CHINA LAW UPDATE

IN THE CONTEXT OF CHINESE CONSTITUTIONALISM AND THE HONG KONG BASIC LAW: IS "SEPARATION OF POWERS" A DELUSIONARY PRODUCT?

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I. INTRODUCTION

In late August 2020, the Hong Kong Education Bureau removed a Non-Permanent Judge's presentation of the doctrine of "Separation of Powers" from official-approved textbooks.[1] Later, the Chief Executive of the Hong Kong Special Administrative Region of the People's Republic of China (HKSAR), Carrie Lam Cheng Yuet-ngor (Carrie Lam), told the media that there was no separation of powers in Hong Kong.[2] Carrie Lam further elaborated that the disputes among the Hong Kong society over the "Separations of Powers" reflected a misunderstanding of the HKSAR's political framework under "*One Country, Two Systems*" (OCTS) as prescribed under The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the Basic Law).[3]

In early September, Ronny Tong Ka-wah, Senior Counsel and Executive Councillor, said that there was no "Separation of Powers" in Hong Kong. He further said that in Hong Kong's constitutional order under the Basic Law, it is inappropriate to generalize the system using terms that are commonly used to describe the governance of a country.[4] Also, the Liaison Office of the Central People's Government in the HKSAR clarified that Hong Kong's political system is "executive-led", refuting the allegation that Hong Kong exercises "Separation of Powers" and expressing support for the Chief Executive.[5]

Later, in September 2020, the Hong Kong Bar Association (HKBA) released a statement titled "*Statement of the Hong Kong Bar Association*

[1] Tony Cheung & Chris Lau, *Hong Kong Leader Carrie Lam Sides with Education Chief on No "Separation of Powers" in City, Defends Move to Delete Phrase from Textbooks*, SOUTH CHINA MORNING POST (Sept. 1, 2020), https://www.scmp.com/news/hong-kong/education/article/3099729/hong-kong-leader-carrie-lam-insists-there-no-separation.

[2] Kathleen Magramo & Ng Kang-chung, *Hong Kong Cabinet Adviser Disagrees with Lam on "Separation of Powers" in Textbooks, if Only to Show Students Why Focusing on Issue Is "Meaningless"*, SOUTH CHINA MORNING POST (Sept. 2, 2020), https://www.scmp.com/news/hong-kong/education/article/3099868/hong-kong-cabinet-adviser-disagrees-carrie-lam-separation.

[3] *HK Has Never Adopted Western "Separation of Powers" Concept: State Council*, GLOBAL TIMES (Sept. 7, 2020), https://www.globaltimes.cn/content/1200196.shtml.

[4] Wen Gang, *"Separation of Powers" Wrong Phrase for HK*, CHINA DAILY (Sept. 3, 2020), https://global.chinadaily.com.cn/a/202009/03/WS5f50467ba310675eafc57365.html.

[5] Huaxia, *Liaison Office of Central Gov't in HKSAR Clarifies Hong Kong's Political System as "Executive-led"*, XINHUA NET (Sept. 7, 2020), http://www.xinhuanet.com/english/2020-09/07/c_139349904.htm.

("HKBA") about the Separation of Powers Principle",[6] expressing its concerns about the remarks made by the Chief Executive and the Secretary for Education, which suggested the absence of the principle of Separation of Powers in the constitutional framework of the HKSAR.

In fact, the above "disputes" can be roughly generalized as a swing between a dichotomy of "functionalist approach" and "formalist approach" on the interpretation of the doctrine of the separation of powers.[7] And yet, such rough generalization is still hovering above the liberalist ideology of power-restraint. What this essay, however, seeks to contribute is to go beyond the dimension of the existing ideology, and to explore any possible space of re-construction. As such, one would inevitably ask the following questions: (1) What is Separation of Powers? (2) Where and when did such a concept originate? Thus, what philosophical grounds does such a concept rely upon? (4) If the doctrine of Separation of Powers is to describe the checks and balances of a sovereign country, then, what is the role of such a concept in the HKSAR? (5) After examining the constitutional text of the HKSAR, how should one explain the macro- and micro-dynamics of power relations in regards to the institutional organs in Hong Kong? (6) Fundamentally, has such a concept of Separation of Powers ever existed in Hong Kong or is it only a delusionary product of the discourse of liberalism? (7) Lastly, what are the implications to the HKSAR under China's socio-legal-political architecture of its Constitutionalism in recent decades?

In the following passage, the author explores the above issues by adopting the Foucauldian perspective and the academic approach of both Professor Chen Duanhong (陈端洪) and Professor Jiang Shigong (强世功) of the Peking University Law School.

II. LIBERALIST TRIAS POLITICA

A. The Origin of the Doctrine

The liberalist notion of *trias politica* has existed since the seventeenth century.[8] The doctrine serves to divide a government's responsibilities into distinct branches. Those divided branches must act independently and limit any

[6] Hong Kong Bar Association, *Statement of the Hong Kong Bar Association ("HKBA") About the Separation of Powers Principle* (Sept. 2, 2020), https://www.hkba.org/sites/default/files/20200902%20-%20HKBA%20statement%20on%20separation%20of%20powers%20%28E%29.pdf.

[7] For formalist, it tends to stick with the approaches upheld by textualist/originalist; for functionalist, it tends to focus on the pragmatic, dynamic, and hermeneutical approaches. The rules-standards cycling of the legal concepts mainly rest upon the inherently conflicting nature between "rules" and "standards", while rules are restrictively construed, standards leave rooms for novel and unanticipated considerations. *See* Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 342, 346.

[8] Arnold L. Burns & Stephen J. Markman, *Understanding Separation of Powers*, PACE L. REV., Apr. 1987, at 575, 578.

one branch from exercising the core functions of another.[9] Two of the most influential philosophers whose political idea were regarded as the origins of *trias politica* are (1) Monsieur Montesquieu and (2) John Locke.[10]

In *Two Treatises of Government*,[11] John Locke separated the legislative power from the executive power. As will be elaborated in later sessions, the doctrine of Separation of Powers was derived from the liberalist ideology that "*Power tends to corrupt and absolute power corrupts absolutely*".[12] Therefore, the liberalist theorists sought to formulate a mechanism which can balance the "evilness" of the human nature when they are vested with great power and responsibilities. In this context, John Locke contended that in order to prevent a "temptation to human frailty" apt to grasp power for private advantage, it is important to formulate such mechanism to disconnect private interest from the interest of the community, the society and the government; one of the way to achieve so is to separate powers and require the "ruler" to act for the public good.[13]

Further, it was until Montesquieu that a more thorough framework of *trias politica* as seen today was developed. In *The Spirit of the Laws*, the French Philosopher based the model of Separation of Powers on the Constitution of the Roman Republic and the British constitutional system, and stressed on the distribution of the political power among the legislature, the executive, and the judiciary.[14]

Each of the branches should only exercise its own functions, and such setting of divided institutional organs aims to eliminate any possible tyrannical manner. Montesquieu's theory sought to avoid putting the legislative and executive powers in the same end, because he believed that once those powers are joined together, the life and liberty of the rest of the society would be exposed to arbitrary control, for the "rulers" or its representatives would act with violence and oppression. He even rhetorically described a joint-power mechanism as "the end of everything". The above philosophical grounds are how *trias politica* originated. It was based on the ground that a stabilized state of separated powers can avoid the "evilness" of the "rulers". Extendedly, the doctrine was materialised in the Constitution of the United States.

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[9] Jasna Omejec, *Principle of the Separation of Powers and the Constitutional Justice System*, *in* CONFERENCE OF CONSTITUTIONAL CONTROL BODIES OF CENTRAL ASIA "THE ROLE OF THE CONSTITUTIONAL COURT IN SAFEGUARDING THE SUPREMACY OF THE CONSTITUTION", 3, October 28–29, 2015, https://bib.irb.hr/datoteka/785200.Omejec_-_Separation_of_Powers_and_Constitutional_Judiciary_-_Strasbourg_28.10.pdf.

[10] James T. Knight II, *Splitting Sovereignty: The Legislative Power and the Constitution's Federation of Independent States*, 17 GEO. J. L. & PUB. POL'Y 683, 687 (2019).

[11] JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT ch. XII, para. 143 (Thomas Hollis ed., 1764) (ONLINE LIBRARY OF LIBERTY), available at https://oll.libertyfund.org/title/hollis-the-two-treatises-of-civil-government-hollis-ed.

[12] Letter from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887). (On file with the Online Library of Liberty), available at https://history.hanover.edu/courses/excerpts/165acton.html.

[13] *Supra* note 11, at ch. XII, para. 143.

[14] MONSIEUR MONTESQUIEU, THE SPIRIT OF LAWS xxxvi (Cambridge Univ. Press 1989).

B. The Application of the Doctrine in Contemporary U.S. Political Arena

In Episode 1, Season 5 of *House of Cards*,[15] when President Frank Underwood entered the floor and interrupted the meeting of the House of Representatives, the Representatives of Georgia requested the Parliamentary Inquiry: "*Do the rules of the House not require the President be formally invited in order to attend?*". The scene was intensified when the President refused to leave and continued his speech in front of the Representatives. Such a scene of brutal interruption by President Underwood opened the peak of the dramatic climaxes, and from this cultural-political backdrop, one can see how the doctrine of Separation of Powers, as derived from Montesquieu's *trias politica*, is deeply rooted in both the political system as well as the ideological consciousness of the American audience.

The doctrine of Separation of Powers appears in many court cases, including *Myers v. United States*,[16] a well-known American case decided nearly a hundred year ago, concerning whether the President has the power to appoint and remove the executive of the United States with the advice and consent of the Senate under Article II of the Constitution of the United States. The erstwhile Chief Justice William Taft, in the judgement, reaffirmed that Montesquieu's notion of the independence between the legislative, the executive and the judicial branches is a security of the people under their approval; accordingly, the Constitution of the United States vested the Congress with legislative power, the President with executive power, and the Supreme Court and inferior courts with judicial power.[17] The Court also traced back to Thomas Jefferson's Draft of a Fundamental Constitution for the Commonwealth of Virginia, where the founding fathers of the United States reaffirmed the spirit of Montesquieu's separated powers among the three branches. The role sovereignty plays in the discourse of liberalist political school of thoughts will be further examined in the next section.

III. ELEMENTS OF THE SEPARATION OF POWERS IN THE CONSTITUTIONAL TEXT

The Constitution of the United States was largely based on different liberalist notions of an "ideal state",[18] and the doctrine of *trias politica* is no exception.[19] In *Constitutional Limitations*, Judge Cooley wrote on the separation of functions between legislative, executive, and judicial organs as an established feature of the American government and sovereignty. He described

[15] A popular American political thriller TV drama demonstrating the game of politics in the United States.

[16] Myers v. United States, 272 U.S. 52 (1926).

[17] *Id.*

[18] William B. Munro, *An Ideal State Constitution*, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1935, at 1, 1.

[19] Michael Zuckert, *On the Separation of Powers: Liberal and Progressive Constitutionalism*, SOC. PHIL. & POL'Y, July 2012, at 335, 345.

it as "one of the most noticeable features in the American constitutional law",[20] and that the American people have conferred the full and complete power to be exercised by the sovereign power of the country subject to such restrictions.[21] The same opinion has also been upheld by Huntington.[22] Such understanding of the liberalist doctrine of *trias politica* rested on the relationship between the sovereignty and the limitations of powers as imposed by the Constitution of a Country.

However, that being said, the doctrine of Separation of Powers is not that sclerotic in the context of the United States' politico-legal regime. In *Morrison v. Olson*,[23] the supreme court held that the means of selecting the Attorney General to recommend an "independent counsel" to investigate and prosecute government officials who violated the federal criminal laws under the Ethics in Government Act of 1978[24] did not contravene Article III of the Constitution of the United States, on the ground that such manner did not impermissibly interfere with the functions of the Executive Branch of the government.

Further, in *Wellness International Network v. Sharif*,[25] with the voluntary consent of the parties, the bankruptcy courts can adjudicate claims that are normally be heard by an Article III court, and that such manner did not contravene Article III of the Constitution of the United States, on the grounds that the power of the bankruptcy courts was delegated by the Congress with limited power and for a limited purpose. Such a pragmatic approach taken by the majority of the court was not without dissent; there was opinion among the chief judges that the court should have taken a more strict and doctrinal approach in relation to the doctrine of Separation of Powers.[26]

The above two cases, thus, manifested the importance of scrutinizing the elements of Separation of Powers, if any, in the textual and court case-based constitutional framework of the HKSAR. Namely, whether there is mechanism as designed within the Basic Law which expressively or impliedly suggests that the institutional organs are subject to the powers of the Central Authorities;

[20] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 86 (2d ed. 1871).

[21] *Id.* at 86.

[22] In his book, Huntington wrote: "*When an American thinks about the problem of government-building, he directs himself not to the creation of authority and the accumulation of power but rather to the limitation of authority and the division of power. Asked to design a government, he comes up with a written constitution, bill of rights, separation of powers, checks and balances, federalism, regular elections, competitive parties — all excellent devices for limiting government. The Lockean American is so fundamentally antigovernment that he identifies government with restrictions on government.*" SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 7 (Yale Univ. Press 1973).

[23] Morrison v. Olson, 487 U.S. 654 (1988).

[24] Ethics in Government Act of 1978, Pub. L. 95–251, 92 Stat. 1824–1867, 95th Cong. (1978).

[25] Wellness International Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

[26] Chief Justice G. Roberts, Jr. dissented in that case, his lordship opined that such approach would undermine the principle of separation of powers, especially the judicial power, as the bankruptcy court does not have the constitutional power to adjudicate in that circumstance. A litigant's consent to adjudication beyond Article III is a violation of the separation of powers. *Wellness International Network, Ltd.*, 135 S. Ct. at 9.

also, whether there is any "substantive constitutional commitments" [27] prescribed in the Basic Law other than "OCTS" and "High Degree of Autonomy"; and more importantly, how the Central Authorities delegate powers to the institutional organs in the HKSAR, or whether such delegations are within limitations or subject to certain absolute principle which gives no room for further adjustment. The following sessions would turn to the examination of the constitutional text of the HKSAR, namely, the Basic Law and the Constitution of the People's Republic of China.

Authoritative directions (such as Deng Xiaoping's (邓小平)[28]) on the executive-led political structure of Hong Kong, both before and after the 1997 Hand-over (回归), are undeniably at the centre of the discussions of the political structure of the HKSAR.[29] Yet, as distinguished from most of the legal commentaries which focus on the liberalist notions of the complete restraint of power as opposed to any concentrated governmental power,[30] or, a complete rejection of integrating with a new emerging model of governance under the socio-legal-politico-architecture in China and a vivid tendency to preserve the existing liberalist ideological order in Hong Kong, [31] or, "*Sub-constitutionalism*",[32] this essay seeks to answer a more fundamental question: Under the sovereignty of China and being a semi-autonomous region of the unitary nation, would there ever be liberalist *trias politica* in Hong Kong?

Such a question would be approached by critically examining the functions of the executive, legislative and judiciary power in the HKSAR, as well as the implication of the National People's Congress (NPC)'s power of the interpretation of the Basic Law.

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[27] Yu Xingzhong, *Formalism and Commitment in Hong Kong's Constitutional Development*, *in* INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE 183, 184 (Fu Hualing et al. eds., 2007).

[28] During a meeting with members of the Basic Law Committee in 1987, Deng Xiaoping (邓小平) rejected the idea of Separation of Powers for Hong Kong's post-handover political structures, *see* Gary Cheung, *Hong Kong "Separation of Powers": Why Beijing is Laying Down the Law on Who's in Charge*, SOUTH CHINA MORNING POST (Mar. 16, 2015), https://www.scmp.com/news/hong-kong/politics/article/1858535/why-beijing-laying-down-law-whos-charge-hong-kong.

[29] Wen Gang, *HK Executive-led Political System Determined by Basic Law*, CHINA DAILY (Sept. 8, 2020), http://www.chinadaily.com.cn/a/202009/08/WS5f571035a310675eafc583f8.html.

[30] Johannes M. M. Chan, *A Shrinking Space: A Dynamic Relationship between the Judiciary in a Liberal Society of Hong Kong and a Socialist-Leninist Sovereign State*, 72 CURRENT LEGAL PROBLEMS 85 (2019).

[31] Samson Yuen & Edmund W. Cheng, *Between High Autonomy and Sovereign Control in a Subnational Island Jurisdiction: The Paradox of Hong Kong Under "One Country, Two Systems"*, ISLAND STUD. J., Nov. 2020, at 131 (2020).

[32] Zhu G. B. & Antonios Kouroutakis, *The Hong Kong Subconstitutional Model of Separation of Powers: The Case of Weak Judicial Review* 47 HONG KONG L.J. 221, 240 (2017). According to some legal scholars, there are three models of sub-constitutionalism, including (a) monistic sub-constitutionalism which provides that there is a hierarchy between the two vertical legal orders, (b) dualism sub-constitutionalism which provides that the two legal orders are distinct and without any hierarchy, and (c) pluralism sub-constitutionalism which provides that each legal order makes competing claims about supremacy and on legal matters that affect both legal orders.

A. *Separation of Functions Under the Hong Kong Basic Law*

The Basic Law provides the separation of functions between different institutional organs, and assigned certain functions to the executive, legislative and judicial organs of the HKSAR.

On the functions of the HKSAR Government, according to Article 59 of the Basic Law, the HKSAR Government is the executive authority of the Region.[33] Article 62 of the Basic Law further provides the functions of the HKSAR Government, including: (1) to formulate and implement policies; (2) to conduct administrative affairs; (3) to conduct external affairs as authorized by the Central People's Government under the Basic Law; (4) to draw up and introduce budgets and final account; (5) to draft and introduce bills, motions and subordinate legislation; and (6) to designate officials to sit in on the meetings of the Legislative Council and to speak on behalf of the government.[34]

According to Article 64 of the Basic Law, [35] it provides that the Government of the HKSAR is accountable to the Legislative Council of the Region, the functions of the Government include (1) implementing laws passed by the Council and already in force, (2) presenting regular policy addresses to the Council, (3) answering questions raised by members of the Council, and (4) obtaining approval from the Council for taxation and public expenditure.

Articles 109 and 118 of the Basic Law provide that the HKSAR Government shall provide an economic and legal environment for encouraging investments, technological progress and the development of new industries, as well as maintaining the status of Hong Kong as an international financial center.[36]

The functions of the HKSAR Legislative Council, according to Article 73 of the Basic Law, include but are not limited to (1) enacting, amending and repealing laws, (2) examining and approving budgets introduced by the government, (3) debating issues concerning public interests, and (4) endorsing the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court.[37]

On the functions of the HKSAR Judiciary, according to Articles 80 and 81 of the Basic Law,[38] the courts of the HKSAR at all levels (including the Court of Final Appeal, the High Court, district courts, magistrates' courts and other special courts) can exercise the judicial power of the Region. Further, Article

[33] Xianggang Tebie Xingzhengqu Jiben Fa (香港特别行政区基本法) [The Basic Law of the Hong Kong Special Administrative Region] (promulgated by the Nat'l People's Cong., Apr. 4, 1990, effective July 1, 1997), art. 59.

[34] The Basic Law, art. 62.

[35] The Basic Law, art. 64.

[36] The Basic Law, art. 109 & 118.

[37] The Basic Law, art. 73.

[38] The Basic Law, art. 80 & 81.

82 of the Basic Law provides that the power of final adjudication of the HKSAR is vested in the Court of Final Appeal.[39]

Apart from the above distribution of functions as prescribed in the Basic Law of the HKSAR, there are certain provisions of the Basic Law which provide that (1) the Chief Executive of the HKSAR may return a bill to the Legislative Council if that is not compatible with the overall interest of the Region,[40] that (2) the Chief Executive is also vested with the power to dissolve the Legislative Council,[41] and that (3) the Chief Executive must resign under certain circumstances in relation to the dissolved Legislative Council or if she/he losses the ability to discharge the duties.[42]

However, on the outer surface of the textual reading of the Basic Law, there is no explicit indication or mentioning of the doctrine of separation of powers/*trias politica* throughout the whole Basic Law.[43] And yet, it is also undeniable that many liberalist countries upholding the doctrine do not directly mention separation of powers/*trias politica* in their constitutional documents.[44] Thus, it requires one to look deeper into the implicit context or to see whether the doctrine has been conceptualized in the Basic Law. Even though the separation of powers in Hong Kong may be a hybrid of *trais politica* and *One Country Two Systems*, it is found that all the provisions of the Basic Law cited above, which provide a certain degree of the balance and restraint of powers, are only related to the internal matters of Hong Kong on an administrative level.[45] In other words, as to the restraint of the sovereign power, the HKSAR is totally subjected to the People's Republic of China.[46] Further, as a semi-autonomous region of a unitary nation, a formalist model of *trias politica* would inevitably mitigate the Central Authorities' jurisdiction over Hong Kong. From this perspective, a general conclusion that there is liberalist *trias politica* in Hong Kong is fundamentally erroneous and misunderstands the constitutional relationships between the Central Authorities and the HKSAR; that is, Hong Kong is "an inalienable part of the People's Republic of China".[47] The importance of the role that sovereignty plays in the constitutional hierarchy would be further examined in the following sub-sessions.

[39] The Basic Law, art. 82.

[40] The Basic Law, art. 49.

[41] The Basic Law, art. 50.

[42] The Basic Law, art. 52.

[43] Zhu & Kouroutakis, *supra* note 32, at 227. Noted that the doctrine of separation of powers is also absent from the Constitution of the People's Republic of China.

[44] *Id.* at 277.

[45] Xu Xiaobing & George D. Wilson, *The Hong Kong Special Administrative Region as a Model of Regional External Automy,* 32 Case W. Res. J. Int'l L. 1 (2000).

[46] Such sovereign power can also be manifested in art. 13 of the Basic Law, in relation to foreign and external matters; and also art. 14 of the Basic Law, in relation to national defence and public order.

[47] The Basic Law, art. 1.

B. Power of Interpreting the Basic Law

According to Articles 57 and 58 of the Constitution of the People's Republic of China, the NPC is the highest organ of state power and its permanent body is the Standing Committee, both of which exercises the legislative power of the state.[48] Thus, the acts of the NPC are the acts of sovereignty.[49] As a result, based on the constitutional text, it indicates that both the political structure and the legal system of China does not carry the elements of Separation of Powers in the liberalist sense or the same as under the Common Law.[50]

The Basic Law of the HKSAR, as posited in the constitutional hierarchy of China, is a national law and is the constitution of the region.[51] As a hybrid of both the Chinese Law and Common Law,[52] Article 158(1) of the Basic Law also reflects the NPC's power of interpretation:

"*The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.*"[53]

Such power of interpretation is not only bound to be exercised when litigation arises but is also plenary and covers all the provisions of the Basic Law.[54] Further, the Basic Law also provides that when there are affairs concerning the responsibility of the Central People's Government or the relationship between the Central Authorities and the Region, the Hong Kong Court of Final Appeal should seek the interpretation of those provisions of the Basic Law when adjudicating cases.[55]

As such, the Standing Committee of the National People's Congress's (NPCSC) power of interpretation made clear that there is a higher-level institution within the constitutional hierarchy of China that functions to clarify or supplement the laws of Hong Kong.[56]

In order to examine the constitutional hierarchy as within the HKSAR, it is important to examine how a court case triggered the first NPCSC interpretation of the Basic Law two years after the 1997 Hand-over. After the Court of Final Appeal delivered the judgement of the *Ng Ka Ling* (*An Infant*) *v. Director of Immigration* (the *Ng Ka Ling* case) on January 29, 1999, the Hong Kong Director of Immigration filed a notice of motion applying for the clarification on the issues of the interpretation of the Basic Law by the Standing Committee

[48] XIANFA art. 57 & ch. 58 (2018) (China).

[49] *See* Ng Ka Ling v. Director of Immigration, [1999] 2 H.K.C.F.A.R. 4.

[50] Chen Duanhong (陈端洪), Sanquan Fenli de Luoji ji Qi Bianjie (三权分立的逻辑及其边界) [The Logic and Boundaries of *Trias Politica*], 3 FAXUEIA CHAZUO (法学家茶座) [TEAHOUSE FOR JURIST], http://www.360doc.com/content/20/1015/15/60669552_940595131.shtml.

[51] *Id.*

[52] PRISCILLA LEUNG MEI FUN, THE HONG KONG SAR BASIC LAW: HYBRID OF COMMON LAW AND CHINESE LAW (2006).

[53] The Basic Law, art. 158, para. 1.

[54] *See* Lau Kong Yung v. Director of Immigration [1999] 4 H.K.C. 731.

[55] The Basic Law, art. 158, para. 3.

[56] *See* Director of Immigration v. Chong Fung Yuen [2001] 4 H.K.C.F.A.R. 211.

of the NPC and Hong Kong courts, on the grounds of "*great constitutional, public and general importance*".

On February 26, 1999, the Court of Final Appeal took an exceptional course and further delivered a judgement responding directly to the constitutional controversies brought by the court's previous judgement, which stated that there are no constitutional rights or duties of the Hong Kong courts to challenge or even question the authority of the NPC and its standing committee:

> *The Court's judicial power is derived from the Basic Law. Article 158(1) vests the power of interpretation of the Basic Law in the Standing Committee under Articles 158(2) and 158(3). In our judgement on 29 January 1999, we said that the Court's jurisdiction to enforce and interpret Basic law is derived from and is subject to the provisions of the Basic Law whose provisions include the foregoing.*[57]

> *The Court's judgement on 29 January 1999 did not question the authority of the Standing Committee to make an interpretation under Article 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court's judgment question, and the Court accepts that it cannot question, the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedures therein.*[58]

C. Sovereignty and the Separation of Powers

The aforementioned power to interpret the Basic Law has manifested the exercise of judicial sovereign power by the Central Authorities of China, especially, Article 158(3) of the Basic Law provided that the Court of Final Appeal should seek the interpretation from the NPCSC on sovereignty issues.[59] The interpretation and explanation of the relevant provisions of the Basic Law would inevitably cause a direct influence on the adjudication of the Hong Kong courts.[60] From this perspective, it is clear that there is a higher-rank institution exercising constitutionally legitimized power above the Court of Final Appeal in Hong Kong.

The interpretation made by the NPCSC in 1999 in response to the Court of Final Appeal's attempt to extend the judicial independence of Hong Kong further manifested the fact that the judicial organ in Hong Kong does not enjoy

[57] *See Ng Ka Ling*, [1999] 2 H.K.C.F.A.R. 4; Tsui Kuen Nang v. Director of Immigration, [1999] 1 H.K.L.R.D. 315; Director of Immigration v. Cheung Lai Wah [1999] 1 H.K.C. 291.

[58] *See Ng Ka Ling*, [1999] 2 H.K.C.F.A.R. 4, para. 6.

[59] The Basic Law, art. 158, para. 3.

[60] HARDINGE STANLEY GIFFARD, HALSBURY'S LAWS OF HONG KONG para. 105.137 (1995).

full independence as reflected in other Common Law jurisdictions.[61] The constitutional order, as well as the politico-legal model designed under the Hong Kong Basic Law, preserved and maintained the sovereignty of the Central Authorities. In fact, some legal scholars are of the opinion that such mechanism allows the Central Authorities to step in when there is constitutional controversy, thus limiting the autonomy of the HKSAR.[62]

Sovereignty is an important concept which the founding theorists of liberalism also upheld its supremacy. For Hobbes, the sovereign cannot be bound by the general laws.[63] As to Bodin, he was a supporter of single ultimate sovereignty.[64] Further, even Duguit, who strongly negated and criticized the notions of sovereignty and state power, also held that a logical consequence of the indivisibility of sovereignty is the impossibility of a separation of powers.[65] He further held that sovereignty cannot be divided into several elements or into several organs of representation.[66] Following this logic, sovereignty is absolute and cannot be divided. Therefore, upholding the liberalist *trias politica* in Hong Kong is inherently paradoxical. In other words, unless Hong Kong itself enjoys an independent sovereignty, the aforementioned division of functions would only amount to a *separation of functions* but not a liberalist *trias politica* because there lacks a mechanism to restrain the powers of the "rulers" or "sovereign", which in the context of Hong Kong, is China or the Central Authorities of China (or the Chinese Communist Party, the *de facto* sovereign in China according to Professor Jiang Shigong (强世功)).[67] The same goes to the colonial Hong Kong, the political powers were absolutely subjected to the Governor, let alone any deviation from the sovereignty of the United Kingdom and the crown. It is from such perspective, the author argues the first reason why a liberalist *trias politica* is deemed to be delusional in the context of post-British colonial Hong Kong, especially, under Chinese Constitutionalism.

This has also exemplified the blind-spot of the normative law stream of academic thought. Namely, in searching for normative grounds and frameworks of the legal system as a closed and universal discourse, it has ignored the ontological differences among different socio-political context.[68] Accordingly, as Professor Chen Duanhong (陈端洪) rightly noted, the liberalist notion of *trias politica* deems the sovereignty of a nation as forever-stabilized, which neglects any possible exceptional conditions which would undermine its

[61] *The Five Cases of HKSAR Basic Law Interpretations by the PRC NPCSC in 1999, 2004, 2005, 2011 and 2016*, 50 *Chinese L. & Gov't* 10, 10–18 (2018).

[62] Yu Xingzhong, *Formalism and Commitment in Hong Kong's Constitutional Development*, *in* INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE (Fu Hualing et al. eds., 2007).

[63] Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 Bos. Coll. L. Rev. 433, 449 (2013).

[64] John A. Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393, 395 (1923).

[65] *Id.* at 395.

[66] *Id.* at 420.

[67] Jiang Shigong, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, MODERN CHINA, Jan. 2010, at 12, 36.

[68] Su Li (苏力), DAGUO XIANZHI (大国宪制) [THE CONSTITUTION OF CHINA] 4–6, 63 (2018).

sovereignty.[69] As such, one vital factor all commentators should take into account is that the Basic Law of the HKSAR together with the establishment of the HKSAR is a product of the sovereignty of China. There is a higher-rank constitutional institution above the executive, legislative and judicial organs of the HKSAR.[70] In this context, one can critically see the second reason why there can never be liberalist *trias politica* from an empirical perspective of how the politico-constitutional mechanism operates in Hong Kong. Not only should the Chief Executive (executive power) and the Legislative Council (legislative power) be accountable for the (whole) sovereignty of China,[71] the Central Authorities may also intervene the judicial power of Hong Kong courts in exceptional circumstances. Thus, any discussion on the liberalist *trias politica* in Hong Kong that ignored the national security and sovereignty of China would not be accurate and fail to recognize the political reality in Hong Kong. The exercise or non-exercise of such power, to what degree that power would be exercised, and when such power should be exercised, solely depend on the self-disciplined decisions and actions from the Central Authorities within the operations of the politico-constitutional mechanism in Hong Kong.

It would then turn to the third reason why liberalist *trias politica* is deemed to be a delusionary product in Hong Kong. First, one should look into the U.S. model of Separation of Powers once again, and critically see that another vital "function" of the discourse of the separation of powers in the context of the United States is to prevent promoting a single normative value under its democratic system, by which it seeks to preserve *normative pluralism* by treating different branches as distinctively isolated.[72] In other words, the socio-politico-legal mechanism cannot, and should not, be affected by the rise-and-fall of any particular political actors or normative values.[73] Yet, even within these boundaries, the legal regime of the United States (mainly be seen from the decisions of the Supreme Court) would only endeavour to seek such balance of powers within *normative pluralism* issues relating to "liberty, democratic accountability, rule of law and effective administration concerns", but not in the context of foreign affairs and national security.[74] Many of the socio-political norms the doctrine of separated powers seeks to require the three branches to step back are the ideological issues with thick political surrounding,[75] such as abortion and gun control. As such, it is logical to infer

[69] Chen, *supra* note 50, at 36.

[70] Jiang Shigong (强世功), Sifa Zhuquan zhi Zheng — Cong Wu Jialing An Kan Renda Shifa de Xianzheng Yihan (司法主权之争——从吴嘉玲案看"人大释法"的宪政意涵) [The Battle of Judicial Sovereignty — Exploring the Constitutional Implications of NPCSC's Interpretation from the *Ng Ka Ling* case], QINGHUA FAXUE (清华法学) [TSINGHUA LAW REVIEW], no. 5, 2009, at 5 (2005).

[71] Jermain T.M. Lam, *Political Accountability in Hong Kong: Myth or Reality*, 68 AUSTRALIAN JOURNAL OF PUBLIC ADMINISTRATION 73 (2009).

[72] Huq & Michaels, *supra* note 7, at 351.

[73] *Id.* at 351.

[74] *Id.* at 351.

[75] *Id.* at 431.

that a lack of the liberalist model of democratic system, including, *inter alia*, universal suffrage and multi-parties mechanism of rotation ruling, has unmasked the third reason why the liberalist *trias politica* is deemed to be delusional in the context of Hong Kong. From the colonial Hong Kong to the post-colonial HKSAR, there has never been a "ebb and flow of politics", the effect of normalization and ideology propaganda are largely initiated by different disciplinary institutions in Hong Kong, which is embedded in the British governance strategy in colonial Hong Kong.[76] Dialectically, if the liberalist *trias politica* really aims to prevent "bureaucratic expertise"[77] and "populist administration",[78] the boundaries of Chinese Constitutionalism may open a space to achieve so (will be discussed in later sessions). On a side note, as a former British colony and of great geo-political/financial value to China, national security would inevitably override the so-call democratic development in Hong Kong if such two values are in conflicts, thus a further assertion as to strengthening the Basic Law as a sub-constitution in Hong Kong is also deemed to be unattainable, especially under Chinese Constitutionalism.

To sum up this section, it is important for one to realize that in the contemporary liberalist political arena, the field of political dynamics has been regarded as a dichotomous opposition between "liberal democracy" and "totalitarian dictatorship",[79] and thus undermined the complex techniques of Governmentality[80] and rejected any possible alternative to the apparatus of a free market and "liberal conception of parliamentary government".[81] It may as well explain why the "disputes" on *trias politica* stirred a heat debate in Hong Kong. The liberalist ideology, which Hong Kong has been intricately influenced under the governance of the colonial British government and as an international financial hub,[82] has already posited individual liberty on the absolute opposite of authoritative (or joint-power) governance. And yet, in the current space-time, it needs not require one to study Erich Fromm's *Escape from Freedom*[83] in great detail, but to have a revision on how China and other liberalist countries handled the Covid-19 pandemic — such an empirical comparison serves as an enlightenment for one to ponder over the above issues from a fresh perspective.[84]

[76] *See* JIANG SHIGONG, CHINA'S HONG KONG: A POLITICAL AND CULTURAL PERSPECTIVE ch. 3 & 4 (2017).

[77] *Id.* at ch. 3 & 4.

[78] *Id.* at ch. 3 & 4.

[79] Geoff Boucher & Matthew Sharpe, *"Žižek's Communism" and in Defence of Lost Causes*, INT'L J. ZIZEK STUD., no. 2, 2010, at 1, 2.

[80] A Foucauldian term: "Governmentality is about how to govern", *see* FOUCAULT, M. ET AL., THE FOUCAULT EFFECT 35 (1991).

[81] The Basic Law, art. 158, para. 3.

[82] JIANG, *supra* note 76, at ch. 3 & 4.

[83] ERICH FROMM, THE FEAR OF FREEDOM (2011).

[84] The governance model of joint-powers is not as "evil" as argued by many liberalists, it can be critically deployed and well-devised. Therefore, the author argued that a dichotomous notion of centralized powers/de-

Back to the context of this essay, as will be further elaborated in the following sessions, the liberalist notions of power and governance, including the creation of the concept of *trias politica*, were largely originated from the prime assertion that power is a materialised tool and that "*power tends to corrupt and absolute power corrupts absolutely*".[85] Such concepts neglected how the macro- and micro-dynamics of power relations operate. Thus, embracing only the doctrinal and formalist model of power relations is not only problematic but erroneous.

IV. THE DOCTRINAL SEPARATION OF POWERS V. THE MICRO-DYNAMICS OF POWER RELATIONS

A. De-construction and Re-construction

The above analysis is only based on a normative reading of the constitutional framework, what the author really seeks to argue is in a rather philosophical (or ideological) dimension. Before continuing the analysis in the preceding section, the author seeks to explore the neo-theoretical grounds of the adoption of a Foucauldian school of thought and the critique on the liberalist ideology.

From Foucault to Derrida, a wave of post-modernist theorist in the past century had sensitized us to reconsider the validity of certain concepts and knowledge that were once taken for granted, namely, the metaphysical value of *presence* throughout the "western" philosophy tradition.[86] From the critique of *patria potestas* and anti-homosexualism to the attack of racial supremacy, those post-modernist theorists sought to de-construct ideology from its phenomenological appearance in the society, thus, untwist the deadlock and released any possibility of the gradual progression of the humanity. Following this stream, only by exposing the formalistic/doctrinal deadlock of *trias politica* and liberalism can a space of re-construction be made possible.[87] Accordingly, it is neither desirable nor appropriate to prioritize liberalist theories above any other school of thought, or *vice versa*; such power relations between different school of thought should be one that is constructive and positive.

In essence, how did the above-mentioned philosopher explore and expose the gap of certain socio-political concepts and values? Put simply, Foucault's genealogical method of de-constructing the modern concept of "sexuality" from the heterogeneous ensemble of "discourse, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific

centralized powers, or, joint-powers/separation of powers are outdated, which fail to response to the complex problems of governmentality in the age of digitalization and "globalization".

[85] *Supra* note 12.

[86] ARTHUR BRADLEY, DERRIDA'S OF GRAMMATOLOGY: AN EDINBURGH PHILOSOPHICAL GUIDE 6 (2008).

[87] For the intersection of law and Derridean deconstruction, *see* Catherine Turner, *Deconstructing Transitional Justice,* 24 LAW & CRITIQUE 193 (2013); *see also* PIERRE LEGRAND, DERRIDA AND LAW (2009).

statements, philosophical, moral and philanthropic positions".[88] Thus, he unmasked how different institutional power constituted and concealed such concepts. For example, in the context of sexuality, it is "medicalization of sexuality" (medical institutions), "prioritized place of family in modern society" (moral consensus), and "criminal justice and law" (legal system).[89] Such methodology has been widely adopted interdisciplinarily in the studies of social sciences and humanities, including law.[90] In fact, from a more legal studies-leaning perspective, the methodology of de/re-construction of legal concepts is nothing new. To be seen as a continuance of the Critical Legal Studies academic stream, "rational reconstruction" takes bodies of seemingly confusing, disordered and conflicting precedent together, to re-construct them in a way that is comprehensible.[91] Such model of legal genealogy can also be seen in China.[92]

B. "Truthiness" of Trias Politica

Back to the context of this essay, *as per* the discussions in previous sessions, based on the constitutional text of the HKSAR and the relevant court cases, it appears that the existence of *trias politica* is uncertain and not clear in Hong Kong. However, from the perspective of the sociology of law, in addition to the normative textual reading of a particular area of law or legal principle, one should further examine the effective operations of the law and the intended outcomes of the legal doctrine.

In our current studies, the examination of the effective operation of law and the intended outcomes of the legal doctrine are the checks and balances of powers, and the prevention of corruption and illegal political exchange in Hong Kong. One should then critically see that the following equation is not only too simplistic but also ignores the discursive operation of power:

"The lack of doctrinal Separation of Powers" = "Absolute power domination"

This essay would then turn to the analysis of liberalism and the operations of the power apparatus, as well as the "Truthiness" of *trias politica*. As Professor Costas Douzinas rightly noted, the founding theorists of Liberalism, including Hobbes, Locke and Montesquieu, were concerned and feared that if the "plebs" and "underserving poor" received and acquired political power, they would abolish the "quasi-transcendental precondition"/basis of capitalism

[88] ROBERT W. GEHL & COLIN KOOPMAN, GENEALOGY AS CRITIQUE: FOUCAULT AND THE PROBLEMS OF MODERNITY 233 (2013).

[89] *Id.* at 4.

[90] BEN GOLDER & PETER FITZPATRICK, FOUCAULT'S LAW (2009).

[91] Huq & Michaels, *supra* note 7, at 354.

[92] According to Professor Jiang, the critical legal studies in China has pushed the wave of legal transplantation. *See* Jiang Shigong (强世功), Pipan Falv Lilun de Puxi: Yi <Qiuju Da Guansi> Yinfa de Faxue Sikao wei Li (批判法律理论的谱系：以《秋菊打官司》引发的法学思考为例) [The Genealogy of Critical Legal Studies: on the Story of Qiuju], 31 ZHONGWAI FAXUE (中外法学) [PEKING UNIVERSITY LAW JOURNAL] 307, 308–09, 312 (2019).

and liberal political institutions.[93] From a genealogical perspective, the liberalist political discourse was originated from the perception that the freedom/liberty of an individual is on the absolute opposite of the dominated political power. Namely, the government is the enemy of the people.[94] Alike all other popularised and legitimised "modern" legal concepts, the doctrine of *trias politica* is yet another derivative product of a specific set of "linguistically infused socio-political-historical-cultural-legal practices",[95] which (re-)engineers the production of subjectivity.[96] Without perceiving the present as a linear progression in time, Foucault argued that "truth" cannot be more than "a thing of this world".[97] Further, in one of his most celebrated book, *Beyond the Perspective of Law* (超越法学的视界), Professor Jiang Shigong reflected on the Foucauldian approach towards the studies of power relations between the subject and the Other,[98] as well as the "intricate" micro-power dynamics among the subjects: "*In addition to power relations on the macro-level (such as trias politica), we should also pay considerable attention to intricate micro-power dynamics*"[99] In fact, Professor Jiang's assertion has echoed what Foucault referred to as an atomic power which is diffused throughout the entire social field through multi-disciplinary mechanisms and techniques.[100] Put simply, the social apparatus is operated in a micro-physics of power.[101]

Also, from the above critical perceptive against discursive discourse, the conception that power is to be obtained and may be "abused" is fundamentally problematic in the Foucauldian discourse of power relations.[102] The Foucauldian studies of power focus not on *what is power*, but on *how power operates*.[103] Further, the Foucauldian reading of power, as power is not solely originated from the institutional repression of the sovereign organs, focuses

[93] Germanou, M. & Douzinas, C., *Democracy, Neoliberalism, and Resistance: an Interview with Costas Douzinas*, 9 SYNTHESIS: AN ANGLOPHONE JOURNAL OF COMPARATIVE LITERARY STUDIES 158, 158 (2016).

[94] JIANG SHIGONG (强世功), CHAOYUE FAXUE DE SHIJIE (超越法学的視界) [BEYOND THE PERSPECTIVE OF LAW] 155–58 (Peking Univ. Press 2004).

[95] JANE FLAX, DISPUTED SUBJECTS: ESSAYS ON PSYCHOANALYSIS, POLITICS, AND PHILOSOPHY 99–100 (1993).

[96] ZHAO WENZONG, DE/SEXING HONG KONG LAW (Red Publish 2017).

[97] Lennie R. C. Geerlings & A. Lundberg, *Global Discourses and Power/Knowledge: Theoretical Reflections on Futures of Higher Education During the Rise of Asia*, 38 ASIA PACIFIC JOURNAL OF EDUCATION 229, 233 (2018).

[98] In phenomenology, the Other is identified by the Self as dissimilar to and the opposite of the Self (In Chinese, the Other is "他者"). *See* TED HONDERICH, THE OXFORD COMPANION TO PHILOSOPHY (2d ed. 1995).

[99] Jiang Shigong, *How to Explore the Chinese Path to Constitutionalism? A Response to Catá Backer*, MODERN CHINA, Mar. 2014, at 196, 198.

[100] Erica Susser, Foucault and Education: The Punitive and Disciplinary Societies (2016) (Ph.D. dissertation, Educational Leadership & Policy Studies) (On file with the Arizona State University Library Digital Depository).

[101] MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Vintage Books 1995).

[102] MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972–77 (Colin Gordon ed. 1st ed. 1980).

[103] Roger Deacon, *Strategies of Governance Michel Foucault on Power*, THEORIA: A JOURNAL OF SOCIAL AND POLITICAL THEORY, Dec. 1998, at 113 (1998).

instead on the mechanism which consists of a complex web of power-knowledge.[104]

One of the most important contribution of Foucault is that he located various model of power, including "bio-power", "discipline" and "sovereign power". There are interconnections of discourse and practice, and of knowledge and power.[105] Therefore, it is critically argued that there was no restraint or constriction of power (as argued by the liberalist), as power is not a materialized object tightly held by a subject/organ, but rather, utilized by the dominant party in the power structure. Thus, no institutional organs can be "truly" independent from the complex web of micro-power intersection. From such perspective, one should go beyond the mere formalist analysis of the complex web of micro-power intersection of different institutions, and ask: What constitutes such complex web? What is the ideology rested upon/concealed by such web? And what "knowledge" has it relied upon so as to constitute this web of "power"?

The answer can be seen in the very beginning of this essay, where the author argues that both the "formalist" and "functionalist" explanation of *trias politica* are still hovering above the liberalist ideology.[106] For example, in the context of the United Kingdom, its political arena has long been criticized as a hub of the Oxbridge elites, and outsiders who do not share the same/similar socio-cultural background would find it very difficult to enter the interpersonal network of the "elites".[107] As such, not only are those future-leaders being educated and trained in a similar manner, they are instilled with a similar ideology (*Conservative*, in the context of the UK). Thus, their decisions and judgements would more or less, consciously or unconsciously, embrace the same stream of theories and ideas, making a de/re-construction of the politico-legal apparatus more difficult, if not impossible; the UK's low social mobility and the monopoly of Oxbridge graduates can be seen as signs of such phenomena. Therefore, from such perspective of Foucauldian power-knowledge, liberalist *trias politica* is merely a formalist and doctrinal creation of the Anglo-liberalism at its purest, a mask concealing the inter-power relationships of governance.

Back into the current context of this essay, in fact, even from the perspective of the renowned philosopher John Rawls' liberalist political theories, practitioners (including lawmakers and lawyers) advocating for the liberalist *trias politica* in the context of the HKSAR has contradicted the "Veil of

[104] Jiang, *supra* note 99, at 203.

[105] Marianne Constable, *Foucault & Walzer: Sovereignty, Strategy & the State*, 24 POLITY 269, 279 (1991).

[106] The example of the Oxbridge elitism is only taken as an illustration, and readers should avoid any biased stereotyping.

[107] Carole Cadwalladr, *Whatever the Party, our Political Elite is an Oxbridge Club*, THE GUARDIAN (Aug. 24, 2015), https://www.theguardian.com/commentisfree/2015/aug/24/our-political-elite-oxbridge-club. Also, according to the following news report, the UK cabinet members are more or less from the same background, in terms of personal network, education, experience and family background. *See* Amy Walker, *Two-thirds of Boris Johnson's Cabinet Went to Private Schools*, THE GUARDIAN (July 25, 2019), https://www.theguardian.com/education/2019/jul/25/two-thirds-of-boris-johnsons-cabinet-went-to-private-schools.

Ignorance"[108] because of the perverted relationship between *trias politica* and their functions. Put simply, without a proper system of checks and balances for them to take part in, those practitioners would be reduced to *de facto* rubber-stamp and, to certain extent, their interests would be undermined.[109] As such, one should stay cautious from any liberalist who advocates for the *status quo* if one intends to explore any possible re-construction of the politico-legal apparatus. Such a group of practitioners (*e.g.*, the Hong Kong Bar Association and pro-liberalist lawmakers) has formed a complex intersecting web ("power"), upholding the same/similar "knowledge" (liberalism), so as to maintain and smoothen the current ideological politico-legal apparatus, making a de/re-construction of the apparatus extremely difficult. Critically, the complex intersectional web of knowledge-power is not an inherently fault, but when there are conflicting values to the "knowledge" they uphold, it would impose a great burden of substantial socio-political progress of the society. For example, the controversy of mandatory Covid-19 test in mid-2020.[110] When placing *prima facie* individual liberty on the absolute opposite of the concentrated governmental apparatus, the public health crisis in Hong Kong was still not under control (as of November 2020). The same goes to the "disputes" over separation of powers in Hong Kong. From such perspective, here appears this section's first reason why *trias politica* is deemed to be a delusionary product in a philosophical dimension. Where all the mainstream practitioners are upholding the same/similar ideology, their decisions/judgements are derived from the same/similar theories/ideas. When those "elites" in power are upholding similar ideology, the effect of checks and balances is deemed to be only scratching the surface.

C. Restraints by Other Orders

Turning the above narrow interpersonal knowledge-power to a wider scene of analysis, Žižekian philosophical analysis between the manifestation of certain socio-political value and its phenomenological appearance in the society is of value to the discussion in this section. In his essay, *Tolerance as an Ideological Category*,[111] philosopher Slavoj Žižek argued that the "formal freedom" or the "appearance" of *egaliberté* can re-articulate the actual socio-economic relations by way of their progressive 'politicization' and impose questions such as "why shouldn't women also vote?" or "why shouldn't conditions at work place also be of public political concern?" Dialectically, following the Žižekian logic, if the mere appearance of such a value cannot re-

[108] JOHN RAWLS, A THEORY OF JUSTICE 118–23 (Harvard. Univ. Press 1971).

[109] For the pervasive relationship of "law" and "crime"/ "sin", *see* SLAVOJ ŽIŽEK, THE PUPPET AND THE DWARF: THE PERVERSE CORE OF CHRISTIANITY (MIT Press 2003).

[110] *Hong Kong Embarks on Mass Covid Testing amid Criticism*, BBC NEWS (Sept. 1 2020), https://www.bbc.com/news/world-asia-china-53981010.

[111] Slavoj Žižek, *Tolerance as an Ideological Category*, 34 CRITICAL INQUIRY 660, 669 (2008).

articulate true socio-economic relations of power, it would only be "*illusory expression of its concrete social content*".[112]

Applying the above understanding between the gap of actuality and illusion, it is observable that there are distinct operations among the institutional organs (the different functions of the executive, legislative and judicial branches), but the reading of such differences of their functions as the absolute balancing or constraint of power is not very convincing in the context of Hong Kong. Well-divided functions among different institutional organs are, in effect, not the ultimate aims of *trias politica*.

To dig in deeper, one should not only look at the normative textual interpretation of the laws, but the actual effect of certain phenomena within the society. As advocated by many liberalist supporters of the liberalist *trias politica*, the doctrine is "*a cornerstone of governance in democratic nations*"[113] and to prevent corruption by the "*misuse of public office for private gain*".[114] The values which the Constitution of the United States seeks to prescribe and preserve are "*liberty, effective administration, democratic accountability, the rule of law and the prevention of tyranny*".[115] From this perspective, one should critically ask: Is it really the "Separation of Powers" (notwithstanding the fact that it does not really exist in either colonial Hong Kong or the post-colonial HKSAR), which aims to constraint the power of the institutional organs so as to achieve the balance of powers, that has effectively eliminated the core problem of corruption and illegal political exchange in Hong Kong? Or is there another force of institutional power exercised to concretely resolve the problem? Applying another Foucauldian concept *Governmentality*, the Hong Kong Independent Commission Against Corruption (ICAC) and the Hong Kong Police Force (HKPF) represent two of the many disciplinary institutions[116] in Hong Kong.

Taking the low corruption rate [117] and concrete public safety in the HKSAR as an example to illustrate the permeated operations of power among different institutional organs. Within the political discourse of Hong Kong, two

[112] *Id.* at 669.

[113] James E. Alt & David D. Lassen, *Political and Judicial Checks on Corruption: Evidence from American State Governments*, 20. ECONOMICS & POLITICS 33, 33 (2008).

[114] *Id.* at 33.

[115] Huq & Michaels, *supra* note 7, at 351.

[116] For Foucault, disciplinary institutions operate by (1) Functional inversion of disciplines (now they produce, not repress, things), (2) swarming of disciplinary mechanism (interlocking of institutions), and (3) state-control of mechanisms of discipline (the rise of the police-state, the night-watchman state, amd the welfare state). The State doesn't originate these mechanisms, but they play a key role in their promulgation. *See* Stephen Shapiro, *Michel Foucault's Discipline & Punish: The Birth of the Prison Reader/Workbook* 20 (Course Material of the University of Warwick, 2002), https://warwick.ac.uk/fac/arts/english/currentstudents/undergraduate/modules/fulllist/second/en229/marxfctintros_/foucault_reader.pdf.

[117] According to the Corruption Perceptions Index of Transparency International, Hong Kong is ranked the 16th least corrupt place among 180 countries/territories in the Corruption Perceptions Index 2019. *See* CORRUPTION PERCEPTION INDEX 2019, https://www.icac.org.hk/en/intl-persp/survey/corruption-perceptions-index/index.html (last visited Dec. 21, 2020).

of the most frequently cited "Core Value" from different political subjects of the broad political spectrum are "Integrity" and "Public Safety".[118] The ICAC and the HKPF, both as an institutional administrative apparatus of the Hong Kong society, aid the governance of the city and attempt to ensure the smooth operation of the Hong Kong society, especially in terms of the liberalist common law tradition: the protection of private property and public safety.[119]

Here appears this section's second reason why *trias politica* is deemed to be a delusionary product: The problems it seeks to tackle are actually done by other streams of disciplinary institutions. The maintenance of the integrity of the Hong Kong society and governmental institutions, as well as the public safety in general, are normatively and substantively contributed by the exercise of powers by the ICAC and the HKPF, which arguably creates a positive force of the power relations.[120] From such a perspective, the ideological "ideal state" of the balance of power under the Anglo-notion of the Rule of Law is unmasked: Instead of the mere formalist appearance of *trias politica*, a space of resistance against corruption and illegal political exchange is created by another branch of institutional power. In other words, from an empirical studies of the Hong Kong society, one can critically see that instead of relying on the doctrine itself, the supreme aims of *trias politica*, that is, to limit the powers of the "ruler" so as to avoid any tyrannous governance (here presuming the "ruler" as the HKSAR authorities instead of the Central Authorities of China because there simply lacks the mechanism to restrict the *de facto* sovereign in Hong Kong), is achieved by two disciplinary institutions, the HKPF and the ICAC, in a relatively micro-power dynamics. It therefore exposes the formalist limitation of *trias politica*, that it is only a delusionary product that conceals the actual Governmentality in Hong Kong, thus, reducing itself as part of the game of the house of cards.

D. Brief Reflections

To conclude the argument in this section, from a critical philosophical perspective, it is argued that neither is the doctrine of *trias politica* a universally "true" concept nor is any of the institutional organs being truly independent. As Professor Jiang Shigong rightly pointed out, from the Foucauldian perspective of power-knowledge, there are various ideological elements within the "Western" academic discourses that are pervasive in the legal discourse concerning constitutionalism and the rule of law.[121] Professor Jiang further pointed out that even the concept of "*Rule of Law*" is only a modern technique of "governmentality" in the Foucauldian sense, and constitutionalism is

[118] *See* Ambrose Leung, *Push to Defend City's Core Values*, SOUTH CHINA MORNING POST (June 7, 2004), https://www.scmp.com/article/458500/push-defend-citys-core-values.

[119] LUDWIG VON MISES, LIBERALISM: IN THE CLASSICAL TRADITION 37–38 (1985).

[120] Tony Kwok Man-wai, "*Effective Investigation of Corruption Case: the Hong Kong Experience*, https://www.unafei.or.jp/publications/pdf/GG7/sp3.pdf (last visited Dec. 21, 2020).

[121] Jiang, *supra* note 99, at 203.

"*nothing more than an institution that harmonizes and manages the power relations between the populace and the elites in control*".[122]

Therefore, the very concept of *trias politica*, as derived from Anglo-liberalism, is not universal and "true" in essence. The doctrine can be challenged and unmasked from the perspective of the Foucauldian reading of power relations: There are different level of micro-dynamics of power relations, and no institutional organ can be "truly" independent.

The ideal liberalist separation of powers is not the ultimate answer to the problems that it has proposed to tackle, a space of resistance against corruption and illegal political exchange is created by another branch of institutional power. In relation to exploring an alternative architecture of power-knowledge which can further offer a space of resistance against the problems unsolved under liberalism, Chinese Constitutionalism would be examined in the following section.

V. THE IMPLICATIONS OF CHINESE CONSTITUTIONALISM TO THE HKSAR

After examining the doctrine of Separation of Powers from a normative textual approach and the post-modernist approach of unmasking the ideological phenomenon of such liberalist concept, this section would critically examine the architecture of Chinese Constitutionalism and its implications to the HKSAR.

A. Diverse Schools of Thought

The Chinese legal academia is contributed by diverse academic schools that seek to develop a localized methodological jurisprudence in China.[123] In the context of constitutional law, such diversity has been amplified by Legal Dogmatics (Rechtsdogmatik), Normative Constitutionalism,[124] Party-State Constitutionalism and Sociology of Law.[125] While normative liberalist still seeks to strengthen the normalization of constitutionalism in China by the resurgence of the products of liberalism (which is full of gaps awaiting to be filled by the particular socio-political context it seeks to apply in)[126], other school of thought, including those adopted in this essay, are attempting to destabilize certain legal concepts, thus opening the gate of any possible re-construction of the legal discourse in the context of China,[127] which echoes the

[122] *Id.* at 203.

[123] Lei Lei (雷磊), FA JIAYI XUE DE JIBEN LICHANG (法教义学的基本立场) [THE FUNDAMENTAL STANCE OF LEGAL PRAGMATISM] 198 (2015).

[124] For normative constitutionalism, *see* LIN LAIFAN (林来梵), CONG XIANFA GUIFAN DAO GUIFAN XIANFA (从宪法规范到规范宪法) [FROM CONSTITUTIONAL NORM TO NORMATIVE CONSTITUTIONALISM] (2001).

[125] Lei Lei, *supra* note 123.

[126] Su, *supra* note 68, at 4–6, 63.

[127] Su Li (苏力), BIANFA FAZHI JI QI BENTU ZIYUAN (变法、法治及其本土资源) [ON REFORMING, RULE OF LAW AND LOCAL RESOURCES] 1–9 (1995).

elements of Derridean theory of De-construction and Foucauldian theory of Genealogy. If such architecture of the politico-legal apparatus can successfully destabilize Anglo-jurisprudential concepts, and thus fill their gaps, it would bring trans-jurisprudential value to both China and foreign jurisdictions in a historical dimension (as opposed to what Francis Fukuyama referred to as "The End of History"[128]). For example, similar successful politico-legal progression and re-construction can be seen in the anti-racial discrimination law in the United States (to certain extent, it is the severe racial chaos in the United States that gave birth to such re-construction; the same goes to China and the HKSAR, it is the unsettled or unprecedented political and jurisprudential transformation that has stimulated such re-construction).[129]

B. Devised School of Thought

One of the emerging streams of Chinese Constitutionalism is China's Party-State Constitutionalism.[130] Professor Chen Duanhong's perception on *trias politica* has jeopardized the notion from its ideological origin, thus making possible the reconstruction of a better model of *trias politica.* In his article, *The logic and boundaries of trias politica* (三权分立的逻辑及其边界),[131] Professor Chen Duanhong rightly pointed out that *trias politica* is not erred in essence, but that there are certain limitations within its own boundaries. That is, *trias politica* is based on two universal premise which the theory deems to be forever-stabilized: (1) the sovereign autonomy of the country, including matters in relation to national security, and (2) a forever-stabilized political order within the country.

According to Professor Chen, sovereignty theory aims to offer theoretical grounds on the concentration of administrative and sovereign power by which the political subject governs the nation, and against any internal or external factors which would disturb the political order of the nation; while the theory of Separation of Powers deems such threats of political order disturbance as unnecessary and non-existent, and it, therefore, turns only to offer the theoretical grounds of a liberal power structure which completely eliminates any possible circumstance of radical governance.[132]

Stepping back from the discourse of separation of powers, Chinese Party-State Constitutionalism as upheld and partially developed by Professor Chen and Professor Jiang can be viewed as an academic stream of the sociology of law, which indicates that not only should the legal regime be a normative

[128] Francis Fukuyama's assertion of "The End of History" mainly rests upon the premise that there are no other viable socio-politico-economic system rather than the synthesis of market economy plus democratic democracy or "liberal-democratic capitalism". For the original work, *see* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992). For its criticism, *see* SLAVOJ ZIZEK, THE TROUBLE IN PARADISE (2014).

[129] JIANG, *supra* note 76, at ch. 3 & 4.

[130] According to Professor Larry Backer, China is evolving toward a "single-party constitutionalist state" that is grounded in its unique form of "party-state constitutionalism." *See* Jiang, *supra* note 99, at 203.

[131] Chen, *supra* note 50.

[132] *Id.*

framework, but also a carrier and driver of substantial cultural and political values.[133] In a wider and philosophical dimension, human subjectivity is always fluxing and unstable,[134]and the same goes to the ideological reliance which generated different political and social theories, including liberalism and the doctrine of *trias politica*. Therefore, to re-construct a better neo-model of the legal discourse, it is crucial to seek a localized "Chinese path" by not only sustainably adopting the gist of the "Western" model of the *Rule of Law*, but also filling its gaps. Professor Jiang, in one of his articles, rejected direct transplantation of the "Western" model of the laws: *"We must walk our own constitutional path and achieve substantive constitutionalism based on our own challenges*."[135]

Professor Jiang also heavily criticized the formalism and dogmatism on China's constitutional studies among the Chinese legal academia in the past decades since the 1980s, arguing that such methodology excluded the Chinese Communist Party's position in the nation's constitutional hierarchy, and thus neglected the reality of the Chinese socio-political power structure, which he referred to as the "Unwritten Constitution" of China.[136] As mentioned in previous sessions, in order to resolve the endless debates on the doctrine of "separation of powers" in Hong Kong, apart from de-constructing such a concept from the liberalist ideology, another crucial element is to recognize and consider whether the existing mechanism can restraint powers of the *de facto* sovereign in Hong Kong. Thus, it is of utmost importance to adopt Professor Jiang's observation which he referred to as "Unwritten Constitution" of China.

Further, by recognizing "constitutionalism" as a transnational ideology and a discursive instrument for "Western" hegemony in international political discourse in the global age, Professor Jiang argued that Chinese constitutionalism is a system of political consultation and the NPC under the leadership of the Chinese Communist Party.[137] Further, by turning to articulating its own Chinese-characteristic socio-legal-political apparatus, Professor Chen, in *On the Constitution as the Fundamental Law and the Higher Law of the Land"* (论宪法作为国家的根本法和高级法), introduced "Constituent power" into the discourse of constitutional law, and placed the leadership of the Chinese Communist Party as the first fundamental law (第一根本法) of China.[138] Such can be regarded as filling the gaps of the legal theories transplanted into China.

By examining how the legal scholars in China analysed, or criticised, the ideological gaps of *trias politica* and the unsettled problems of a country's state

[133] Jiang, *supra* note 99, at 203.
[134] LAURENT DE SUTTER & KYLE MCGEE, DELEUZE AND LAW 39 (2009).
[135] Jiang, *supra* note 99, at 203.
[136] JIANG, *supra* note 76, at 6.
[137] *Id.* at ch. 3 & 4.
[138] *Id.* at ch. 3 & 4.

of exception (German: *Ausnahmezustand*),[139] it is manifested that the Chinese legal academia is well-aware of the limitations and insufficiencies of the liberalist "modern" concept of laws, such as the predicament of the Counter-Majoritarian Difficulty debates in the United States.[140] Here, one should critically see the following trends of nowadays Chinese legal academia's approach in formulating a better socio-legal-political apparatus: Instead of focusing on the legality and methodology of legal transplantation,[141] by injecting the extracted elements of the Anglo-legal system into the Chinese legal system, the Chinese legal academia is turning to explore the establishment of its own Chinese-characteristic legal structure under the one-party constitutionalism, which both embraces the virtue of the classic Chinese socio-legal ideology and is tailor-made to cope with the complex socio-political reality of China, such as the raising concerns hovering over the geopolitical challenges.

From this perspective, it is lamentable to see that the dominated legal discourse in Hong Kong is still locked inside the liberalist, formalist and doctrinal debates on whether a certain type of discursive products is alive in Hong Kong. Though it is beyond the scope of this essay to further explore the approaches taken by the Chinese legal scholars to re-engineer a better socio-legal-political apparatus that could "*genuinely forge a new path toward liberty, democracy, rule of law, and constitutionalism*", it is in this context the author critically recommends that Hong Kong should de/re-construct the politico-legal regime under the boundaries of the Basic Law, so as to explore substantial socio-legal-political progress which goes beyond the liberalist ideology the system rested upon. Such reform and reconstruction may be confrontational and takes a long road, but the liberalist ideology shall not be the sole reliance when substantial progress and certain liberalist values are seemingly in conflicts. Such would be the biggest implication of Chinese Constitutionalism to Hong Kong on a philosophical, post-modernist and post-liberalist dimension.

[139] A state of exception (German: Ausnahmezustand) is a concept introduced in the 1920s by the Nazi jurist Carl Schmitt, similar to a state of emergency (martial law) but based on the sovereign's ability to transcend the rule of law in the name of the public good. *See* Marc de Wilde, *Locke and the State of Exception: Towards a Modern Understanding of Emergency Government*, 6 EUR. CONST. L. REV. 249, 255–56, 259 (2010).

[140] "The counter-majoritarian difficulty states a problem with the legitimacy of the institution of judicial review: When unelected judges use the power of judicial review to nullify the actions of elected executives or legislators, they act contrary to "majority will" as expressed by representative institutions. If one believes that democratic majoritarianism is a very great political value, then this feature of judicial review is problematic. For at least two or three decades after Bickel's naming of this problem, it dominated constitutional theory". *See* Lawrence Solum, *Legal Theory Lexicon: The Counter-Majoritarian Difficulty*, LEGAL THEORY BLOG (Sept. 9, 2012, 4:42 PM), https://lsolum.typepad.com/legaltheory/2012/09/legal-theory-lexicon-the-counter-majoritarian-difficulty.html.

[141] According to Professor Jiang, the wave of legal transplantation was pushed by critical legal theories in China, *see* Jiang Shigong (强世功), *supra* note 92, at 308–09, 312.

VI. CONCLUSION

In this essay, in order to respond to the prime research question on whether a liberalist *trias politica* is a delusionary product in the context of Hong Kong, the author has gone through how and where such concept was originated. It is found that the doctrine of *trias politica* was a product of liberalism, particularly developed by Monsieur Montesquieu and John Locke.

By the following layers of analysis, the author argues that such liberalist doctrine of separated powers is a delusionary product in the context of Hong Kong:

On the first layer of analysis, which is based on a normative textual approach, it is found that the Basic Law of the HKSAR provided separated functions among the institutional organs, namely, the executive, legislative and judicial power. It is also found that there is a certain degree of check and balance as prescribed in the Basic Law but it is only limited to the internal affairs of Hong Kong on an administrative level. More importantly, Hong Kong, as a semi-autonomous region under China's political structure of a unitary nation, has no restriction on the sovereign power. In other words, there lacks the mechanism to restrict powers of the *de facto* "rulers" or "sovereign", thus, not strictly complying with the liberalist notion of *trias politica*. Therefore, a general conclusion that there is liberalist separation of powers in Hong Kong is inaccurate and problematic as Hong Kong is not itself a sovereign country.

Digging in deeper, the second layer of analysis adopts the Foucauldian studies of power relations, and further unmasks the liberalist concept of *trias politica*. It is found that alike other "modern" legal concepts, the doctrine is yet another derivative product of a specific set of "linguistically infused socio-political-historical-cultural-legal practices", which (re-)engineers the production of subjectivity. When applying the Foucauldian theory of knowledge-power, it is found that the complex intersectional web of knowledge-power comprised of liberalists has made the de/re-construction of a politico-legal apparatus extremely difficult. Also, when applying the Foucauldian theory of Governmentality, and from the perspective of the sociology of law, it is found that instead of the appearance of *trias politica*, a space of resistance against socio-political problems such as corruption and illegal political exchange is created by another branch of institutional powers.

Finally, on a bigger scale of analysis, the third layer of analysis goes on to examine the political-constitutional architecture of the People's Republic of China, which seeks to go beyond the mere formalist and doctrinal operations of the laws, and to further explore a space of resistance against the problems unsolved under liberalism.

To conclude the above layers of analysis, the author argues that liberalist *trias politica* is only a delusionary product in the context of the HKSAR. However, this essay does not intend to substitute or prioritize any analogical or dichotomous ideologies/theories in the current regime. Instead, the author hopes to destabilize the inherent ideology the concept relies upon, and thus to

sensitize any substantive socio-legal-political progress in Hong Kong. If such de/re-construction is successfully architected, it would bring trans-jurisprudential value to both China and foreign jurisdictions in a historical dimension.

It is overdue and outdated if our central discussion is still hovering over how to regulate the "tyrannous" behavior of the "rulers". It is the burden of our generation, perhaps, to move forward and beyond such dichotomous reasoning of centralized powers/de-centralized powers or joint powers/separation of powers; it is also the burden of our generation, perhaps, to search for any substantive progress of the intricate strategy of Governmentality, especially in the age of digitalization and de-/globalization. Such process of de/re-construction should be, and ought to be, forever-going and consistently re-visited. As concluded by Feng Xiang (冯象): Law is weak, fragile and elusive.[142] On the basis of that, the author would also add: Law is *Delusionary*.

[142] Jiang, *supra* note 92, at 319.