Statute Law Review, 2021, Vol. 42, No. 3, 291–304
doi:10.1093/slr/hmz018
Advance Access publication September 23, 2019

Judicial Review of the Legislative Process in Hong Kong: A Comparative Perspective

Shucheng Wang*

ABSTRACT

This article examines the deferential approach to judicial review of the legislative process as adopted by the Court of Final Appeal in *Leung Kwok Hung* v. *The President of Hong Kong Legislative Council*. Through a comparative analysis, it explains that the underlying basis on which the doctrines of separation of powers and the parliamentary privilege of exclusive cognizance, and the corresponding principle of non-intervention, are significantly different in Hong Kong. Given Hong Kong's semi-democratic system under the 'one country, two systems' rubric, it argues for a less traditional allocation of power between the different institutions of government and a more assertive judiciary vis-à-vis the legislature. Moreover, it suggests the necessity of developing a human-rights-based approach to the adjudication concerning the non-intervention principle in order to maintain its common law system with liberal principles under the 'one country, two systems' rubric.

1. INTRODUCTION

Since the Basic Law of the Hong Kong Special Autonomous Region (HKSAR) came into operation in 1997, the Court of Final Appeal (CFA) has developed a significant body of law and doctrine. An important portion of the CFA's work has involved judicial review of legislative and executive actions for compatibility with rights guaranteed under the Basic Law. Indeed, the Court's judgments in matters including the right of abode[1] and social welfare[2] have proven not only jurisprudentially important, but integral to establishing the rule of law in a challenging political environment. Interestingly, comparatively little judicial (or, indeed, academic) attention has been given to the powers and functions of the legislature and the scope and nature of judicial scrutiny of the legislature's internal workings. The extent to which courts may interfere with the legislature when adjudicating constitutional challenges is an important question, going

* School of Law, City University of Hong Kong. Email: shucwang@cityu.edu.hk.

1 *Ng Ka Ling* v. *Director of Immigration* [1999] 1 H.K.C. 291 (C.F.A.).

2 *Kong Yunming* v. *Director of Social Welfare* [2013] 16 HKCFAR 950.

to the heart of the separation of powers doctrine underpinning most, if not all, modern democracies.

In the landmark case of *Leung Kwok Hung* v. *The President of the Legislative Council of the Hong Kong Special Administrative Region* (*Leung*),[3] the CFA provided important clarification on the relationship between the legislature and judiciary in HKSAR, strongly articulating a 'non-intervention principle' with respect to judicial review of legislative processes. By reference to the Court's reasoning in *Leung*, this article critically examines the contours of the separation of powers doctrine in HKSAR, and the structural and contextual factors that have influenced the CFA's openly deferential approach to dealing with the interface of the exercise of judicial and legislative power in the region. By reference to foreign jurisprudence, it also seeks to evaluate possible alternative interpretative approaches that the CFA could have adopted in determining the limits of judicial review of the legislature's internal workings, with particular regard to future adjudication of conflicts between parliamentary privilege and constitutional rights.

2. *LEUNG* AND THE PRINCIPLE OF NON-INTERVENTION

On 29 September 2014, the CFA delivered its judgment in *Leung*. The case involved an application for judicial review of the power of the President of the Legislative Council (LegCo) to close a LegCo Committee debate on proposed amendments to draft legislation in order to end a filibuster, pursuant to Rule 92 of the LegCo's Rules of Procedure (Rules). For the purposes of this article, it is sufficient to briefly set out the grounds upon which the appellant in *Leung* sought judicial review of the President's decision to end the LegCo Committee debate. These grounds centred around Article 73(1) of the Basic Law, which stipulates that the LegCo has the power and function to enact, amend, or repeal laws in accordance with the provisions of the Basic Law and 'legal procedures'. Firstly, the appellant argued that Article 73(1) conferred on the appellant, as a member of the LegCo, an individual right to participate in the legislative process. Secondly, the appellant argued that the requirement in Article 73(1) that the LegCo must accord with 'legal procedures' in carrying out its law-making power had the effect of making compliance with the provisions of both the Basic Law and the Rules a condition of the validity of legislation enacted by LegCo. The appellant further submitted that Rule 92 did not confer power on the President to close the debate, and there were other Rules to deal with filibustering; thus the President's reliance on Rule 92 in closing the debate was a defect in the legislative process, which vitiated the legislative amendments subsequently enacted.

In dismissing the application, the CFA held that Article 73(1) does not confer powers or rights on individual members, but rather, on the LegCo as a law-making body. The Court further held that Article 73(1) should be interpreted in light of relevant common law principles and policy considerations, and articulated a system of separation of powers in HKSAR, which, subject to constitutional requirements, recognized the 'exclusive authority of the legislature in managing its own internal processes in the conduct of its business' and a corresponding principle that courts would not intervene in the internal workings of the legislature by ruling on the regularity, or

[3] (2014) 17 HKCFAR 689 (*Leung*).

otherwise, of those internal processes.[4] The CFA further clarified that the court has jurisdiction to determine the existence of a power, privilege, or immunity of LegCo but not 'to determine the occasion or the manner of exercise of any such powers, privileges or immunities … by LegCo'.[5]

The Court reinforced policy grounds for the principle of non-intervention, noting that the LegCo had been empowered with important powers and functions under Article 73 of the Basic Law—including the power to examine and approve budgets introduced by the government and to receive and debate policy addresses of the Chief Executive—and it was thus 'desirable and necessary' for the LegCo to be left to manage and resolve its internal affairs free from intervention by the Courts and possible disruption, delays, and uncertainties which could result from such intervention.

In adopting the principle of non-intervention, the CFA all but eliminated the prospect of future pre-enactment challenges to LegCo proceedings, and introduced a strong presumption against judicial interpretation of constitutional provisions that makes compliance with procedural regularity a condition of the validity of an enacted law. Indeed, in interpreting Article 73(1) of the Basic Law, the CFA acknowledged that while accordance with the Rules was required by the constitutional provision, the Basic Law made no attempt to address the question of whether non-compliance with the Rules invalidated a law subsequently enacted. Accordingly, the CFA held that as Article 73(1) was ambiguous on this point, it did not displace the principle of non-intervention.

It is relevant to note that while the principle of non-intervention as articulated in *Leung* relates to judicial intervention in the legislative process, affirmation of the principle has broader ramifications. In a previous Court of First Instance matter of *Cheng Kar Shun* v. *Li Fung Ying* (*Cheng Kar Shun*),[6] for example, Cheung J applied the (less clearly articulated) general principle of non-intervention in circumstances involving a challenge to the power of a LegCo Select Committee to summon witnesses. What this indicates is that there is judicial inclination in HKSAR to apply the non-intervention principle to parliament's internal workings generally. Indeed, it is on this basis that the interpretative approach adopted by the CFA in *Leung* has been criticized for paving 'a jurisprudential foundation for judicial deference to the views of the legislature in matters of constitutional interpretation affecting the internal operation of LegCo and the effective performance of its constitutional functions'.[7] It is with regard to these broader ramifications that this article undertakes its analysis

3. SEPARATION OF POWERS AND THE HKSAR CONTEXT

In order to provide a conceptual framework for understanding the non-intervention principle as articulated by the CFA in *Leung*, it is necessary to examine the history of the doctrine of separation of powers put forward by the Court when demarcating the boundaries of judicial review. A pure doctrine of separation of powers divides governmental powers between the three arms of government—the legislature, executive, and judiciary—with no arm to trespass upon the other's province. In general, each branch

4 *Leung*, para 28.

5 *Leung*, para 43.

6 79 HCAL (2009) (*Cheng Kar Shun*).

7 Ahy Chen quoted in Y Gu *Hong Kong's Legislature Under China's Sovereignty: 1998–2013* (Leiden and Boston: Brill Nijhoff 2015) 212.

of government has its own limited power: the legislature makes laws; the executive implements laws; and the judicial branch interprets and applies laws to controversies brought before it. In this way, the doctrine constructs a system that avoids concentrating too much power in one body of government and instead relies on a checking and balancing of power between the three arms, including by way of such mechanisms as appointments and removals of office holders and vetos of laws.

As a doctrine, the separation of powers is essentially 'a theory of government', the objectives of which are 'the facilitation of good government by appropriate specialization'[8] and upholding the constitutional values of a particular society (such as majority will).[9] Functions are divided between the three arms of government in a way that best achieves these objectives. Accordingly, the doctrine may be adopted to varying degrees within any system of government, and in various ways, depending on the context. As such, the formula for separating powers, and the principles, doctrines, and concepts adopted to uphold that separation, also vary from jurisdiction to jurisdiction.[10]

In the context of HKSAR, the very existence of separation of powers has proven controversial. As recently as 2015, Zhang Xiaoming, head of the Central Government's Liaison Office in Hong Kong, declared that Hong Kong did not have a separation of powers, as the executive was superior to the other two branches of government.[11] This type of mainland hostility towards the separation of powers is underpinned, in part, by fundamentally different conceptions of the role of the courts on the mainland and HKSAR. While courts in HKSAR are independent from the executive and legislature, and vested with the power to review the validity of both legislation and executive acts, courts in China follow Party directives in appropriate cases and cannot refuse to enforce a law on the basis that it contravenes the Constitution.[12] During the drafting phase of the Basic Law, Chinese objections "put an end to any…explicit discussion of the concept of separation of powers…".[13] Yet, while there is no explicit reference to separation of powers in the Basic Law, the separation of judicial, legislative and executive powers is clear from its text; legislative power is vested in the LegCo,[14] executive power in the Chief Executive[15] and judicial power in the courts of the region.[16] That said, it is less apparent exactly how the drafters intended the separation of powers system to be practiced in HKSAR after the transfer of sovereignty.[17] Thus, as Yash Ghai notes 'the

[8] G Carney 'Separation of Powers in the Westminster System' (paper presented to the Australian Study of Parliament Group [Queensland Chapter] 13 September 1993) 2.

[9] Chen, above n 7.

[10] C Chan 'Deference and the Separation of Powers: An Assessment of the Court's Constitutional and Institutional Competences' (2011) 41 *Hong Kong Law Journal* 7, 4.

[11] M Davis 'Separation of Powers Already a Fact of Life in Hong Kong' South China Morning Post (Online Edition) 18 September 2015 <http://www.scmp.com/comment/insight-opinion/article/1859296/separation-powers-already-fact-life-hong-kong> (accessed 25 February 2016).

[12] Y Ghai 'Litigating the Basic Law: Jurisdiction, Interpretation and Procedure' in JMM Chan, HL Fu, and Y Ghai (eds) *Hong Kong's Constitutional Debate* (Hong Kong University Press Hong Kong 2000) 9.

[13] D Gittings 'Separation of Powers Under the HK Basic Law' 4 <https://ssrn.com/abstract=2412448> (accessed 26 February 2016).

[14] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (*Basic Law*), Art. 62.

[15] *Basic Law*, Art. 73.

[16] *Basic Law*, Art. 80.

[17] Gittings, above n 13.

interesting question is not whether there is a separation of powers, but the balance and relationship between the institutions'.[18]

4. CONTINUITY AND SEPARATION OF POWERS IN HKSAR

Writing extra-judicially in 2013, Sir Anthony Mason, a non-permanent judge to the CFA, emphasized continuity as a factor in determining the contours of the separation of powers in HKSAR:

> just what the Basic Law separation of power entails for Hong Kong has not yet been comprehensively considered by the CFA. It is not for me to predict what form that consideration may take. But caution suggests that it might be unwise to adopt an extreme version of the separation of powers. The theme of continuity is a very strong element in the Basic Law.[19]

The constitutional importance of continuity is perhaps best understood by reference to the broader socio-political context in which the Basic Law was drafted. Most notably, the Basic Law was enacted as a statute of the National People's Congress—the highest organ of state power in the PRC—to give effect to the Sino-British Joint Declaration, under which Britain agreed to hand over Hong Kong to China, and China agreed to rule Hong Kong under the 'one country, two systems' rubric. This rubric aims to provide for the coexistence of capitalism and communism within one sovereignty. Hong Kong peoples' desire to preserve their way of life vis-à-vis the PRC, coupled with the mainland's intention to make full use of Hong Kong to help modernize its economy, meant that both were equally anxious to ensure a smooth transfer of sovereignty that did not threaten Hong Kong's stability and prosperity.[20] Accordingly, the Joint Declaration (and the Basic Law that gave effect to it) sought to maintain the status quo.

As such, there are numerous provisions contained in the Basic Law that are intended to ensure social, economic, and legal continuity.[21] Relevantly for the purposes of this article, Hong Kong's colonial systems and practices of law were firmly entrenched in the Basic Law; the colonial judicial system continues (except for consequences arising from the establishment of the CFA), independent judicial power is guaranteed, and basic procedures regulating due process are maintained.[22] In addition, Article 8 of the Basic Law, supplemented by Article 160, maintains those laws in force in Hong Kong prior to reunification, including the common law, rules of equity, ordinances, subordinate legislation, and customary law (except those that contravene the Basic Law and subject to legislative amendments).

[18] Y Ghai *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn Hong Kong University Press Hong Kong 1999) 263.

[19] A Mason 'Sitting as a Non-Permanent Judge in the Court of Final Appeal for the Past 16 Years' Hong Kong Judicial Institute 23 October 2013, <http://www.hkcfa.hk/filemanager/speech/en/upload/78/20131025%20Mason%20-%20Sitting%20as%20Non-Permanent%20Judge%20in%20the%20Court%20of%20Final%20Appeal%20for%20the%20past%2016%20years.pdf> (accessed 27 February 2016).

[20] R Horlemann *Hong Kong's Transition to Chinese Rule: The Limits of Autonomy* (London and New York: Routledge 2003) 9.

[21] Ibid.

[22] See *Basic Law*, Art. 81, 85.

Accordingly, the theme of continuity of past practice has been a guiding principle of the Hong Kong courts in interpreting the Basic Law from its commencement.[23] However, the preservation and continuation of existing laws was not intended to freeze HKSAR legal doctrinal development. Indeed, Article 84 of the Basic Law empowers the courts to refer to precedents in other common law jurisdictions in enforcing and interpreting the Basic Law. It was clearly envisaged that the common law would be capable of adapting to changing circumstances.

Notwithstanding this capacity to adapt legal doctrines and principles, the CFA in *Leung* applied the common law principle of non-intervention as understood prior to the transfer of sovereignty, relying on past court precedents from Britain and elsewhere in the common law world. As noted by the CFA, the non-intervention principle has its origins in the power, privileges, and characteristics of the British Parliament, and in particular the House of Commons. Indeed, the exercise of exclusive cognizance by the legislature over its own proceedings and internal affairs is one of the essential components of parliamentary privilege in the United Kingdom, as well as many other common law jurisdictions. Historically, privileges of the parliament arose out of a political struggle between the House of Commons and the Crown and were 'originally asserted by English parliamentarians to immunize themselves from the king's own (and later the Cabinet's) opportunistic invocation of legal liability for their conduct in Parliament'.[24]

The exclusive cognizance of Parliament forms part of the British common law, with a number of judgments confirming that the Courts should refrain from intervention.[25] Notably, in the landmark case of *Bradlaugh* v. *Gossett*, an applicant sought judicial review of his exclusion from the British Parliament on the basis that it violated the Parliamentary Oaths Act of 1866.[26] The Court of the Queen's Bench, in dismissing the application, stated that while, as it understood the laws, the House's exclusion of the applicant had violated the Act, it had to be assumed that the House acted in accordance with some interpretation of the law of which the judges were unaware. Further, Lord Coleridge CJ noted that:

> What is said and done within the walls of Parliament cannot be inquired into in a court of law…The jurisdiction of the House over their own members, their right to impose discipline within their walls, is absolute and exclusive.[27]

The exclusive cognizance of the British Parliament is supported by the common law principle of comity, by which the courts and Parliament demonstrate mutual respect and understanding for each other's domain. The principle also ensures non-intervention of the courts into matters relating exclusively to parliamentary proceedings.[28]

[23] A Mason, n 19.

[24] E Ip 'Mapping Parliamentary Practice in Hong Kong' (2015) 3(2) *The Chinese Journal of Comparative Law* 18.

[25] See, for example, *Handard* v. *Stockdale* (1836–37) 173 ER 322 and *R* v. *Graham Campbell ex parte Herbert* [1935] 1 KB 594.

[26] See *Bradlaugh v Gossett* (1884) 12 QBD. 271.

[27] Ibid, para 275.

[28] J Arditi 'Parliamentary Sovereignty and the Relationship with the Courts' 3 <http://www.parliament.nz/resource/en-nz/00CLOOCanzacatt1/a1be808fee55d264ab113649e07ca04d9612f68e> (accessed 23 February 2016).

The British common law has significantly influenced the adoption of parliamentary privilege statutes and the application of privilege in HKSAR, with principles absorbed by Hong Kong's common law early on. In its landmark decision in *Rediffusion (Hong Kong) Ltd* v. *Attorney General*, a case concerning the LegCo as a colonial non-sovereign legislature under British rule, the Hong Kong Supreme Court held that it could 'not conceive of circumstances in which a court would be willing to grant a declaration against the Legislative Council which would inhibit either the passing of a Bill or its presentation for the Governor's assent on the ground of its contents'.[29] After commencement of the Basic Law, Cheung J in *Cheng Kar Shun*, citing *Rediffusion*, concluded that the same common law principles applied to a sovereign LegCo under the Basic Law.[30] He held that the courts did not, as a rule, interfere with the internal working of the LegCo, but they did have jurisdiction to intervene in the exceptional circumstances when questions of whether LegCo, in going about its business, had acted in contravention of the provisions of the Basic Law. He emphasized that the jurisdiction had to be exercised with great restraint, having regard to the different constitutional roles assigned under the Basic Law to different arms of the government. Otherwise, subject to the Basic Law, '[i]n setting Rules of Procedure to govern how it goes about the process of making laws, provided those rules are not in conflict with the Basic Law...the Legislative Council is answerable to no outside authority'.[31]

5. CONTINUITY IN THE CONTEXT OF HKSAR'S UNIQUE LEGAL AND POLITICAL CONTEXT

There is, however, some difficultly in transplanting one context's formula for allocating powers to another context without sacrificing some of its normative force.[32] Indeed, Justice Lam in *Lee Yee Shing* v. *Inland Revenue Board of Review* cautioned against the automatic application of foreign precedent in HKSAR, noting that it 'is unsafe to simply borrow and apply the Australian jurisprudence on the meaning of judicial power without regard to the difference between the strict Australian constitutional approach to separation of power based on the United States federal model and the constitutional order in Hong Kong enshrined in the Basic Law'.[33]

Despite their shared common law basis, the suitability of applying British principles in HKSAR is by no means self-evident. The underlying justification for affording the legislature exclusive cognizance in the United Kingdom is that it ensures the independence of a sovereign Parliament, and in particular of the democratically elected House of Commons as against an unelected and unrepresentative judiciary. Within this context, parliamentary privilege is considered central to both the rule of law and representative government in the United Kingdom.

There are two notable issues that arise in applying a variant of the exclusive cognizance privilege in HKSAR. Firstly, the British common law is underpinned by the doctrine of parliamentary supremacy. Accordingly, the role of the judiciary is necessarily

[29] *Rediffusion (Hong Kong) Ltd v The Attorney General & Anor* (1970) HKLR 231.

[30] *Cheng Kar Shun*, para 217.

[31] Ibid, para 217.

[32] Chan (n 10) 7, 5.

[33] [2008] 3 HKLRD 51, para 86.

constrained to interpreting and applying what the sovereign British Parliament has enacted. By contrast, the role of the court in HKSAR—where the Basic Law is supreme—is expanded to that of enforcing the Basic Law, and thereby tempering Parliament and the majority. Secondly, while the supremacy of the British Parliament and its exclusive cognizance is justified on democratic grounds, the legislature in HKSAR is at best characterized as only partially democratic or semi-democratic, with only 50 per cent of its members directly elected by universal suffrage. Indeed, the LegCo is 'custom designed to be ineffective', with 'few powers of control and almost none of initiation' under the Basic Law.[34] In particular, the ability of the LegCo to propose legislation that might not be favoured by the mainland authorities is curtailed by rules restricting the right of its members to initiate legislative proposals without the permission of the Chief Executive (Article 74).

In accordance with both colonial and communist constitutional models, the executive is also strong normally with political support from both pro-Beijing legislators of HKSAR and China's Central Government, and the legislature relatively weak in HKSAR, when compared with the British Westminster model. Indeed, the Basic Law grants the Chief Executive broad powers over the introduction (Article 74) and promulgation (Article 49) of legislation. Such is the supremacy of the executive within the constitutional structure of HKSAR that, in 2003, the Chief Executive refused a summons to testify before a LegCo committee on the grounds of his constitutional precedence over the LegCo.[35] In addition, the Chief Executive is currently elected by a 1,200-member election committee, which is not only limited in size, but also fails to fully reflect the composition of Hong Kong's electoral base, particularly women, young adults, retired senior citizens, ethnic and religious minorities, and persons from disadvantaged groups.[36] In terms of democratic legitimacy, the HKSAR government has been criticized on the basis that it 'does not have a particularly promising record for conducting thorough public consultations and incorporating public views reflected through consultations'.[37]

Notwithstanding the fundamental differences between the governmental systems of the United Kingdom and HKSAR, the CFA in *Leung* continued to apply the entrenched common law principle of non-intervention, without a fresh examination of its ongoing relevance. In the recent matter of *Wong Yuk Man* v. *Ng Leung Sing and Tommy Leung Yu Yan*, in which leave was sought by the applicant to apply to the CFA for judicial review of the regularity of proceedings of the LegCo Finance Committee in relation to the funding of infrastructure works, the applicant made submissions on this very point; that the previously understood common law principle of non-intervention as applied in *Leung* needed to be reconsidered in light of the 'special political and legislative model in Hong Kong'.[38] In refusing leave to so apply, Justice Au, citing *Leung*, noted that:

[34] Ghai (n 12) 8.

[35] Ip (n 24) 17.

[36] S Young and R Cullen *Electing HK's Chief Executive* (Hong Kong University Press Hong Kong 2010) 75.

[37] C Chan 'Judicial Deference at Work: Some Reflections On Chan Kin Sum and Kong Yun Ming' (2010) 40 (1) *Hong Kong Law Journal* 9.

[38] Judgment of Hon Mr Justice Au on Application for Leave for Judicial Review made by Wong Yuk Man, HCAL 78/2014 dated 7 October 2015, para 54.

> There is nothing in this argument … in Leung Kwok Hung the Court of Final Appeal has specifically taken into account the constitutional structure of the Executive, Legislature and the independent Judiciary as laid down by the Basic Law in explaining the non-intervention principle as applied in Hong Kong.[39]

However, the CFA's analysis of HKSAR's constitutional structure in *Leung* is superficial at best, being largely limited to an acknowledgement of (i) the constitutional separation of powers provided for in the text of the Basic Law and (ii) the necessary allowances that must be made to account for the fact that HKSAR has a written constitution. In this regard, the CFA referred to the general principles stated by the Privy Council in *The Bahamas Methodist Church* v. *Symonette*. In that case, Lord Nicholls, delivering the judgment of the Judicial Board, gave particular consideration to the interplay between the courts' recognition of the exclusive cognizance of parliament in the UK context, and that of common law countries with a written constitution that is supreme (as distinct from a parliament that is supreme). In particular, Lord Nicholls noted that the principle of exclusive cognizance:

> must be modified to the extent, but only to the extent, necessary to give effect to the supremacy of the Constitution. Subject to that important modification, the rationale underlying the … principle remains as applicable in a country having a supreme, written constitution as it is in the United Kingdom where the principle originated.[40]

Beyond this dismissal of parliamentary subordination to the constitution as a basis for allowing broader judicial review of the legislative process, the CFA's judgment in *Leung* lacks any detailed examination of the unique governmental system now operating in HKSAR; neither the region's democratic deficit, nor the transformative impact of this deficit on the role of the judiciary, is acknowledged.

Indeed, given that only 50 per cent of LegCo members are elected by way of universal suffrage, the LegCo cannot be conceived of as a monolithic institution. Marginalization of pro-democracy political influence within the legislature is a real issue. As such, the scheme of the Basic Law—with its dominant executive, weakened and bifurcated legislature and independent judiciary—has the effect of relocating opportunities for democratic accountability from the legislative to the judicial branch.[41] A reconsideration of the non-intervention principle in light of these political realities could have justified the CFA articulating a less traditional boundary of separation of powers, or at the very least, articulating a more nuanced and flexible application of the principle of non-intervention. Indeed, a danger of the non-intervention principle as expressed by the CFA is that it provides no principled basis for the courts to intervene in the internal workings of the legislature when context warrants such intervention, save for 'constitutional requirements'.

[39] Ibid, para 55.

[40] [2000] UKPC 31, para 30.

[41] W Tam *Legal Mobilization Under Authoritarianism: The Case of Post-Colonial Hong Kong* (New York: Cambridge University Press 2013) 4.

Admittedly, given the nature of the impugned norms forming the basis of the constitutional challenge in *Leung*, even if the HKSAR courts had applied a less deferential approach to judicial intervention in the internal workings of LegCo, it would have had little impact on the outcome of the case. Nonetheless, the judgment sets a broadly applicable precedent of judicial deference that may well have negative ramifications in less clear-cut circumstances.

It must nonetheless be acknowledged that there are obvious prudential reasons for the CFA adopting a cautious rather than an interventionist approach in *Leung*. In particular, the ever-present threat of mainland intrusion increases the importance of a judicial approach that embeds the rule of law, preserves and enhances the Court's institutional authority, and develops a robust legal culture. Thus, the production of judicial opinions that are consistent, well reasoned, and readily understood is of utmost important to the CFA.

6. ALTERNATIVE APPROACHES TO JUDICIAL REVIEW

The question thus arises as to possible alternative approaches to judicial review that could be adopted by the HKSAR courts, having regard to the unique political and legislative context in HKSAR. In its submissions before the CFA in *Leung*, the Applicant sought for the first time to rely on Israeli jurisprudence asserting that the courts may intervene in the pre-enactment stage of the legislative process where a defect 'goes to the heart of the process'.[42] Such a defect has been determined by the Israeli High Court of Justice (HCJ) to be one that involves a severe and substantial violation of the basic principles of the legislative process in Israel's parliamentary and constitutional system.[43] The HCJ has articulated four such fundamental principles: the principle of participation, the principle of majority decision, the principle of publicity (according to which the legislative process must be public), and the principle of formal equality.[44]

Given its determination that the applicant's appeal would fail, irrespective of whether the Israeli jurisprudence was taken into account, the CFA did not hear full arguments on this matter, and provided relatively brief grounds for determining that the jurisprudence was not compelling. However, the CFA did note that the Israeli approach to judicial intervention was at odds with traditional principles of common law constitutionalism and public policy and that the endorsement of intervention by the HCJ 'seemed to us, with great respect, to be insufficiently precise to offer firm guidance and to involve the making of judicial assessments of a kind which common law courts do not usually make'.[45]

Notwithstanding the CFA's observations, Suzie Navot notes that the characteristics underpinning the HCJ's judicial review of the internal proceedings of the Knesset are similar to those manifested in judicial review of legislation generally in Israel; they are based on (i) the existence of a supreme constitutional norm (such as basic rights or fundamental principle); (ii) the concept of proportionality; and (iii) the HCJ's exercise

[42] *MK Sarid* v. *Chairman of the Knesset* HCJ 652/81; *Litzman* v. *Knesset Speaker* [2004] Isr LR 363; *Israel Poultry Farmers Association* v. *Government of Israel* [2004] Isr LR 383.

[43] *Israel Poultry Farmers Association* v. *Government of Israel* [2004] Isr LR 383.

[44] Ibid, paras 18–24.

[45] *Leung*, para 28.

of restraint in intervention.[46] Indeed, Navot argues that these three characteristics—*constitutionality*, *proportionality*, and *restraint*—are appropriate and should dictate the relationship between the HCJ and the Knesset in all aspects of judicial review. Relevantly, all three characteristics are also consistent with well-established judicial approaches adopted in common law courts.

While judicial intervention in the legislative process (as with other forms of judicial review) 'challenges, and perhaps even contradicts our conventional understanding of the separation of powers',[47] Navot contends that democratic procedures must be taken seriously, and thus judicial encouragement of legislative due process should be stimulated. Indeed, this is consistent with an inherent premise of the rule of law; that the law is properly enacted. Navot further argues that judicial review of legislative processes may eventually even serve as a trigger for better parliamentary engagement and regulation.[48] Notably, in the Israeli experience, the power of the HCJ to review laws that contravene the Basic Laws on Human Rights provided the impetus for the Knesset to conduct pre-enactment reviews and debates to ensure that legislation is rights-compliant. In this way, judicial involvement and supervision in the legislative process has arguably resulted in better legislative processes and outcomes.[49]

Writing in the Canadian context, Evan Fox-Decent similarly argues that a jurisdiction-based approach to judicial review actually allows legislatures to avoid having to debate reasons for and against the propriety of a particular exercise of parliamentary privilege, because such considerations are wholly irrelevant to a jurisdictional separation of powers argument cast in absolute and categorical terms.[50] Fox-Decent contends that legislative assemblies and their members should instead be treated as full participants in the ongoing construction of a legal order based on public justifications, with a requirement that reasons be given whenever parliamentary privilege is invoked to immunize the legislature's internal workings from the reach of the ordinary law.[51] According to Fox-Decent, a pragmatic and functional approach to privilege, which uses a series of contextual factors to determine the appropriate standard of review, more readily achieves democratic ends than a jurisdictional approach. In particular, he argues that a less deferential standard of judicial review is appropriate where a constitutional challenge arises with respect to internal parliamentary processes that infringe fundamental principles or constitutionally protected rights, particularly the rights of individuals who are not members of parliament.[52] In this regard, it is important to remember that parliamentary privilege not only governs the relationship between institutions of government, but also the relationship between legislatures and individuals within a polity.

46 S Navot 'Judicial Review of the Legislative Process' (2006) 39(2) *Israeli Law Review* 247.

47 Ibid, 184.

48 Ibid.

49 Ibid.

50 E Fox-Decent 'Parliamentary Privilege, the Rule of Law and the Charter after the Vaid Case' [Autumn 2007] *Canadian Parliamentary Review* 23.

51 Ibid.

52 Ibid, 25.

7. NON-INTERVENTION AND HUMAN RIGHTS ADJUDICATION

In *Leung*, the CFA did emphasize that the general principle of non-intervention is subject to constitutional requirements.[53] As such, the principle is limited by the Basic Law itself. In particular, the interplay between the LegCo's powers and privileges and the fundamental rights and freedoms set out in Chapter III of the Basic Law is worthy of examination. While conflicts between parliamentary privilege and human rights are common in many common law jurisdictions, 'only a handful of cases pitting human rights and parliamentary privilege against one another have come before high courts'.[54] Indeed, in HKSAR, no such case has come before the CFA.

The South African Court of Appeal decision in *Speaker (National Assembly)* v. *de Lille* provides an example of an assertive judicial approach.[55] In that case, despite a statutory provision purporting to empower the Speaker to issue a certificate requiring a court to stay proceedings which concerned parliamentary privilege, the Court intervened in the internal proceedings of the legislature by reviewing a decision of the National Assembly to suspend a member for 15 days following allegations she made against several of her colleagues. In upholding the appeal, the Court adopted a narrow reading of the legislature's power to regulate its own internal proceedings that excluded any power to suspend members for punitive reasons, ultimately finding that the suspension violated the member's constitutional right to freedom of speech in the National Assembly. It is relevant to note that the respondent was a member of a minority political group in the National Assembly. This contextual factor will arguably resonate in the HKSAR context, where the courts may be called upon to review the exercise of parliamentary privilege vis-à-vis the rights of marginalized pro-democracy members of the LegCo.

In Canada, the Supreme Court has made it clear that a more intense standard of judicial scrutiny is appropriate when reviewing the exercise of parliamentary powers and privileges that infringe rights; particularly, the rights of individuals who are not members of parliament.[56] However, given the interpretative framework established by the CFA in *Leung*, it is unclear how the HKSAR courts could increase the intensity of review in cases involving the exercise of parliamentary privilege that infringes the rights of non-Parliamentarians. Among other matters, the CFA made a qualitative distinction between review of the existence and scope of a power, privilege or immunity of the LegCo (i.e. a review of legality) and review of the occasion or the manner of the exercise of any such powers, privileges or immunities (i.e. a review of merits), expressly limiting its role to that of conducting a review of legality. However, a more intense judicial review of cases involving non-Parliamentarians arguably requires an evaluation of the effect of the LegCo's actual exercise of its powers, privileges and immunities.

Relevant to this discussion is the interpretative approach adopted by the European Court of Human Rights in *A* v. *United Kingdom*, where the Court applied a proportionality test in determining whether the exercise of parliamentary privilege constituted a

[53] *Leung*, para 32.

[54] C Langlois *Parliamentary Privilege: A Relational Approach* (thesis submitted in conformity with the requirements for the degree of Master of Law, Faculty of Law, University of Toronto 2009) 22.

[55] [1999] ZASCA 50.

[56] Fox-Decent (n 50) 20.

permissible limitation upon Convention rights.[57] In that case, a member of parliament (MP) gave a speech in the UK House of Commons, identifying the applicant (a constituent) by name and address and referring to reports of disruptive activities associated with the applicant's home. The applicant subsequently complained to the MP, and received a letter from the office of the Speaker advising that the MP's comments were protected by parliamentary privilege. The applicant therefore had no avenue of legal recourse open to her to bring a defamation claim against the MP. Accordingly, the applicant brought a complaint before the Court, arguing that the absolute nature of the parliamentary immunity prevented her from exercising her right of access to a court and her right to privacy. In dismissing the complaint, the Court found that a rule of parliamentary immunity was consistent with and reflected generally recognized rules within the Member States of the Council of Europe and the European Union, and served the legitimate aim of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary. Accordingly, the Court held that parliamentary privilege could not 'in principle be regarded as imposing a disproportionate restriction' on the applicant's rights, particularly vis-à-vis the MP's right to freedom of speech.[58]

Proportional analysis is not unfamiliar in HKSAR. Indeed, the Court of First Instance in *Cheng Kar Shun*,[59] which pre-dated *Leung*, did consider human rights issues in its judicial review of the LegCo's power to summon witnesses. Relevantly, the applicant sought leave, inter alia, to argue that a parliamentary resolution granting certain powers of inquiry to a Select Committee of the LegCo must be interpreted in such a way as to make it 'fundamentally rights-compatible'. The applicant favoured an interpretation of the relevant LegCo resolution that would lead to a finding that the Select Committee's summoning of witnesses was *ultra vires* a LegCo resolution.

In dismissing the application, Cheung J referred to cases arising in the UK context, including *A* v. *United Kingdom*, noting that those cases:

> illustrate that when it comes to fundamental rights that are not absolute, they may be impinged upon, subject to satisfaction of the proportionality test, by a public investigatory body or by members of Parliament when properly discharging their statutory or parliamentary functions.[60]

Cheung J held that the Select Committee, in exercising its investigative powers, could make findings and reach conclusions 'which had the incidental effect of prejudicing the reputations of individuals or companies, that, by itself, could not be an objection to the LegCo (or its select committee) holding the inquiry in the first place'.[61]

What this makes clear is that while the proportionality test as articulated in *A* v. *United Kingdom* necessarily reframes the conflict between parliamentary privilege and human rights by seeking to balance privileges and rights rather than defining the

[57] (2003) 36 EHRR 51

[58] Ibid, para 83.

[59] *Cheng Kar Shun*.

[60] *Cheng Kar Shun*, para 264.

[61] *Cheng Kar Shun*, para 262.

scope of the privilege, it is no less of a subjective decision-making process. Indeed, the European Court of Human Rights granted considerable deference to the British Parliament in applying the test of proportionality and did not achieve a greater rationalization of privilege than the CFA in *Leung*. What this makes clear is that a principled approach to the adjudication of conflicts between the non-intervention principle and human rights still requires further careful development by the HKSAR courts.

8. CONCLUSION

This article has examined the deferential approach to judicial review of the LegCo's internal workings adopted by the CFA in *Leung*. Having regard the broader implications of the decision, it has sought to provide context to the CFA's reasoning, through an examination of the constitutional principle of continuity and its influence upon the continued application of British common law principles and doctrines in HKSAR courts. With particular reference to the traditional doctrine of separation of powers, the parliamentary privilege of exclusive cognizance, and the corresponding principle of non-intervention, this article has sought to expose the danger of transplanting British common law principles to HKSAR, particularly given that the underlying basis on which these principles were developed in Britain is absent, or significantly different, in the region. Building upon this analysis, this article has argued that the CFA's judgment in *Leung* gave insufficient attention to the structural and political realities of HKSAR, and, in particular, the impact that HKSAR's democratic deficit has had on the role of the court as the defender of democratic principles. In doing so, it has argued for a less traditional allocation of power between the different institutions of government and a more assertive and interventionist judiciary vis-à-vis the LegCo. In turn, it has highlighted foreign jurisprudence advocating a functional and pragmatic approach to judicial review of the legislature's internal workings, before exploring the constraints that the CFA's reasoning in *Leung* has placed upon the future adjudication of matters that pit parliamentary privilege against human rights.