

One Country, Two Stances on Separation of Powers Tensions over Lack of Parallelism Between the National and Subnational Levels

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Abstract

Experience in numerous jurisdictions with separate constitutional documents at the national and subnational levels demonstrates a strong pattern of parallelism in the type of structure adopted for the executive-legislative relationship at both levels, even when the constitutional structure at the two levels differs significantly in other respects. Whichever of the many variants of separation of powers is adopted at the national level tends to be mirrored at the subnational level, even when there is no constitutional requirement for such parallelism. Tensions are not uncommon in the relatively few jurisdictions where the structures at the two levels do diverge, sometimes resulting in changes at either the subnational or national level to bring the structures at the two levels more closely into parallel.

The Hong Kong Special Administrative Region occupies an unusual place in this pattern. On the one hand, under the one country two systems principle it is a fundamental principle of constitutional design that the system which applies at the subnational level must differ in important respects from the national system that exists in most other parts of China. Nonetheless, the central authorities strongly expressed preference for the implementation of a system of executive-led government in Hong Kong would appear to reflect a wish to parallel, at least in part, the system that applies in practice at a national level.

Given the tensions that invariably arise from a lack of parallelism between the national and subnational levels, it is not surprising to see friction over the Hong Kong courts' finding of the existence of a system of separation of powers under the Hong Kong Basic Law, a system expressly rejected at a national level. While some degree of tension may be inevitable, it could be better managed than has been the case so far, particularly by providing greater clarity about which variant of separation of powers exists under the Hong Kong Basic Law.

Parallelism is the Usual Pattern

The term “subnational constitution” refers to constitutional documents that exist at a level immediately below that of a nation or quasi-nation, resulting in a constitutional structure of at least two tiers with the national (or “superconstitution”) supplemented by separate constitutional documents (or “subnational constitutions”) in at least some regions of that nation which govern elements of the constitutional arrangements in those respective regions.² Subnational constitutions can be found in both federal and

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² Tom Ginsburg and Eric A. Posner, “Subconstitutionalism” (2010) 62 *Stanford Law Review* 1583, 1584.

unitary nations. While relatively more research has been conducted into subnational constitutions in federal states,³ those studies which have considered both types of nations have identified broadly similar patterns in both cases,⁴ suggesting that similar conclusions hold true for subnational constitutions in a federal or unitary nation.

One of the few apparent points of difference is an issue of terminology. Unitary states seem more sensitive than their federal counterparts to the sovereignty-related implications of officially designating as constitutional law a document which only governs constitutional relationships at a subnational level. That is evident, for example, in the Hong Kong context from the repeated reluctance of some mainland Chinese scholars to describe the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("the Hong Kong Basic Law") as a constitution or even "mini-constitution".⁵ This is despite the fact that the Hong Kong Basic Law performs the roles normally associated with a written constitution,⁶ and has been repeatedly recognised as such by the Hong Kong courts.⁷

But that is a matter of terminology than substance. The term Basic Law is commonly used as a title for constitutional laws in a number of countries around the world, even at a national level.⁸ What matters is not what such a document is called but rather the role it performs. It is in this context that subnational constitutions will be considered as including not just formally designated constitutional laws, but also "sub-national legal texts that work and have similar effects as proper constitutions".⁹

Subnational constitutions rarely mirror in all respects the provisions of the super-constitutions of the nation of which they are part. In some cases, such as Hong Kong, that is because one of their most fundamental purposes is to provide for the existence of a system at a subnational level that differs in many important respects from that which applies elsewhere in the country under the national constitution. Even in less extreme cases, the different considerations that apply at a subnational level, as well as the ability of subnational entities to shelter under the protections afforded by the national constitution without necessarily replicating its most cumbersome procedures, often results in significant differences between the subnational and national constitutions of the same state.

³ For example, Maxwell A. Cameron and Tulia G. Falleti, "Federalism and the Subnational Separation of Powers" (Spring 2005) 35 *Publius* 245-271 and John Dinan, "Patterns of Subnational Constitutionalism in Federal Countries" (2008) 39 *Rutgers L. J.* 837-861.

⁴ See, in particular, Ginsburg and Posner, "Subconstitutionalism" (see note 2) and Ronald L. Watts, "Foreword: States, Provinces, Lander, and Cantons: International Variety among Subnational Constitutions" (Summer 2000) 31 *Rutgers L.J.* 941-959.

⁵ For an early example of this, see Zhang Youyu, "The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and its Essential Contents and Mode of Expression" (1988) 2 *Journal of Chinese Law* 5, 7-8. For a more recent example, see Pang Jiaying, "On the Ultimate Authority of the Constitution of the People's Republic of China in the Special Administrative Regions" (Dec 2013) 3 *Academic Journal of "One Country, Two Systems"* (English Edition) 111, 113.

⁶ See further the discussion on this point in Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong: Hong Kong University Press, 2nd edition, 2016) at pages 46-50.

⁷ In cases from *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 26 onwards.

⁸ See, for example, the Basic Laws of Israel as well as the Basic Law for the Federal Republic of Germany, which serves as the German constitution.

⁹ Paul Blokker and Werner Reutter, "Sub-national constitutional politics: contesting or complementing, replicating or innovating, traditional constitutionalism?" (2015) 7:1 *Perspectives on Federalism* 3.

An example of the first of these two factors driving divergence between certain aspects of subnational constitutions and their national counterparts is the relatively smaller number of bicameral legislatures at the subnational level. While bicameral legislatures are commonly embraced at a national level as a means of ensuring broadly equal representation of all regions and subnational units in that state,¹⁰ with an upper chamber often organized along geographical lines, this is much less often necessary at a subnational level. Massicotte (2001) identifies only 73 bicameral state legislatures out of a total of 450 in various federal nations.¹¹ Dinan's (2008) survey of the patterns between national and subnational constitutions in 12 federal nations found that "the majority of these federations exhibit non-parallelism, in that the national legislature is bicameral, but all subnational legislatures are unicameral".¹² To be sure, there are exceptions. In both Australia and the United States, bicameralism continues to prevail at both the national and subnational levels, with only a single exception in each case.¹³ But a global trend away from parallelism is evident in this area, with countries as diverse as Brazil, Canada and Nigeria all abandoning bicameral legislatures at the subnational level even as they continue to prevail at the national level.¹⁴

The second of the two factors driving divergence between national and subnational constitutions in certain areas, the ability to avoid replicating often cumbersome procedures at the subnational level by instead sheltering under the similar protections afforded at a national level, can be seen in the generally more flexible procedures for amending subnational constitutions than apply to their national counterparts. Constitutions are commonly entrenched at a national level, primarily to prevent governments from easily altering their contents to favour particular interests, even at the price of imposing rigidity and sacrificing the flexibility that can be useful in responding to changing circumstances. But Ginsburg and Posner (2010) postulate there is less need to prioritise rigidity over flexibility when it comes to subnational texts, since any attempt by authorities at this level to amend constitutional provisions to suit their own interests would be likely to prompt national level intervention, or even migration of citizens away from the subnational unit in question into other regions of the same state.¹⁵ Available evidence would tend to support Ginsburg and Posner's theory on this point. In none of the jurisdictions they studied were subnational constitutions more difficult to amend than those of the national constitution,¹⁶ while Dinan's (2008) survey found that "in the majority of cases subnational procedures differ from national procedures by providing more flexibility" in amendment.¹⁷

Applying analogous reasoning, Ginsburg and Posner (2010) suggest that *in theory* there similarly should be less need to replicate in subnational entities any strict system of separation of powers which applies at a national level.¹⁸ Once again the

¹⁰ Dinan, "Patterns of Subnational Constitutionalism in Federal Countries" (see note 3) at page 860.

¹¹ Louis Massicotte, "Legislative Unicameralism: A Global Survey and a Few Case Studies" (2001) 7 *J. Legis. Stud.* 151, 151.

¹² Dinan, "Patterns of Subnational Constitutionalism in Federal Countries" (see note 3) at page 857.

¹³ Queensland in the case of Australia, and Nebraska in the United States.

¹⁴ Massicotte, "Legislative Unicameralism" (see note 11) at page 153.

¹⁵ Ginsburg and Posner, "Subconstitutionalism" (see note 2) at page 1600.

¹⁶ *Ibid.*

¹⁷ Dinan, "Patterns of Subnational Constitutionalism in Federal Countries" (see note 3) at page 842-843.

¹⁸ Ginsburg and Posner, "Subconstitutionalism" (see note 2) at pages 1597-1598.

argument is that the benefits of the checks and balances against the abuse of power that exist at a national level can be enjoyed at a sub-state level without the need to suffer the burden of any accompanying shortcomings, and so “separation of powers constraints in the substate can be dropped or weakened”.¹⁹

Separation of powers is a widely misunderstood doctrine, sometimes erroneously equated exclusively with a presidential system of government.²⁰ In reality, the doctrine is much broader than this, embracing a wide variety of configurations of separate executive, legislative and judicial branches along what is best described as a “separation of powers continuum”.²¹ These different variants of the doctrine differ primarily in the extent of their separation between the executive and legislative branches. Presidentialism lies at one end of this continuum, with almost no overlapping membership between the executive and legislature and neither branch dependent upon the other for its selection or survival.²² At the opposite end lies the British-style parliamentary system of government, where the membership of the executive is drawn entirely from the legislature and depends upon its confidence in order to remain in office. Although anathema to separation of powers purists,²³ it is now widely accepted such extensive overlaps in the membership of the executive and legislature does not preclude parliamentarianism from taking its place along the separation of powers continuum.²⁴

While presidentialism, parliamentarianism, as well as other systems of government such as semi-presidentialism, all fall within the broad scope of the separation of powers doctrine, the significant differences between these different variants have important practical implications. Presidentialism is often, if somewhat simplistically, seen as prioritising checks and balances against the abuse of power over efficiency, as summarised in Justice Brandeis’ famous dictum such a system results in “inevitable friction” between the different branches of government.²⁵ That takes a narrow view of the meaning of efficiency, which is capable of being defined in broader terms that might in some ways be enhanced by the strict separation between the executive and legislature that comes with presidentialism.²⁶ It also overlooks a historical record that shows the American founding fathers, in putting in place a

¹⁹ Ibid. at page 1598.

²⁰ See, for example, Cameron and Falleti, “Federalism and the Subnational Separation of Powers” (see note 3) at pages 245, 249 and 254.

²¹ Donald S Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006) at page 123.

²² Matthew S. Shugart and John Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge: Cambridge University Press, 1992) at pages 18-19.

²³ See the classic definition of a *pure* system of separation of powers as precluding any overlapping membership between the three branches in M J C Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 2nd ed, 1998) at pages 14-19

²⁴ See, for example, the British Government’s description of separation of powers as a fundamental constitutional principle under that country’s parliamentary system in Ministry of Justice, *The Governance of Britain* (London: Her Majesty’s Stationery Office, 2007) at page 31.

²⁵ *Myers v United States* (1926) 272 U.S. 52, 293.

²⁶ For a survey of the different possible meanings of efficiency in this context see Danny Gittings, *Applying the Efficiency Rationale to Separation of Powers in Hong Kong (在香港的權力分立當中引入效率理念)* in Zhu Guobin (ed.), *The Study of Political Structure of the Hong Kong Special Administrative Region* (Hong Kong: City University Press, published in Chinese, 2017).

presidential system under the U.S. constitution, were motivated as much by efficiency considerations as the need for checks and balances against the abuse of power.²⁷

Nonetheless, there is no denying that when efficiency is viewed through the narrow prism of the executive-legislative structure, the stricter separation between these two bodies under a presidential system is generally likely to impose relatively greater strains on the timely enactment of legislature and other issues which require close cooperation between the executive and legislature. That is the rationale behind Ginsburg and Posner's (2010) reasoning that, just as there is less necessity for cumbersome restrictions on amendments at the subnational level, so *in theory* there should be less need for a strict presidential-style system of separation of powers. The argument being that, even if a system is adopted at the subnational level which allows for greater overlap—and so hopefully also a closer working relationship—between the executive and legislature, the subnational entity can still shelter under the protective umbrella of the checks and balances imposed by the stricter separation between the two bodies at the national level.

It is here that constitutional theory collides with reality with Ginsburg and Posner (2010) acknowledging that, notwithstanding their reasoning pointing in the opposite direction: “Generally speaking, countries with presidential systems for the national government do not have parliamentary systems in the substates, and vice versa”.²⁸ That finding is strongly supported by other studies. Dinan's (2008) survey identified five countries which have presidential systems at both the national and subnational levels, including two which might be termed cases of “voluntary parallelism”.²⁹ In both the United States and Argentina, where the national constitution gives subnational constitutional makers wide discretion over what constitutional structure to adopt,³⁰ states and provinces have nonetheless all chosen to parallel the presidential system that exists at the national level, even when their constitutions diverge from the subnational constitution in other important respects.³¹

It could be argued that such voluntary parallelism simply reflects a recognition that a strict system of checks and balances between the executive and legislature is considered such an important protection against the abuse of power that its merits being replicated at the subnational level even when its existence at the national level arguably makes this less essential. But that has not generally proved true in jurisdictions with a parliamentary system at the national level, even though the absence of strict separation at a national level in those countries arguably makes such protections all the more necessary at a subnational level. There too, all the evidence points to a high degree of parallelism in the executive-legislative structure between the two levels. Watts (2000) found that not only are parliamentary systems in national constitutions invariably replicated in their subnational counterparts, but even in those

²⁷ See, in particular, the detailed accounts by Louis Fisher, ‘The Efficiency Side of Separated Powers (1971) 5(2) *Journal of American Studies* 113-131 and Malcolm P Sharp, ‘The Classical American Doctrine of “The Separation of Powers”’ (1935) 2(3) *The University of Chicago Law Review* 385-436.

²⁸ Ginsburg and Posner, “Subconstitutionalism” (see note 2) at page 1626.

²⁹ Dinan, “Patterns of Subnational Constitutionalism in Federal Countries” (see note 2) at pages 853-854.

³⁰ In the U.S., the only substantive restriction (under Article IV of the U.S. Constitution) is that the subnational structure must be “a republican form of government”.

³¹ In addition to less entrenched constitutional amendment procedures, provisions for direct democracy are more common at the subnational level with half the state constitutions in the U.S. providing for referenda or other popular initiatives, something which is not mirrored at a national level. See Dinan, “Patterns of Subnational Constitutionalism in Federal Countries” (see note 2) at page 850.

jurisdictions with a mixed parliamentary-presidential system at a national level, this too tends to be replicated at a subnational level.³² Dinan (2008) concludes that “there is a greater degree of parallelism in this area than in any of the others examined”.³³

Exceptions to this pattern are relatively rare. Dinan (2008) identifies only two—Russia and Switzerland—out of the 12 in his study, where there is any significant degree of non-parallelism between the executive-legislative structure at the national and subnational levels.³⁴ In Russia, where parallelism did prevail until relatively recently, its disappearance appears to have been a political move by President Vladimir Putin to prevent the emergence of rivals at the subnational level by pushing through legislation in 2004 to end the direct election of regional leaders. In Switzerland, a hybrid parliamentary-presidential system at the national level is not totally mirrored at the subnational level, where individual cantons hold presidential-style direct elections for small executive councils.³⁵

It is not entirely clear why national and sub-constitutional constitutions display such a high degree of parallelism between the executive-legislative structure at the national and subnational levels, even when there is no requirement for the subnational constitution to mirror its national counterpart in this respect and the two documents often differ significantly in other areas. Possible reasons include Suksi’s (2011) suggestion of an “intuitive feeling” that the executive-legislative structure at the subnational level should be organised along the same lines as at the national level.³⁶ More practical considerations may also play a role, particularly the smoother working relationship between the two levels that may be facilitated by the existence of parallel structures. In democracies, it seems probable that political parties play some role in exerting pressure for the establishment of parallel structures at the two levels as it is strongly in their self-interest to do so, given how the role and stature of political parties is generally affected by which form of separation of powers is adopted.³⁷ Nonetheless it is difficult to reach any firm conclusions at this stage on the reasons underlying this undoubted tendency towards parallelism between the executive-legislative structure at the subnational and national levels.

A classic example of the tensions that can arise when the executive-legislative structure of a sub-state entity is organised in a fundamentally different way from that of its national counterpart can be found in the predominantly ethnic German Memel Territory, which enjoyed an autonomous status while part of Lithuania from 1923-1939. Tensions between the subnational authorities, who operated under a system of parliamentary accountability, and presidential-ruled Lithuania proved so severe that they eventually boiled over into a court case on the conflicting interests of the national and subnational authorities before the Permanent Court of International Justice.³⁸

³² Watts, “Foreword: States, Provinces, Lander, and Cantons” (see note 4) at page 953.

³³ Dinan, “Patterns of Subnational Constitutionalism in Federal Countries” (see note 3) at page 853.

³⁴ *Ibid.* at page 855.

³⁵ *Ibid.* at pages 855-856.

³⁶ Markku Suksi, *Sub-State Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Heidelberg: Springer, 2011) at page 568.

³⁷ David J Samuels and Matthew S Shugart, *Presidents, Parties, and Prime Ministers: How the Separation of Powers Affects Party Organization and Behavior* (Cambridge: Cambridge University Press, 2010). See also Danny Gittings, “Separation of Powers and Deliberative Democracy” in Ron Levy, Hoi Kong, Jeff King and Graeme Orr (eds.) *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018).

³⁸ *Interpretation of the Statute of the Memel Territory, United Kingdom and Others v Lithuania* (1932) PCIJ Series A/B no 49.

Analysing the reasons for this conflict, Suksi (2011) concludes “it must have been incomprehensible for the central government under those circumstances that a sub-state entity is not organized under a one-man principle and as a consequence, the mechanism of parliamentary accountability made the decision-making of the sub-state entity ... difficult to control and anticipate by the central government”.³⁹

In the Memel example, it was Adolf Hitler who effectively brought the impasse between national and subnational authorities to an end by annexing the territory, resulting in its disappearance as a separate entity. But in other instances of lack of a parallelism between the national and subnational levels there is evidence of “homogenizing dynamics”,⁴⁰ where the resulting tensions contribute to a change in the governmental structure at one of these two levels so that the national and subnational systems are eventually brought into parallel. Cameron and Faletti (2005) cite four examples of Latin American states—Argentina, Brazil, Mexico and Venezuela—where divergences between the structure at the national and subnational level were resolved in this way.⁴¹

Of particular interest is the Mexican experience, where there is widespread acknowledgement of the important role that “subnational characteristics”⁴² played in helping bring to an end more than 70 years of de-facto one party rule at a national level. While the ruling Institutional Revolutionary Party controlled all aspects of the political structure at a national level for many decades, it was unable to prevent the emergence of opposition-dominated legislature at the subnational level that mushroomed in number and ultimately paved the way for the election of an opposition president in 2000. Drawing on the Mexican examples, as well as the experience in Brazil, where elections at the subnational level played an instrumental role in the eventual ousting of a military regime at the national level, Cameron and Faletti (2005) conclude that, in both cases, “the separation of powers at a subnational level was instrumental in achieving the separation of powers at a national level.”⁴³

This potential for the system of government at one level to have an impact on, and possibly even result in changes to, the system of government at the other level needs to be borne in mind as we now consider Hong Kong’s place in this pattern of parallelism between the executive-legislative structures at the national and subnational levels.

³⁹ Suksi, *Sub-State Governance through Territorial Autonomy* (see note 36) at page 507

⁴⁰ Ginsburg and Posner, “Subconstitutionalism” (see note 2) at page 1627.

⁴¹ Cameron and Falleti, “Federalism and the Subnational Separation of Powers” (see note 3) at pages 265-269.

⁴² Enrique Ochoa Reza, “Multiple Arenas of Struggle: Federalism and Mexico’s Transition to Democracy” in Edward L. Gibson (ed.) *Federalism and democracy in Latin America* (Baltimore: Johns Hopkins University Press, 2004) at page 256.

⁴³ Cameron and Falleti, “Federalism and the Subnational Separation of Powers” (see note 3) at pages 267-269.

Hong Kong's Place in this Pattern

It is one of the most fundamental principles of one country two systems that the system of government in Hong Kong must not parallel in all respects the system that exists at a national level. In particular, there is no place in the Hong Kong SAR for the socialist system which constitutes the “basic system”⁴⁴ of governance elsewhere in China.⁴⁵ Nor for the accompanying Leninist principle of democratic centralism that dictates subservience to higher-level authority.⁴⁶ Neither is there any local equivalent in Hong Kong of the People's Congresses which in theory exercise the highest level of state power across the rest of the country.⁴⁷

But that does not mean there are no points of commonality. Zhang Xiaoming, Beijing's then top representative in Hong Kong, referred to “an inseparable relationship between the political system of the HKSAR and that of the nation”, in a high-profile 2015 speech.⁴⁸ Hong Kong is not totally divorced from the People's Congress system, with specific provision made in the Hong Kong Basic Law for Chinese citizens in Hong Kong to select representatives to the highest of these bodies, the National People's Congress.⁴⁹ More fundamentally, some aspects of the system of government at a national level in China appear to bear more than a passing resemblance to the system which the central authorities have strongly and repeatedly expressed a preference to see implemented in Hong Kong.

That system of government at the national level is not one which can be ascertained solely by reference to the text of a state constitution that, as just noted, theoretically vests supreme power in a system of People's Congresses. While these People's Congresses have no precise equivalent in the non-communist world, they bear a closer resemblance to legislatures than any other branch of the western political structure. For instance, Albert Chen (2000) draws a parallel between this Chinese system of “congressional supremacy” and the British system of “parliamentary supremacy”.⁵⁰ But in this, as in other areas, reality in China differs greatly from the provisions in its constitutional text. Even in the area of law-making, the role of China's de-facto legislature has been overshadowed by the repeated delegation of wide legislative powers to the executive branch of the national government. As a result, Chen Jianfu (2008) suggests that the State Council has emerged in practice as a more powerful law-making body than the National People's Congress⁵¹ to which it supposedly reports.⁵² Nor is this conclusion necessarily confined to the legislative

⁴⁴ Article 1, PRC Constitution 1982.

⁴⁵ Preamble and Article 5, Hong Kong Basic Law.

⁴⁶ Article 3, PRC Constitution 1982.

⁴⁷ Articles 2 and 3, PRC Constitution 1982.

⁴⁸ Zhang Xiaoming, “A Correct Understanding of the Characteristics of the Political System of the Hong Kong Special Administrative Region” (12 September 2015), translated as “Zhang Xiaoming's controversial speech on Hong Kong governance”, *South China Morning Post*, 16 September 2015. Zhang was Director of the Liaison Office of the Central Peoples' Government in Hong Kong from 2012-2017.

⁴⁹ Article 21, Hong Kong Basic Law.

⁵⁰ Albert HY Chen, “The Court of Final Appeal's Ruling in the ‘Illegal Migrant’ Children Case: Congressional Supremacy and Judicial Review” in Johannes M.M. Chan, H.L. Fu, and Yash Ghai (eds.), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong: Hong Kong University Press, 2000) at page 80.

⁵¹ Chen Jianfu, *Chinese Law: Context and Transformation* (Boston: Martinus Nijhoff Publishers, 2008) at page 183.

⁵² Article 92, PRC Constitution 1982.

arena. Given the infrequency with which the National People's Congress meets⁵³ and its unwieldy large size, it is not unreasonable for scholars such as Chow (2015) to conclude that it is the executive rather than legislative branch which plays the dominant role within China's state constitutional structure.⁵⁴

In any case, the real system of governance in China can hardly be understood by reference to the state constitutional structure alone. Given the leading role played by the ruling Communist Party of China,⁵⁵ there is a consensus among most Chinese and Western scholars of Chinese constitutional law that it is necessary to consider the governing roles played by the different organs within the party's own structure as well.⁵⁶ That is often called a "dual constitution" approach,⁵⁷ in a reference to how the Communist Party's own charter supplements the state constitution. However care needs to be taken in interpreting the party constitution too literally, since some of the provisions in the party text are almost as divorced from the realities of where power lies in China as the corresponding provisions in its state counterpart. In theory, like its state counterpart, the party constitution vests ultimate power in a congressional body, the National Party Congress,⁵⁸ the party's counterpart to the National People's Congress. But in practice, most power is exercised by smaller executive-like bodies charged with carrying out the party's day-to-day work,⁵⁹ the Politburo and, especially its (currently seven member) Standing Committee.⁶⁰ And throughout most of the history of the People's Republic of China, ultimate power has been generally wielded by a single figure within the Communist hierarchy usually, although not always, the party Chairman or, in recent decades, its General Secretary.⁶¹

So regardless of whether the governmental system in China is viewed solely through the prism of the state structure or in tandem with the party's own structure, the conclusion is the same. The system that exists in practice at a national level is one of Communist rule through small executive bodies that wield far greater power than their supposedly supreme congressional counterparts. If the same principle of parallelism holds true in China as in numerous other jurisdictions, this is the system we would normally expect to see replicated across the country at a subnational level.

It is here that one country two systems intervenes to make it inconceivable that all aspects of China's national system would be replicated in Hong Kong. Given the express prohibition against the socialist system being practised in the Hong Kong

⁵³ The National People's Congress meets only once a year (Article 61, PRC Constitution 1982), although its Standing Committee meets every two months.

⁵⁴ Chen Jianfu, *Chinese Law* (see note 51) at page 135. See also Daniel C.K. Chow, *The Legal System of the People's Republic of China in a Nutshell* (St. Paul: West Academic Publishing, 3rd edition, 2015) at page 97.

⁵⁵ Preamble, PRC Constitution 1982.

⁵⁶ Albert H.Y. Chen, "Constitutions, Constitutionalism and the Case of Modern China" *University of Hong Kong Faculty of Law Research Paper* No. 2017/023 (27 August 2017) at page 19.

⁵⁷ *Ibid.* at page 20. See also Shucheng Wang, "Emergence of a Dual Constitution in Transitional China" (2015) 45 *HKLJ* 819, 825-827.

⁵⁸ Article 10(3), Constitution of the Communist Party of China.

⁵⁹ Article 22, Constitution of the Communist Party of China.

⁶⁰ Christine Loh, *Underground Front: The Chinese Communist Party in Hong Kong* (Hong Kong: Hong Kong University Press, 2010) at page 17.

⁶¹ However it is not essential to hold any formal position within either the official state or party structure in order to wield such power, as evidenced by the example of Deng Xiaoping who remained China's de-facto leader for several years after stepping down from his all party posts in 1990, with his only official title being Honorary Chairman of China's Bridge Association.

SAR,⁶² there was never any question of the Communist leadership aspect of the national system being paralleled in Hong Kong. But that does not necessarily mean there are no elements of parallelism at all. As Suksi (2011) noted in the context of the autonomous Memel Territory's struggles with the Lithuanian national authorities during the 1930s, authoritarian states tend to feel more comfortable dealing with sub-state entities organized along lines which more closely parallel the one-man rule that exists at a national level.⁶³ Transplanted into the Chinese context, it is easy to see how a powerful leader at the national level, such as the current party General Secretary Xi Jinping, would feel more comfortable dealing with a single figure who wields a similar level of power at the subnational level, and can implement the central government's directives without obstruction from other branches of the subnational governmental structure. Stripping away the requirement for Communist leadership, the system of executive-led government dominated by a single leader which exists in practice at the national level in China closely describes what now appears to be the central government's preferred constitutional structure for Hong Kong.

That is clearly demonstrated by Zhang's 2015 speech. In terms that might almost as easily have been used to describe current party General Secretary Xi Jinping's standing at a national level, China's then top representative in Hong Kong characterised region's Chief Executive as having a special status "that transcends the executive, legislature and judiciary", and asserted that the system of governance which exists under the Hong Kong Basic Law is "an executive-led system with the Chief Executive at its core".⁶⁴ This preference for executive-led government, coupled with a firm rejection of any characterisation of Hong Kong's system of governance as one of separation of powers,⁶⁵ is not new although, as will be discussed shortly, it only emerged after the drafting of the Hong Kong Basic Law had been completed, apparently in reaction to the emergence of a more powerful than anticipated legislature.

What was new in Zhang's 2015 speech was his elevation of both the executive to a "predominant position" over both the legislature and judiciary and of the Chief Executive, in particular, to a special status that "transcends all three branches", suggestions which provoked much controversy at the time.⁶⁶ Neither assertion had ever been mentioned before in such strong terms in any of the Chinese government's previous statements on Hong Kong's political structure. In particular, both were absent from Beijing's most authoritative policy document on Hong Kong in recent years, the State Council's White Paper on *The Practice of the "One Country, Two Systems Policy" in the Hong Kong Special Administrative Region*.⁶⁷ For all this document's shortcomings in other areas,⁶⁸ that 2014 White Paper offered a far more balanced summary of the respective powers of the executive, legislature and judiciary

⁶² Article 5, Hong Kong Basic Law.

⁶³ See note 39 earlier.

⁶⁴ Zhang Xiaoming, "A Correct Understanding of the Characteristics of the Political System of the Hong Kong Special Administrative Region" (see note 48).

⁶⁵ Zhang suggested that "non-implementation of the 'separation of powers' was an important guiding principle in the drafting of relevant provisions of the Basic Law".

⁶⁶ See, for example, Rowan Callick, "China's man in Hong Kong, Zhang Xiaoming, ignites rule of law row," *The Australian*, 19 September 2015.

⁶⁷ Information Office of the State Council, 10 June 2014.

⁶⁸ The document contained references to "patriotic" and "political requirements" for Hong Kong judges that were criticised in many quarters as posing a threat to judicial independence. See Gittings, *Introduction to the Hong Kong Basic Law* (see note 6) at pages 163-164.

under the Hong Kong Basic Law correctly noting, for instance, the legislature's important power to decide whether or not to approve budgets, taxation and public expenditure proposals introduced by the executive.⁶⁹ Nor were either a predominant executive or a transcendent Chief Executive mentioned by Xi Jinping himself during a 2008 visit to Hong Kong, when the then newly-appointed Politburo Standing Committee member instead referred to “mutual understanding and support” between the different branches of the political structure.⁷⁰ So it is difficult to avoid the conclusion that this change in emphasis from stressing mutual understanding in 2008 to emphasising the transcendent status of Hong Kong's Chief Executive in Zhang's speech seven years later⁷¹ reflects, at least in part, Xi's successful consolidation of power during the intervening period so that he now enjoys something akin to transcendent status at the national level, and prefers to deal directly with someone in Hong Kong who enjoys similar status at the subnational level.

Assertions of a predominant executive and transcendent Chief Executive are difficult to justify by reference to the text of the Hong Kong Basic Law, with Zhang having to resort to repeated cherry-picking from its provisions to advance these two assertions. For instance, his 2015 speech makes no direct mention of the legislature's extensive powers of financial scrutiny,⁷² often seen as one of its most significant prerogatives under the Hong Kong Basic Law,⁷³ even though they were cited in the State Council's White Paper only a year earlier. In another example of selective citation from the Hong Kong Basic Law, Zhang highlights the Chief Executive's power to dissolve the legislature in certain limited circumstances following a prolonged standoff with the legislature,⁷⁴ but makes no mention of the accompanying provisions which may enable a re-elected legislature to force from office any Chief Executive foolhardy enough to risk such a dissolution⁷⁵—provisions very difficult to reconcile with the concept of a transcendent Chief Executive.

While Zhang's speech placed great emphasis on the Chief Executive's “dual responsibilities” under the Hong Kong Basic Law as both head of the executive branch of the government⁷⁶ and head of the Hong Kong Special Administrative Region as a whole,⁷⁷ that second role really refers to Hong Kong's dealings on the

⁶⁹ Part II(2) of the White Paper, referring to the powers granted to the Legislative Council under Articles 72(2)-(3) of the Hong Kong Basic Law.

⁷⁰ Benny Y.T. Tai, “The Judiciary” in Lam Wai-man, Percy Luen-tim Lui and Wilson Wong (eds.), *Contemporary Hong Kong Government and Politics* (Hong Kong: Hong Kong University Press, 2nd edition, 2012) at page 82.

⁷¹ While Zhang did acknowledge that the legislature exercises some checks and balances on the executive, this was only in the context of stressing the “bigger decision-making powers” of the executive.

⁷² Tellingly, the only reference to these powers is an indirect one in the context of one of the Chief Executive's own powers, namely the power to respond to the legislature's failure to pass the budget by ordering its dissolution under Article 50.

⁷³ See, for example, Ma Ngok, *Political Development in Hong Kong: State, Political Society, and Civil Society* (Hong Kong: Hong Kong University Press, 2007) at pages 111-112.

⁷⁴ Under Article 50 of the Hong Kong Basic Law if the legislature either “refuses to pass the budget or any other important bill” or twice passes (on the second occasion by a 2/3rds majority) a bill which the Chief Executive refuses to sign.

⁷⁵ Under Article 52(2)-(3) of the Hong Kong Basic Law, if the newly-elected legislature either continues to refuse to pass the budget or important bill that prompted the dissolution, or once again passes by a 2/3rds majority a bill which the Chief Executive still refuses to sign.

⁷⁶ Article 60, Hong Kong Basic Law.

⁷⁷ Article 43(2), Hong Kong Basic Law.

external stage, in interacting with national authorities and foreign countries.⁷⁸ As such, it hardly provides any evidence that the Chief Executive enjoys predominant status in purely inter-Hong Kong dealings with the other branches of the local political structure. Nor is such a dual constitutional role unique to Hong Kong's chief Executive. For instance, the Governor of the autonomous Indonesian province of Aceh exercises a similar dual role, as both a representative—in this case, popularly elected—of the people of Aceh, while also being accountable to the national Indonesian government.⁷⁹ Indeed, in the absence of some kind of plenipotentiary exercising the powers of the national authorities, it may be almost inevitable that the leader of a subnational region has to wear two different hats on occasions, particularly in dealing with the national authorities.

By contrast, the broader concept of executive-led government (shorn of any contentious references to either a predominant executive or transcendent Chief Executive) is somewhat easier to substantiate by reference to the text of the Hong Kong Basic Law.⁸⁰ In particular, it is possible to find examples of powers bestowed on the Chief Executive which are rarely granted even to presidents of nation states, most notably the Chief Executive's broad gatekeeping powers to exercise almost complete control over which bills are introduced into the legislature.⁸¹

Nonetheless, it is difficult to view executive-led government as a definitive description of the system of governance under the Hong Kong Basic Law when the term was never used during the drafting of that document, and specifically repudiated by some influential drafters for a while after its promulgation. In particular, the 1990 first edition of an introductory book on the Hong Kong Basic Law edited by Wang Shuwen, a mainland scholar who co-chaired one of the sub-groups on the Basic Law Drafting Committee, explicitly stated that “it is unscientific to explain the political structure of the Hong Kong SAR in the future as ‘executive-dominant’ or ‘legislative dominant’.”⁸² In terms which now stand directly at odds with Zhang's 2015 assertion of executive predominance, the 1990 edition of this book went on to suggest that, when it comes to the powers of the executive and legislature, “the question is not which subordinates the other and there is no question of which overrides the other.”⁸³

By the time the second edition of the book was published in 1997, this wording had changed to reflect Beijing's emerging position that the political structure under the Hong Kong Basic Law is “one in which the executive is dominant.”⁸⁴ What had

⁷⁸ Under Article 48(9) of the Hong Kong Basic Law, the Chief Executive conducts external affairs under authorization from the Central Authorities.

⁷⁹ Article 40 of the Law of the Republic of Indonesia No. 11 of 2006 on the Governing of Aceh. See further Suksi, *Sub-State Governance through Territorial Autonomy* (see note 36) at page 545.

⁸⁰ See Ma Ngok, Political Development in Hong Kong (see note 73) at pages 58-59 and Albert H.Y. Chen in “Executive-led Government, Strong and Weak Governments and Consensus Democracy” in Johannes Chan and Lison Harris (eds.), *Hong Kong's Constitutional Debates* (Hong Kong: Hong Kong Law Journal Ltd., 2005) at pages 9-10.

⁸¹ Under Article 74 of the Hong Kong Basic Law, only bills not “relating to government policies” may be introduced without the Chief Executive's written consent.

⁸² Wang Shuwen (ed.), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Beijing: Party School of the Central Committee of the CPC Press, 1st edition, 1990), cited in Lo Pui Yin, *The Judicial Construction of Hong Kong's Basic Law* (Hong Kong: Hong Kong University Press, 2014) at page 40.

⁸³ *Ibid.*

⁸⁴ Wang Shuwen (ed.), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Beijing: Law Press China, English translation, 2000) at page 346, citing text from the Chinese 2nd edition published in 1997.

changed during the intervening seven years was the election of pro-democracy legislators in large numbers, from the first direct elections in 1991 onwards, signalling that the legislature was likely to be a more assertive and rebellious force than the drafters of the Hong Kong Basic Law may have originally envisaged.⁸⁵ This would eventually be mitigated by the emergence of a majority pro-establishment bloc within the legislature. But as Chen (2014) rightly points out this bloc suffers from a lack of internal cohesion and effective organization among other shortcomings,⁸⁶ making it a much less reliable ally than the Chief Executive—so enhancing the logic, from Beijing’s perspective, of interpreting Hong Kong’s political system in a way which emphasises the powers of a transcendent Chief Executive.

What is interesting about the Hong Kong experience is that it suggests that a preference for some degree of parallelism between certain aspects of the executive-legislative structure at the national and subnational levels may emerge during the implementation of a subnational constitution, even when such a preference was not evident during the drafting of that document. Constitution makers may be focussed on other considerations during the drafting process, particularly in autonomous entities where the emphasis is often on highlighting that region’s distinctive characteristics rather than considering the possible need for any element of parallelism with the national system. In Hong Kong’s case, given the considerable scepticism about the viability of one country two systems in the run-up to 1997, it is hardly surprising that the national authorities initially focussed on emphasising the differences between the two systems under the Hong Kong Basic Law. Only after certain aspects of the implementation of that subnational system proved more problematic than anticipated,⁸⁷ at least from the perspective of the national authorities, did attention begin to turn to those areas where they appear to believe a certain element of parallelism might be desirable.

⁸⁵ Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong: Hong Kong University Press, 1st edition, 2013) at page 142.

⁸⁶ Albert Chen, “The Executive Authorities and the Legislature in the Political Structure of the Hong Kong SAR” (Dec 2014) 4 *Academic Journal of “One Country, Two Systems”* (English Edition) 80, 85.

⁸⁷ See, for example, the Information Office of the State Council’s statement in Part V of their 10 June 2014 White Paper “the practice of “one country, two systems” has come to face new circumstances and new problems”. For an explicit acknowledgement that the national authorities changed some aspects of their policy towards Hong Kong in response to unanticipated difficulties, see Jie Cheng, “The Story of a New Policy” (July 2009) 15 *Hong Kong Journal*.

Two Stances on Separation of Powers

As already noted, Zhang's 2015 assertion of a predominant executive and transcendent Chief Executive was accompanied by a rejection of the idea that Hong Kong's system of governance can be characterised as one of separation of powers. China's then top representative in Hong Kong went so far as to suggest "that the non-implementation of the 'separation of powers' was an important guiding principle in the drafting of relevant provisions of the Basic Law".⁸⁸

That rejection of the applicability of any system of separation of powers in the Hong Kong context echoes numerous comments in a similar vein by other mainland leaders, most notably a high-profile speech on the same theme by then National People's Congress Standing Committee Chairman Wu Bangguo eight years earlier.⁸⁹ On almost every occasion, including both Zhang and Wu's speeches, these drew heavily for authority on a critical reference to separation of powers made by Deng Xiaoping during the drafting of the Hong Kong Basic Law.⁹⁰ It is easily now forgotten that Deng only ever mentioned separation of powers in passing, as part of a generalized attack on the wholesale copying of any Western political system into the Hong Kong Basic Law, with separation of powers being cited simply as one example. But that has stopped the then paramount leader's apparently off-the-cuff remarks⁹¹ from acquiring almost gospel status in Beijing, as authority for rejecting any notion that the Hong Kong Basic Law provides for a system of separation of powers.

This rejection of the idea that the Hong Kong Basic Law provides for a system of separation of powers now needs to be seen in the context of Beijing's apparent preference for some degree of parallelism between the executive-legislative structure at the national and subnational levels when it comes to the role of the executive. Viewed in this light, such strong antipathy towards separation of powers should come as no surprise. After all, it is hard to envisage anything which is more of an anathema as far as China's constitutional structure at the national level is concerned, where the Leninist principle of democratic centralism means all power is theoretically concentrated in a system of People's Congresses⁹² and, in practice, in the hands of the Communist leadership.

It might seem far-fetched to draw comparisons with 1990s Mexico where, as noted earlier,⁹³ the emergence of a system of separation of powers at the subnational level played an instrumental role in bringing to an end more than 70 years of de-facto one party rule at a national level.⁹⁴ Especially since the leadership of today's increasingly powerful and prosperous China would appear to be in a much stronger

⁸⁸ Zhang Xiaoming, "A Correct Understanding of the Characteristics of the Political System of the Hong Kong Special Administrative Region" (see note 48).

⁸⁹ Wu Bangguo, "The Most Significant Feature of Hong Kong's Political System is Administrative-Led Government", 6 June 2007.

⁹⁰ Deng Xiaoping, "Speech at a Meeting with the Members of the Committee for Drafting the Basic Law of the Hong Kong Special Administrative Region", 16 April 1987 in *Deng Xiaoping on the Question of Hong Kong* (Beijing: Foreign Languages Press, 1993) at page 55.

⁹¹ Strong evidence that Deng's remarks appear to have been unscripted comes from the fact that they contained one factual inaccuracy, referring to the existence of an "American parliamentary system", and were not fully reported by mainland state media until several days after they were delivered.

⁹² Articles 2 and 3, PRC Constitution 1982.

⁹³ See note 43.

⁹⁴ Cameron and Falletti, "Federalism and the Subnational Separation of Powers" (see note 3) at pages 265-269.

position to maintain a firm grip on power than the enfeebled leadership of an economically wrecked Latin American nation several decades earlier. Nonetheless the concerns of China's Communist leadership about the impact of the advocacy of separation of powers at a national level are evident from the 11-year prison sentence imposed on the late Nobel Peace Prize Winner Liu Xiaobo for "subversion of state power", after he co-authored a manifesto for change which prominently featured calls for the introduction of a system of separation of powers in China.⁹⁵ The national authorities' fears about the potential for the spread of "subversive influences" from Hong Kong were also clearly evident from the mass arrests of mainland activists who expressed support for the Hong Kong protests during the 2014 Umbrella Movement street occupations over universal suffrage.⁹⁶

Given that a lack of parallelism between the executive-legislature structure at the national and subnational levels commonly results in some degree of tension between the two levels, and especially when that lack of parallelism involves a system which has been so categorically rejected—and perhaps even feared—at the national level, it is scarcely surprising that such tensions should have arisen over the Hong Kong courts' finding that the Hong Kong Basic Law provides for a "constitutional separation of powers" which reinforces a similar doctrine that had already emerged at common law.⁹⁷ That is not, in any way, to challenge the accuracy of the courts' finding of the existence of such a system which, as the Court of Final Appeal pointed out in *Leung Kwok Hung v President of the Legislative Council (No 1)*(2014), is clearly demonstrated by the references to executive, legislative and independent judicial power in Article 2 of the Hong Kong Basic Law, as well as the separate sections devoted to these three branches in Chapter IV on Political Structure.⁹⁸

It would, however, have been helpful if the courts had shown the same attention to detail in earlier cases that touched on separation of powers. Instead those earlier cases often seemed to proceed on the basis that the existence of a system of separation of powers under the Hong Kong Basic Law was so self-evident that there was no need to substantiate this by reference to any specific provisions in that document.⁹⁹ In *Lau Kwok Fai v Secretary for Justice* (2003), for instance, the court described separation of powers as "woven into the fabric of the Basic Law" without making any attempts to explain which parts of that fabric it was interweaved with.¹⁰⁰ Those earlier omissions, which were only finally corrected in the *Leung Kwok Hung (No 1)*(2014) case, had the unfortunate side-effect of making it easier for critics to persist in their denial of the existence of a system of separation of powers under the Hong Kong Basic Law. After all, if one side asserts the existence of a system of separation of powers without providing any specifics to substantiate this conclusion, as the courts

⁹⁵ Liu Xiabo and others, *Charter 08* (10 December 2008), English translation by Perry Link, "China's Charter 08", *New York Review of Books*, 15 January 2009.

⁹⁶ More than 100 people were reportedly detained in mainland China for supporting the Hong Kong protests. See Amnesty International, *Callous Guilty Verdicts Against Supporters of Hong Kong Pro-Democracy Protests* (31 March 2017) at <https://www.amnesty.org/en/press-releases/2017/03/china-callous-guilty-verdicts-supporters-of-hong-kong-pro-democracy-protests>.

⁹⁷ *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689, 701.

⁹⁸ (2014) 17 HKCFAR 689, 701-702.

⁹⁹ See, for example, the references to the existence of separation of powers by the Court of Final Appeal in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 223 and *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, 447.

¹⁰⁰ *Lau Kwok Fai v Secretary for Justice* (unrep., HCAL 177 and 180/2002, [2003] HKEC 711 at para. 19.

seem to have done in some early cases, it is much easier for the other side to deny the existence of such a system without providing any specifics either. That was true, for instance, of NPC Standing Committee Wu’s 2007 speech, which denied the existence of a system of separation of powers without making any effort to cite any specific provisions in the Hong Kong Basic Law to substantiate this denial. But by the time Zhang delivered his 2015 speech reiterating the same point the Court of Final Appeal had, in *Leung Kwok Hung (No 1)*(2014), cited specific provisions pointing to the existence of a system of separation of powers. So China’s then top representative in Hong Kong seemed to have felt compelled to respond in kind, citing various provisions from the Hong Kong Basic Law —albeit in a highly selective manner¹⁰¹— which he asserted proved the existence of a system of executive-led government.

Another important omission still remains unresolved. If separation of powers—a doctrine so broad that it embraces numerous distinct variants—is truly “woven into the fabric of the Basic Law, it would seem sensible to try and identify more precisely where within the “separation of powers continuum”¹⁰² Hong Kong’s system lies. But on this point, the guidance offered by the courts has been sparse so far, not to mention confusing. Particularly perplexing was Hartmann J.’s much criticized suggestion in some early cases that the system under the Hong Kong Basic Law “is founded on what is commonly called the Westminster model”,¹⁰³ in what can only be interpreted as a reference to the English parliamentary system of government.¹⁰⁴ That runs counter to the consensus among most local scholars that the system under the Hong Kong Basic Law more closely resembles a U.S. style presidential system than the English parliamentary model,¹⁰⁵ particularly with its provisions on the separate origin and survival of the Chief Executive (as head of the executive) and legislature,¹⁰⁶— which is often viewed as one of the classic hallmarks of presidentialism.¹⁰⁷ Such comparisons to a parliamentary system with a sovereign legislature also have the unfortunate side-effect of intensifying suspicions among national authorities about Hong Kong’s system, given Beijing’s intense suspicion of anything which might raise the stature of a legislature in which the opposition forces of the pan-democratic camp have a significant presence.

¹⁰¹ See footnote 72 earlier, and the accompanying text, for examples of Zhang’s “cherry-picking” from the Hong Kong Basic Law to substantiate his denial of the existence of a system of separation of powers.

¹⁰² Lutz, *Principles of Constitutional Design* (see note 21) at page 123.

¹⁰³ *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, 469 and *Lau Kwok Fai* (see note 100) at para. 17.

¹⁰⁴ For criticism of Hartmann’s citing of the Westminster model in this context, see Peter Wesley-Smith, “Judges and Judicial Power under the Hong Kong Basic Law” (2004) 34 *HKLJ* 83, 84 and Lo Pui Yin, *The Judicial Construction of Hong Kong’s Basic Law* (Hong Kong: Hong Kong University Press, 2014) at page 36.

¹⁰⁵ See Yash Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 2nd edition, 1999) at page 263 and Peter Wesley-Smith, “The Separation of Powers” in Wesley-Smith (ed.) *Hong Kong’s Basic Law: Problems and Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1990) at page 72. However Albert Chen [in “The Executive Authorities and the Legislature in the Political Structure of the Hong Kong SAR” (Dec 2014) 4 *Academic Journal of “One Country, Two Systems”* (English Edition) 80, 89], while agreeing Hong Kong’s system is closer to a presidential than a parliamentary system, notes that it also differs from a presidential system in several respects.

¹⁰⁶ The Chief Executive is selected for a five year term (Article 46, Hong Kong Basic Law) by a 1,200-member Election Committee, no more than 70 of whose members are legislators [Annex I(2)] while the members of the legislature are separately elected for a four year term [Article 69, Annex II(1)].

¹⁰⁷ Shugart and Carey, *Presidents and Assemblies* (see note 22) at pages 18-19.

Subsequent cases have cited approvingly¹⁰⁸—but without elaborating—from the writings of Sir Anthony Mason, pointing out not just the “substantial cleavage” between the Westminster and presidential variants of separation of power, but also how greatly the shape of the doctrine varies between different jurisdictions.¹⁰⁹ The former Australian Chief Justice also noted that the courts have so far “not had occasion to consider what the doctrine may entail in Hong Kong”.¹¹⁰ That later statement, while accurate in so far as it goes, is a touch incomplete since the courts have heard many cases involving separation of powers, including several in which Mason sat on the Court of Final Appeal as a non-permanent judge,¹¹¹ where they could have chosen to elaborate on the nature of the doctrine as it applies under the Hong Kong Basic Law had they wished to do so.

It is difficult to explain why the Hong Kong courts, having so confidently asserted the existence of a constitutionally based system of separation of powers under the Hong Kong Basic Law, seem to have been somewhat reticent to consider the implications of the existence of such a system. One reason could be that it has not proved necessary to do so, particularly when many cases made only brief reference to the existence of a system of separation of powers. But that explanation is not entirely convincing, especially given the Court of Final Appeal’s willingness to delve into *obiter* on other contentious matters concerning the Hong Kong Basic Law. In particular, it is hard to explain why a court that was prepared to assert a controversial jurisdiction to invalidate actions of the National People’s Congress and its Standing Committee in *Ng Ka Ling v Director of Immigration* (1999),¹¹² remarks that were probably *obiter*¹¹³ but nonetheless caused a constitutional crisis with Beijing,¹¹⁴ should feel any need to shy away from elaborating on the nature of Hong Kong’s system of separation of powers.

Another possibility is that separation of powers is not an area the courts initially felt comfortable exploring in more detail, given the lack of previous Hong Kong jurisprudence on the doctrine. After all, the constitutionally-driven variant of separation of powers was unknown in Hong Kong before 1 July 1997, and even the common-law variant of the doctrine hardly ever arose in court cases before that date,¹¹⁵ meaning that most Hong Kong judges had little experience of deciding cases relating to separation of powers. One of the few judges with more experience of separation of powers jurisprudence to have sat in the Hong Kong courts is Sir

¹⁰⁸ Cheung J in *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKLRD 114, 130-131 and Fok JA in *Koon Wing Yee v Financial Secretary* [2013] 1 HKLRD 76, 93.

¹⁰⁹ Sir Anthony Mason, “The Place of Comparative Law in the Developing Jurisprudence on the Rule of Law and Human Rights in Hong Kong” (2007) 37 *HKLJ* 299, 305.

¹¹⁰ *Ibid.* See also Sir 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, University of Hong Kong, 2006) at page 21.

¹¹¹ Simon N.M. Young describes Mason as having an “enormous” influence on the development of the court’s jurisprudence in “Constitutional Rights in Hong Kong’s Court of Final Appeal” (2011) 27 *Chinese (Taiwan) Yearbook of International Law and Affairs* 67, 79-80.

¹¹² (1999) 2 HKCFAR 4, 26-28.

¹¹³ For an explanation of why this section of the judgment was likely *obiter*, see Albert H.Y. Chen, “The Court of Final Appeal’s Ruling in the ‘Illegal Migrant’ Children Case” in Chan, Fu, and Ghai (eds.), *Hong Kong’s Constitutional Debate* (see note 50) at pages 81-83.

¹¹⁴ The crisis was only resolved when the court issued a supplementary, and more conciliatory, judgment in *Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141. See further Gittings, *Introduction to the Hong Kong Basic Law* (see note 6) at pages 181-182.

¹¹⁵ For a rare exception, see *R v Ng Tung Fong* [1992] 1 HKCLR 114, 118.

Anthony Mason, who played an important role in shaping understanding of the doctrine in Australia during his tenure as Chief Justice there,¹¹⁶ and it can hardly be a coincidence that it is Mason who has written most prolifically¹¹⁷—albeit extra-judicially so far—on the application of the doctrine in Hong Kong.

Whatever the reason for the courts’ apparent reticence to consider in more depth the nature of the system of separation of powers that applies under the Hong Kong Basic Law, the result has been a lack of clarity on a number of issues where further guidance would be extremely helpful. To cite one final example, the relationship between the concepts of executive-led government and separation of powers remains largely unexplored. While mainland officials often seem to see a binary choice between the two, citing the existence of executive-led government under the Hong Kong Basic Law as a prime reason for refuting any possibility of separation of powers, there is no reason why this need inevitably be the case. Separation of powers has never required the executive, legislative and judicial branches to be equal in all respects, nor does the doctrine necessarily preclude one of these three branches from playing a leading role, so long as the other two branches retain their separate powers and functions. The possibility of co-existence between the two concepts was briefly alluded to in *Leung Kwok Hung v President of Legislative Council* (2007) where Hartmann J. bracketed—in successive paragraphs—executive-led government together with what he described as how the “Basic Law enshrines the separation of powers”.¹¹⁸ But that possibility has not yet been elaborated on, or considered further in any subsequent judgment, making this another area where clarity remains lacking so far. Clarity that, if it did result in a more substantive explanation of how executive-led government might coexist with separation of powers, might also defuse one of Beijing’s rationales for denying the existence of a system of separation of powers under the Hong Kong Basic Law.

¹¹⁶ See, for example, Sir Anthony Mason, “A New Perspective on Separation of Powers” (Dec. 1996) 82 *Canberra Bulletin of Public Administration* 1-9.

¹¹⁷ See, in particular, Mason, “The Place of Comparative Law” (see note 109) and Mason “The Role of the Common Law in Hong Kong” (see note 110).

¹¹⁸ *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387, 401.

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