic Law to be accountable to both the Central People’s Government and “the HKSAR”.¹⁰⁹ The Chief Executive is therefore the person through whom the Central People’s Government establishes its political connection with the SAR.

As the debate on the pace of democratisation in the HKSAR unfolded in 2003 and 2004, the HKSAR Government advocated “executive-led government” as a principle that underlies the design of the political system of the HKSAR. It was argued that this principle must be respected and consolidated in any development of the HKSAR’s political system, including the gradual progress towards the election of the Chief Executive and of all LegCo members by universal suffrage.¹¹⁰ When the Central Authorities thereafter prescribed restrictively on the procedure for and pace of democratisation of the HKSAR’s political system, a public debate erupted, with pro-democracy Hong Kong academics challenging the position adopted by mainland Chinese legal scholars.¹¹¹

As the HKSAR prepared to celebrate its 10th anniversary in June 2007, Wu Bangguo, the then Chairman of the NPCSC, advocated that a key characteristic of the political system of the HKSAR is “executive-led government” with the Chief Executive as the core (*yi xingzheng zhangguan wei hexin de xingzheng zhudao* 以行政長官為核心的行政主導).¹¹² A slight moderation came in July 2010 when Qiao Xiaoyang, the then Deputy Secretary-General of the NPCSC, recognised in his speech in Macau that there exists a kind of division of power within the political system prescribed by the Basic Law of the HKSAR and the Basic Law of the Macau SAR. At the same time, Qiao opined that it would be wrong to act on the basis of the concept of “separation of the three powers” instead of the actual provisions of

109 Basic Law art.43(2).

110 Tung Chee-hwa, “Speech at a Seminar in Commemoration of the 14th Anniversary of the Promulgation of the Basic Law” (The Government of the HKSAR Press Releases, 15 March 2004), available at <http://www.info.gov.hk/gia/general/200403/15/0315229.htm> (visited 10 July 2018); Constitutional Development Task Force, “The Second Report of the Constitutional Development Task Force: Issues of Principle in the Basic Law Relating to Constitutional Development” (April 2004), available at <http://www.cmab.gov.hk/cd/eng/report2/pdf/secondreport-e.pdf> (visited 10 July 2018).

111 Joseph Chan, “Interpretation of the Basic Law: Change of Tone by Guardians of the Basic Law, Executive-Led Not Original Intention of Basic Law” *Ming Pao* (28 June 2004); Joseph Chan, “Hong Kong’s Political Structure of Separation of Powers: Governance Efficiency Difficult to Improve with No Universal Suffrage and Refusal to Promote Party Politics” *Ming Pao* (29 June 2004). And Xiao Weiyun replied in August 2004; see Xiao Weiyun, “Executive-Dominance is an Important Legislative Intent of the Political System of the Basic Law — In Answer to Mr Chan Cho Wai” *Ming Pao* (11 August 2004); Xiao Weiyun, “Twenty Odd Places in Basic Law Reflects Executive Dominance” *Ming Pao* (12 August 2004).

112 Wu Bangguo, “Enforce the Basic Law of the Hong Kong Special Administrative Region in Depth, Push Forward the Grand Implementation of ‘One Country, Two Systems’” *National People’s Congress* (6 June 2007), available at http://www.npc.gov.cn/npc/xinwen/2007-06/06/content_1538429.htm (in Chinese) (visited 10 July 2018).

the Basic Law, which ought to be read as “a socialist document” with a political system of “executive-led government”.¹¹³

Later, in June 2014, the Information Office of the State Council published a “White Paper” on “The Practice of the ‘One Country, Two Systems’ Policy in the Hong Kong Special Administrative Region”.¹¹⁴ The Paper emphasised the Central Authorities’ “overall jurisdiction” (*quanmian guan zhi quan* 全面管治權) over the HKSAR, comprising the powers directly exercised by the Central Authorities and the powers delegated to the SAR by the Central Authorities to enable it to exercise a high degree of autonomy in accordance with law, subject to the oversight of the Central Authorities.¹¹⁵ The new term “overall jurisdiction” may be understood as being based on the pre-existing discourse on “authorisation/division of power” (*shouquan* 授權 / *fenquan* 分權) as between the Central Authorities and the SAR, in which mainland scholars emphasised that the Basic Law has not established any “division of power” between the two sides, and all the powers that the SAR has under the Basic Law were delegated to it by the Central Authorities — that is, the Central Authorities have authorised the SAR to exercise such powers.¹¹⁶ At the same time, the Central Authorities have maintained the position that the Chief Executive of the HKSAR “is the prime responsible person for implementing the policy of ‘One Country, Two Systems’ and the Basic Law in Hong Kong”, and have consistently expressed their firm support for the Chief Executive and the SAR Government led by the Chief Executive in governing the SAR in accordance with law.

In September 2015, Zhang Xiaoming, the then Director of the Liaison Office of the Central People’s Government in the HKSAR, reiterated the characterisation of the HKSAR’s political system in Wu Bangguo’s 2007 speech above. Zhang Xiaoming also maintained that the SAR’s political system was “tailor-made” according to the actual situation of Hong Kong and involved no direct copying of the political system of other countries or regions. Thus, the claim is that there does not exist in Hong Kong a political system of “separation of the three powers” and that the nature of the HKSAR’s political system as a regional political system determines that “separation of the three powers” — a doctrine usually used to characterise the political system of an

113 Qiao Xiaoyang, “Studying the Basic Law, Upgrading the Quality of Civil Servants: A Speech at the Graduation Ceremony of the ‘Advanced Course of the Basic Law of MSAR’” (2010) 6 *Academic Journal of One Country Two Systems* 1–4, p.4.

114 State Council Information Office, “White Paper on the Practice of the ‘One Country, Two Systems’ Policy in the Hong Kong Special Administrative Region” (June 2014), available at www.gov.cn/xinwen/2014-06/10/content_2697833.htm (Chinese); english.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm (English) (visited 10 July 2018).

115 *Ibid.*

116 See, for example, Cheng Jie, “Jurisprudential Basis for the New Constitutional Order of Hong Kong: Separation of Powers or Delegation of Powers” (2017) 5 *China Legal Science* 56–83.

independent sovereign state — is at best “of reference value” to Hong Kong and cannot be applied completely to it.¹¹⁷ In this regard, Zhang Xiaoming refuted the “simplistic” proposition that the separate establishment of the executive, legislature and the judiciary with relationships of mutual checking signifies the implementation of “separation of the three powers”. These views received high-level endorsement on 27 May 2017 by Zhang Dejiang, the then Chairman of the NPCSC. On this date, Zhang Dejiang gave a speech on the 20th anniversary of the HKSAR, in which he specifically maintained that the political system provided by the Basic Law should be characterised as “executive dominance with the Chief Executive as the core” rather than “separation of the three powers”, “legislative dominance” or “judicial dominance”.¹¹⁸

In the Report to the 19th National Congress of the Communist Party of China on 18 October 2017, General Secretary and President Xi Jinping referred to the “One Country, Two Systems” policy as an integral component of “Xi Jinping’s Thought on Chinese-style Socialism for the New Age” — now the paramount guiding ideology of the PRC. Xi reiterated that the Chief Executive of the SAR occupies the core of its political system, and vowed continuing support for the Government and the Chief Executive of the SAR in their performance of various tasks — including governance in accordance with law; uniting people of all sectors for the purpose of promoting development and social harmony; improving people’s well-being; advancing democracy; maintaining law and order; and the fulfilment of the constitutional responsibility of safeguarding China’s sovereignty, security and development interests.¹¹⁹

Judges and lawyers of the HKSAR have somehow been oblivious to the Chinese discourse described above. The only explicit mention of “executive-led government” in a judicial opinion thus far was in Hartmann J’s judgment in *Leung Kwok Hung v President of the Legislative Council*,¹²⁰ where the judge described at one point that “Hong Kong has an Executive-led government”. This statement was

117 Zhang Xiaoming, “A Correct Understanding of the Characteristics of the Political System of the Hong Kong Special Administrative Region” *Liaison Office of the Central People’s Government in the HKSAR* (12 September 2015), available at http://www.locpg.hk/jsdt/2015-09/12/c_128222889.htm (in Chinese) (visited 10 July 2018). For a commentary on Zhang’s speech, see Albert HY Chen, “Hong Kong’s Political System ABC — Starting from the Recent Dispute” *HKU Legal Scholarship Blog* (28 September 2015), available at <http://researchblog.law.hku.hk/2015/09/albert-chen-on-abc-of-hong-kongs.html> (visited 10 July 2018).

118 Zhang Dejiang, “Speech to Mark the 20th Anniversary of the Coming into Force of the Basic Law” *National People’s Congress of the PRC* (27 May 2017), available at http://www.npc.gov.cn/npc/xinwen/syxxw/2017-05/31/content_2022706.htm (in Chinese) (visited 10 July 2018).

119 Xi Jinping, “Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era” (19th National Congress of the Communist Party of China, 18 October 2017), available at http://www.xinhuanet.com/english/download/Xi_Jinping’s_report_at_19th_CPC_National_Congress.pdf (visited 10 July 2018).

120 *Leung Kwok Hung v President of the Legislative Council* (n.24).

made in the course of affirming the constitutionality of a rule in LegCo's Rules of Procedure that restricted the right of LegCo Members to propose an amendment to a bill, where the proposed amendment had a charging effect on the public revenue. 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".¹²¹ The judge also stated at a later point that "[it] may be said that the Basic Law, in its fundamentals, is fashioned on the 'Westminster model'",¹²² before pointing out that it was by no means unusual in other jurisdictions, such as the United Kingdom, that the executive played a dominant role in proposing bills dealing with public expenditure.¹²³ Thus, the judge perceived no conflict between "executive-led government" and "separation of powers".

Subsequently, in the oath taking cases concerning the newly elected Members of LegCo in 2016 mentioned above, Chief Judge of the High Court Andrew Cheung observed:

"Given the Chief Executive's constitutional role under article 48(2) of the Basic Law (to be responsible for the implementation of the Basic Law and other laws), any attempted restriction on the Chief Executive's right to take steps, including the commencement of court proceedings, to implement the Basic Law must be incompatible with article 48(2) and therefore invalid."¹²⁴

This can be taken as a judicial acknowledgement of one of the core functions of the Chief Executive, namely, ensuring the implementation of the Basic Law. Whether there might be any tension between the Chief Executive's performance of this function and the courts' discharge of the duty to exercise independent judicial power, including that of the interpretation of provisions of the Basic Law,¹²⁵ remains to be seen. For instance, in order to ensure the implementation of the Basic Law, the Chief Executive, as the highest official in Hong Kong whom the Central Authorities hold accountable for the affairs of the HKSAR, would through counsel impress upon the courts the "correct" interpretation of the provisions

121 *Ibid.*, 401.

122 *Ibid.*, 403.

123 *Ibid.*, 404–405.

124 *Chief Executive of the HKSAR v President of the Legislative Council* (n.73), [49].

125 The CFA has deduced from arts.2, 19, 80 and 81 of the Basic Law that the grant of "independent judicial power" to the HKSAR means that the SAR courts (ie, courts of judicature forming the SAR's judiciary) exercise the "independent judicial power" of the SAR; that the courts interpret the laws, including the Basic Law and that the courts are the institutions constituting the SAR's judicial system, separated from that of China, and enjoying judicial independence: *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234, [45].

of the Basic Law involved in the matter for adjudication.¹²⁶ And in the event where the court disagrees with the Chief Executive, the latter may report the matter to the Central People’s Government, which in turn can consider whether the NPCSC should be asked to adopt a final and binding interpretation of the relevant provision of the Basic Law that would override the interpretation adopted by the HKSAR courts.¹²⁷

V. Concluding Remarks

It has been said that the principle of “separation of powers” is “notoriously difficult to define with any precision”.¹²⁸ English scholars have not found this principle fundamental in explaining the English constitutional arrangements, since the embedding of government ministers in the majority party/party-coalition in Parliament, and other features of the monarchical state have all made it difficult to say that there were separate institutions of separate personnel exercising separated functions and powers of state.¹²⁹

This article shows that in Hong Kong’s post-colonial legal system, the doctrine of “separation of powers” has enjoyed a new lease of life. Applying common law principles, HKSAR courts have conceptualised “separation of powers” as a feature of the Basic Law and the Rule of Law in the SAR. They have used this concept to describe the relationship between the institutions of government, and more importantly, fashion it as an operating valve of judicial non-intervention or deference *vis-à-vis* other branches of government. On the one hand, this concept operates to guard against undue encroachment against “independent judicial power”, including the power to interpret and enforce the Basic Law, by other branches of government. On the other hand, this concept justifies non-interference or deference by the courts in matters thought to be within the functions and powers of the “governmental/political” institutions of government.

In the final section of this article, the judicial narrative that embraces the “separation of powers” has been contrasted with a political narrative promoted by

126 From the Central Authorities’ point of view, the completely devolved judicial power of the HKSAR should be subject to some checks and balance. See Cheng Jie, “The Story of a New Policy” (2009) Hong Kong Journal, available at <http://www.hkbasiclaw.com/Hong%20Kong%20Journal/Cheng%20Jie%20article.htm> (visited 10 July 2018).

127 The Chief Executive has sought to justify this ability by reference to arts.43 and 48(2) of the Basic Law, which concerns his accountability to the Central People’s Government and his function to implement the Basic Law. See generally *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300.

128 Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge: Cambridge University Press, 2011) p.3.

129 *Ibid.*, 4; Andrew Le Sueur, “Constitutional Fundamentals” in David Feldman (ed), *English Public Law* (Oxford: Oxford University Press, 2nd ed., 2009) para.1.13. Masterman also surveyed the more recent literature, noting the “casual” approach of commentators of the principle as a theoretical underpinning of the British system of government; see *Ibid.*, pp.9–10.

mainland Chinese officials and scholars. This not only doubts the characterisation of the HKSAR's political system in terms of "separation of powers" but also advocates instead the concept of an "executive-led government". In fact, the matter has gone beyond academic debate and expressions of political opinions and into the education of secondary school students.¹³⁰ So far, judges and lawyers of the HKSAR have been largely oblivious to the Chinese discourse that is critical of the use of the concept or term of "separation of powers" to characterise the political system of the HKSAR, though we have observed at least one acknowledgement close to this track in the HKSAR's senior judiciary.

130 A recent news report has noted that a publisher indirectly owned by the Liaison Office of the Central People's Government in the HKSAR has published in 2017 a textbook for the secondary school curriculum describing the HKSAR's political system as "executive dominance under the three powers"; see "Content of Textbooks Strictly Follows Zhang Xiaoming, Liaison Office Exercises Control of Schoolbooks — Redacts 'Separation of Powers' (*neirong jinggen Zhang Xiaoming xihuan caokong jiaokeshu sanquanfenli* 內容緊跟張曉明 西環操控教科書 刪「三權分立」) *Apple Daily* (9 July 2018), available at <https://hk.news.appledaily.com/local/daily/article/20180709/20444336> (visited 10 July 2018).