

Statement of the Hong Kong Bar Association (“HKBA”) about the Separation of Powers Principle

The HKBA is concerned about the recent remarks made by the Chief Executive and the Secretary for Education suggesting the absence of the separation of powers principle in the constitutional framework of the Hong Kong Special Administrative Region (“HKSAR”).

These remarks depart from the authoritative judicial decisions on the structure of the HKSAR Government¹, which form part of the law of Hong Kong, as well as the considered public statements of two Chief Justices². They give rise to speculation amongst the public about how the Government operates under the existing constitutional and legal framework.

A government that operates under the separation of powers doctrine delineates the functions of the executive, legislative and judicial branches. The idea is that they should operate largely independently of one other and that independent action should create a system of checks and balances between them. This arrangement serves to avoid excessive concentration of power, guards against abuse, and strengthens the Rule of Law.

The HKBA has over the years issued a number of statements on the relationship between the executive and the judiciary. They have sought to dispel any suggestion that the judiciary should be seen to be part of a governance ‘team’³. The Basic Law expressly delineates the respective powers and functions of the executive, legislative and judicial authorities in separate sections of Chapter IV.

Under Article 48, the Chief Executive leads the government of the HKSAR and is responsible for implementing the Basic Law and deciding on government policies. Under Article 59, the Government shall be the executive authorities of the HKSAR and, as stated in Article 64, accountable to the Legislative Council (“LegCo”). Under Article 73, it is the LegCo that enacts, amends and repeals laws. Under Article 80, the

¹ See *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415 at [101]; *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689 at [27]; *Yau Wai Ching v Chief Executive of HKSAR* (2017) 20 HKCFAR 390 at [17]; and *Luk Ka Cheung v The Market Misconduct Tribunal* [2009] 1 HKLRD 114 at [29]

² See Speech by Ma CJ at the Ceremonial Opening of the Legal Year 2014 dated 13 January 2013: <https://www.info.gov.hk/gja/general/201401/13/P201401130352.htm>; and Speech by Li CJ at Luncheon Meeting dated 26 October 2001: <https://www.info.gov.hk/gja/general/200110/26/1026146.htm>

³ See HKBA’s press releases dated 9 July 2008 at [4], 11 June 2014 at [7] and 9 November 2019.

courts exercise the judicial power of the HKSAR and, as stated in Article 85, they exercise that power ‘independently, free from any interference’.

In legal proceedings before the courts, particularly in judicial review proceedings, the Government frequently relies on the separate functions of the executive, the legislature and the judiciary when defending the legality of executive action and the constitutionality of laws enacted by the LegCo.

The Chief Executive cited a number of justifications in the press conference held on 1 September 2020 for saying that there is no separation of powers in the HKSAR, including (1) the fact that the HKSAR derives its authority from the Central Peoples’ Government (“CPG”) and it is the office of the Chief Executive which is directly accountable to the CPG and (2) the courts deal with legal issues but not political issues, the latter being matters for the executive or the legislative authorities.

Neither point supports the contention that there is no separation of powers in the HKSAR.

That the HKSAR, through the Chief Executive, is accountable to the CPG, speaks to the HKSAR’s place within the constitutional order of the PRC. It does not detract in any way from the clear provisions of the Basic Law setting out how local governance is to be conducted.

The second point, far from contradicting a separation of powers, is an integral aspect of it. It recognises that certain functions have been entrusted to the executive or legislative branch and should be exercised without judicial intervention except as prescribed by law.

The Basic Law provides for a constitutional order in the HKSAR where there are effective checks and balances on the exercise of executive power.

The HKBA therefore considers that the suggestion by the Chief Executive and Secretary for Education that no separation of powers principle operates in the HKSAR is unfounded and inconsistent with the unambiguous provisions of the Basic Law prescribing and delineating the functions of the three branches of government.

Dated 2 September 2020

Hong Kong Bar Association