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# Article 158(3) of the Hong Kong Basic Law and the Preliminary Reference Procedure of the European Union

Patrick Jiang\* and Gonzalo Villalta Puig\*\*

## Abstract

*This Article analyses the preliminary reference procedure under Article 158(3) of the Hong Kong Basic Law and its transplantation from Article 267 of the Treaty on the Functioning of the European Union. Preliminary reference procedures require courts of final appeal to refer certain questions of law to a higher legal authority for determination before they can give judgement. This Article argues that this area of Hong Kong constitutional law is underdeveloped, due in large part to the unwillingness of the Hong Kong judiciary to respect the interests of the national legislature. An examination of the preliminary reference procedure, as practiced in the E.U., makes clear that the constitutional order in Hong Kong must do more to balance regional and national interests. To that end, this Article recommends several reforms: 1) to eliminate the existing jurisprudence regarding Article 158(3) of the Basic Law; 2) to*

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*adopt E.U.-style doctrines of judicial economy, including irrelevant question, acte éclairé, and acte clair; 3) to adopt a doctrine of sincere cooperation, so as to increase the quality and quantity of judicial references; and 4) to modernize the concept of Hong Kong law to a hybrid system of common law and Chinese law.*

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## I. INTRODUCTION

The year 2015 marked the twenty-fifth anniversary of the promulgation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law), while 2017 marked twenty years since the return of Hong Kong to the People's Republic of China (PRC or China). These are major milestones for a unique constitutional experiment in which the Hong Kong Special Administrative Region of the PRC (Hong Kong) and the rest of China (mainland China) co-exist as the same sovereign country but under completely different political, legal, and economic systems. The principle of this co-existence—"One Country, Two Systems"—is fundamental to the Basic Law.

Both mainland China and Hong Kong have gained experience while living under this unique constitutional system. Yet, many areas of constitutional law remain underdeveloped. This is partly due to the unprecedented nature of the Basic Law, meaning that Hong Kong has to build up a constitutional jurisprudence from scratch. It is also partly due to political sensitivities, which inhibit a vigorous and constructive judicial dialogue.

This Article focuses on Article 158(3) of the Basic Law, which has proved to be one of its most controversial provisions. It defines a preliminary reference procedure, through which the National People's Congress Standing Committee (NPCSC)—the legislator of the central government in Beijing—is to be the ultimate interpreter of the Basic Law. Under Article 158(3), Hong Kong courts must refer questions of law to the NPCSC when judicial decisions require interpretations of certain Basic Law provisions and such judicial decisions cannot be appealed. This situation is openly opposed by many lawyers and judges in Hong Kong. The Hong Kong Court of Final Appeal (CFA), the highest regional court in Hong Kong, has seldom dealt with Article 158(3), and, when it has, it has decided cases in confusing, even absurd, ways to avoid making references to the NPCSC.

The jurisprudential development of Basic Law Article 158(3) remains primitive. The judicial and political elites do not agree on when a preliminary reference must be made. The people of Hong Kong have a poor understanding about the procedure's role in the constitutional order. Politics and law are often conflated, and when that happens, legal clarity is rarely the victor.

This Article argues that it is time to recall the European Union (E.U.) origins of Article 158(3). Article 158(3) was explicitly modelled upon the preliminary reference procedure in Article 267 of the Treaty on the Functioning of the European Union (TFEU).<sup>1</sup> The E.U., unlike Hong Kong, has developed a

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<sup>1</sup> SHUWEN WANG, INTRODUCTION TO THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION 216–17 (2d ed. 2009).

workable and reputable jurisprudence to govern its preliminary references. Given the plain intention of the Basic Law to imitate the E.U.'s constitution in this provision, it is worth considering whether Hong Kong can also imitate the E.U.'s subsequent practice and jurisprudence. While existing literature tends to emphasize the Basic Law's difference from other constitutional systems, Basic Law Article 158(3) is an instance of similarity in which Hong Kong can learn much from a foreign jurisdiction. Indeed, Hong Kong will have to learn quickly if it wants to prove, before the expiry date of the Basic Law in 2047, that the latter is a workable constitutional document in all respects.

Section II of this Article gives a brief summary of the origins of Article 158(3) and the confusing jurisprudence surrounding it. Section III explains the essential similarities between Basic Law Article 158(3) and TFEU Article 267. Section IV then explains how three E.U. rules of judicial economy (irrelevant question, *acte éclairé*, and *acte clair*) can be imitated by Hong Kong. Section V explains that Article 158(3), being copied from an E.U. treaty, necessarily brings with it the E.U. doctrine of sincere cooperation. Sincere cooperation is currently lacking in Hong Kong, but it is needed to realize the true design of the Basic Law. Finally, Section VI recommends important steps that the CFA must take to realize the intent of Article 158(3).

## II. ORIGINS AND DEVELOPMENT OF ARTICLE 158(3) OF THE BASIC LAW

The Basic Law was drafted by a committee made up of fifty-nine politicians, technocrats, and legal experts: thirty-six from mainland China and twenty-three from Hong Kong.<sup>2</sup> Over the course of about four-and-a-half years, from July 1985 to February 1990, the committee produced two drafts, respectively opened to public comment in 1988 and 1989, and a final draft, which was adopted in 1990.<sup>3</sup> The Basic Law Drafting Committee also had the assistance of the Basic Law Consultative Committee, consisting of 180 people from Hong Kong, and the Sino-British Joint Liaison Group, which facilitated communication between the Chinese and British governments during the handover of Hong Kong.<sup>4</sup>

Collectively, the people contributing to the creation of the Basic Law had knowledge of diverse systems of law, including the English common law and

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<sup>2</sup> For brief history and timeline of the Basic Law's drafting, see THE HONG KONG BASIC LAW: BLUEPRINT FOR 'STABILITY AND PROSPERITY' UNDER CHINESE SOVEREIGNTY? Appendix B (Ming K. Chan & David J. Clark eds., 1991).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Chinese civil law. It is reasonable to suppose that the final product benefited from many people's experience in existing systems. However, only one provision in the Basic Law is copied explicitly from a foreign source. That provision is Basic Law Article 158(3), which defines the preliminary reference procedure for interpretation of the Basic Law:

The courts of the Hong Kong Special Administrative Region may also interpret [provisions of this Law which are outside the limits of the autonomy of the Region] in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.<sup>5</sup>

To summarize, there are areas of the Basic Law that are wholly within the autonomous control of Hong Kong and areas that are not. For those that are not, the ultimate power of interpretation is not with the Hong Kong courts but with the NPCSC. Furthermore, if a Hong Kong court comes upon an issue outside of regional autonomy that affects the outcome of a case that is not appealable, the court must seek an authoritative interpretation from the NPCSC.

Thus, Article 158(3) effectively changed the judicial hierarchy in Hong Kong to reflect the territory's transition from a colony to a highly autonomous region. Under colonial rule, legal questions could be appealed to the Judicial Committee of the U.K.'s Privy Council.<sup>6</sup> After the handover, Hong Kong was given an independent judiciary with the power of final adjudication and interpretation over large areas of legal competence. For other areas that were beyond the legal competence of Hong Kong, a national body had to have a right of participation, to make final interpretations on issues that concerned the central government. The solution of Article 158(3) was to adopt an E.U.-style preliminary reference procedure, to suit the new constitutional order.<sup>7</sup>

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<sup>5</sup> XIANGGANG JIBEN FA [THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 158(3) (H.K.) [hereinafter BASIC LAW].

<sup>6</sup> See *China Field Limited v. Appeal Tribunal (Buildings)*, [2009] 5 H.K.L.R.D. 662, at ¶¶ 79, 81 (C.F.A.).

<sup>7</sup> See Zhenmin Wang, *From the Judicial Committee of the British Privy Council to the Standing Committee of the Chinese National People's Congress: An Evaluation of the Legal Interpretive System after the Handover*, 37 H.K.L.J. 605, 614 (2007).

## A. Case Law

Article 158(3) was a creative solution to an unusual historical problem. On its surface, it strikes a balance between the interests of two layers of government: the Central People's Government of the PRC and the Hong Kong regional government. It assigns to each a respective place in judicial interpretation where the division of competence makes it appropriate. However, Article 158(3) has been controversial in practice.

According to Chinese constitutional principles, the ultimate power to interpret the Constitution of the PRC and PRC statutes must rest with the highest organ of democratic power: the National People's Congress.<sup>8</sup> This body is the national legislature and the most direct representative of the people of China at the national level.<sup>9</sup> The National People's Congress is awkwardly large and meets for only two weeks a year, so it can only deal with high-level issues as a plenary body.<sup>10</sup> It has a standing committee (NPCSC), a subgroup of about 160 people, that deals with finer issues of legislation throughout the year.<sup>11</sup> One major function of the NPCSC is to interpret legislation.<sup>12</sup> In keeping with Chinese constitutional principles, the NPCSC is entitled to make and interpret the laws of the PRC at any time, for any reason.<sup>13</sup>

In the legal order of the PRC, the Basic Law is ordinary legislation;<sup>14</sup> as such it can be interpreted by the NPCSC like any other legislation. Article 158(3) provides one way to solicit an NPCSC interpretation of the Basic Law, but it is by no means the only way. Of the five NPCSC interpretations of the Basic Law to date, only one of them was requested through Article 158(3).<sup>15</sup> A second was requested by the Hong Kong government via the State Council.<sup>16</sup> Another was

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<sup>8</sup> See Dingjian Cai, *Functions of the People's Congress in the Process of Implementation of Law*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 35, 36 (Jianfu Chen et al. eds., 2002) (“[S]ince [the NPC] is the supreme organ of state power, it does not allow the ultimate power of the interpretation of law to rest with the Supreme People's Court. Otherwise, there would exist a power restricting the power of legislation, which is inconsistent with the principle of democratic centralism.”).

<sup>9</sup> See QIANFAN ZHANG, THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS 124 (2012) (describing the National and Local People's Congresses, “which are officially regarded as the cornerstone of the current Constitution and the primary symbol of China's democracy”).

<sup>10</sup> *Id.* at 131–32.

<sup>11</sup> *Id.*

<sup>12</sup> XIANFA [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 67(4) (1982) (China).

<sup>13</sup> See ZHANG, *supra* note 9, at 135–36.

<sup>14</sup> BASIC LAW, *supra* note 5, at Instrument 9 (documenting the adoption of the Basic Law by the National People's Congress).

<sup>15</sup> *Id.* at Instrument 22.

<sup>16</sup> *Id.* at Instrument 17.

requested by the State Council itself.<sup>17</sup> And two others were requested by the NPCSC's Council of Chairmen.<sup>18</sup> So far, nearly all NPCSC Basic Law interpretations have not been obtained through the Article 158(3) procedure.

The concept of NPCSC interpretation is alien to common law lawyers. In common law systems, laws are supposed to be interpreted by courts in the course of litigation, and legislatures are not supposed to determine the outcome of judicial proceedings.<sup>19</sup> The fact that the NPCSC can make interpretations that are not consistent with common law procedure, and not specifically allowed by Article 158(3), is said by some to undermine Hong Kong's autonomy and judicial independence.<sup>20</sup>

The Court of Final Appeals (CFA) is likewise unenthusiastic about the interpretive powers of the NPCSC. Although the CFA recognizes the NPCSC's constitutional role,<sup>21</sup> the CFA prefers not to incur an Article 158(3) obligation to refer. For its part, the CFA has articulated a confusing set of rules establishing when it will or will not refer questions to the NPCSC. The rules revolve around four tests: classification, predominant provision, necessity, and arguability.

### 1. Classification

The first test for judicial referral concerns "classification." The CFA announced the test in the case of *Ng Ka Ling v. Director of Immigration*.<sup>22</sup> In that case, several children who claimed to be born permanent residents of Hong Kong attempted to assert their right of abode in Hong Kong. All of them had entered or stayed in Hong Kong without proper documentation. At issue in the case was the interplay between two provisions of the Basic Law: Article 24 (defining permanent residents)<sup>23</sup> and Article 22(4) (requiring people from other parts of China to apply for approval before entering Hong Kong).<sup>24</sup> Could a

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<sup>17</sup> *Id.* at Instrument 20.

<sup>18</sup> *Id.* at Instruments 18, 25.

<sup>19</sup> See Zhenmin Wang, *supra* note 7, at 610–11; Andrew Li, *The Development of the Common Law in Hong Kong under One Country Two Systems*, 21 SING. ACAD. L.J. 375, 380–81 (2009).

<sup>20</sup> See, for example, Yash Ghai, *The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?*, 37 H.K.L.J. 363, 390–91 (2007); Albert H.Y. Chen, *The Rule of Law under One Country Two Systems: The Case of Hong Kong, 1997-2010*, 6 NAT'L TAIWAN U. L. REV. 269, 275 (2011).

<sup>21</sup> The plenary power of the NPCSC to interpret the Basic Law is confirmed by the Hong Kong Court of Final Appeal in *Lau Kong Yung v. Director of Immigration*, [1999] 3 H.K.L.R.D. 778 (C.F.A.).

<sup>22</sup> *Ng Ka Ling v. Director of Immigration*, [1999] 1 H.K.L.R.D. 315 (C.F.A.).

<sup>23</sup> BASIC LAW, *supra* note 5, at art. 24 (listing six categories of permanent residents).

<sup>24</sup> *Id.* at art. 2 ("For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval.").

permanent resident under Article 24 nevertheless be denied recognition by the Director of Immigration for not complying with Article 22(4)? Put another way, was Article 24 permanent resident status qualified by Article 22(4)'s procedural requirements?

The CFA considered whether it was necessary to ask the NPCSC for an interpretation. First, the CFA examined whether “the provisions of the Basic Law in question (a) concern affairs which are the responsibility of the Central People’s Government; or (b) concern the relationship between the Central Authorities and the Region.”<sup>25</sup> Such provisions are so-called “excluded provisions.”<sup>26</sup> Provisions of the Basic Law that are not excluded provisions do not need to be referred to the NPCSC. The CFA called this query the “classification” test.

Unfortunately, the CFA did not give any details about how to identify excluded provisions. It only “assume[d] that Article 22(4) is an excluded provision on the sole basis that it concerns the relationship between the Central Authorities and the Region.”<sup>27</sup> The CFA also asserted, without evidence, that Article 24, “being a provision within the limits of the Region’s autonomy, is not an excluded provision.”<sup>28</sup>

## 2. Predominant Provision

Although the CFA found that Article 22(4) was an excluded provision and Article 24 was not, this did not resolve the matter because the different questions of interpretation did not separate cleanly. The proper interpretation of Article 24 (the non-excluded provision) depended upon the interpretation of Article 22(4) (the excluded provision). Were the NPCSC to interpret Article 22(4), it would indirectly determine the interpretation of Article 24. Should the NPCSC be allowed to do so?

The CFA thought not. It declared that a main objective of Article 158(3) was to authorize the CFA to “interpret on [its] own the provisions within the limits of the Region’s autonomy.”<sup>29</sup> If the NPCSC could weigh in on the interpretation of non-excluded provisions, even indirectly, that “would be a substantial derogation from the Region’s autonomy and cannot be right.”<sup>30</sup>

Consequently, the CFA invented a “predominant provision” test:

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<sup>25</sup> *Ng Ka Ling*, *supra* note 22, at ¶ 89.

<sup>26</sup> *Id.* at ¶ 86.

<sup>27</sup> *Id.* at ¶ 97.

<sup>28</sup> *Id.* at ¶ 99.

<sup>29</sup> *Id.* at ¶ 104 (internal quotes omitted).

<sup>30</sup> *Id.* at ¶ 102.

[A]s a matter of substance, what predominantly is the provision that has to be interpreted in the adjudication of the case? If the answer is an excluded provision, the Court is obliged to refer. If the answer is a provision which is not an excluded provision, then no reference has to be made, although an excluded provision is arguably relevant to the construction of the non-excluded provision even to the extent of qualifying it.<sup>31</sup>

Again, the CFA did not give any reasoning when it invented and then used this predominant provision test.<sup>32</sup> It only asserted that Article 24 was predominant in this case. Thus, the CFA determined that there was no role for the NPCSC. The CFA proceeded to construe both Article 24 and Article 22(4), even though one of them was an excluded provision.

### 3. Necessity

The third test for judicial referral is the “necessity” test, although the CFA in *Ng Ka Ling* did not actually apply it.<sup>33</sup> The necessity test asks whether the court needs to interpret any excluded provisions and if that interpretation would affect judgment in the case.<sup>34</sup> If so, the CFA must refer the interpretation to the NPCSC.

In *Democratic Republic of the Congo v. FG Hemisphere Associates LLC*,<sup>35</sup> the CFA finally put the necessity test into practice. That case asked whether Hong Kong courts should apply an absolute or restrictive theory of sovereign immunity. In question were Articles 13 and 19 of the Basic Law, both of which, according to the CFA, “plainly” were excluded provisions.<sup>36</sup> The CFA then applied the necessity test. Still, the treatment was cursory:

[T]he [Democratic Republic of the Congo] has not waived its immunity. Hence the case cannot be resolved without a determination of the questions of interpretation affecting the meaning of Articles 13 and 19 of the Basic Law . . . The necessity condition is therefore satisfied.<sup>37</sup>

The CFA has never provided any details about how to determine necessity.

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<sup>31</sup> *Id.* at ¶ 103.

<sup>32</sup> Po-Jen Yap, *10 Years of the Basic Law: The Rise, Retreat, and Resurgence of Judicial Power in Hong Kong*, 36 COMMON L. WORLD REV. 166, 171 (2007).

<sup>33</sup> *Ng Ka Ling*, *supra* note 22, at ¶ 89.

<sup>34</sup> *Id.*

<sup>35</sup> *Dem. Rep. Congo v. F.G. Hemisphere Assocs.*, [2011] 1 H.K.C.F.A.R. 41 (C.F.A.) [hereinafter *Congo*].

<sup>36</sup> *Id.* at ¶ 403.

<sup>37</sup> *Id.* at ¶ 406.

#### 4. Arguability

Finally, there is an arguability test. *Congo* explained it in this way: “[O]nce the classification and the necessity conditions were satisfied there was a duty to make a reference of the question of interpretation if it was arguable but not if it was plainly and obviously bad.”<sup>38</sup>

Thus, *Congo* firmly identified arguability as a separate and final test, after classification and necessity, to deny a reference to any argument that was plainly and obviously bad. It is not clear how the arguability test gets applied because the CFA has never found an argument to have come close to failing it.<sup>39</sup>

### B. Confusion and Controversy

#### 1. Order of Operations

The CFA’s law on preliminary references is a mess. One serious question that has upset scholars is about the order of operations. *Congo*, the most recent case on point, articulated the four tests in this order: 1) classification, 2) predominant provision, 3) necessity, and 4) arguability.<sup>40</sup> The CFA did not say that the order was strict, but government bodies<sup>41</sup> and scholars have gone on to assume that it is orthodox. However, this strict order of operations is not consistent with logic or judicial economy. Scholars have expended considerable energy trying to make sense of it.

Denis Chang and Albert Chen have debated whether the CFA is generally right to consider classification before necessity. The critical question is, according to Chang, “[i]s there a need in this case to interpret an Excluded Provision?”<sup>42</sup> He argues that, to answer the question, one must first decide if one is dealing with an excluded provision.<sup>43</sup> On the other hand, Chen argues that

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<sup>38</sup> *Id.* at ¶ 398 (citing *Ng Ka Ling*, *supra* note 22).

<sup>39</sup> *See, for example, id.* at ¶ 404 (“We consider questions relating to Articles 13 and 19 clearly arguable. No other conclusion as to arguability is possible when regard is had to the conflicting views expressed in the courts below, particularly the division of opinion in the Court of Appeal.”).

<sup>40</sup> *See Congo*, *supra* note 35, at ¶ 395–98.

<sup>41</sup> The Legislative Council recites the tests in faithful order. Legislative Council Panel on Administration of Justice and Legal Services, LC Paper No. CB(2)1150/11-12(01), ¶¶ 14–16 <https://perma.cc/UP84-SLSP>.

<sup>42</sup> Denis Chang, *The Reference to the Standing Committee of the National People’s Congress under Article 158 of the Basic Law: The Question of Methodology*, in HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 143, 143 (Johannes M. M. Chan et al. eds., 2000).

<sup>43</sup> *Id.*

there is no point in classifying a provision unless one finds that the provision is necessary for deciding the case.<sup>44</sup>

Elsewhere, Cora Chan has questioned the sense behind the arguability test. She explains that either arguability is a standard of review for necessity, in which case it is not really a separate test,<sup>45</sup> or it is a threshold question that should come before necessity.<sup>46</sup> Chan is right to conclude that the CFA is confused about the rationale behind the arguability test.

Clearly, the order of operations has become a source of significant anxiety for scholars. The most frustrating thing is that it should never have become a serious concern in the first place because a strict order of operations is illogical and useless. Not even the CFA itself follows the order closely.<sup>47</sup> This Article argues that scholars should abandon any notion of an order of operations.

## 2. Predominant Provision

The second and more serious problem with the CFA's law on preliminary references is the predominant provision test. The CFA invented the test in *Ng Ka Ling* and refused to refer the interpretation of Article 22(4) to the NPCSC, even though Article 22(4) was an excluded provision. It was not because Article 22(4) did not matter; it was only that Article 22(4) was not predominant over Article 24.

The logic of the predominant provision test is indefensible if one considers the letter or the spirit of Article 158(3). In *Ng Ka Ling*, there was a legitimate

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<sup>44</sup> Albert Chen, *The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case*, in HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 113, 116 (Johannes M. M. Chan et al. eds., 2000).

<sup>45</sup> Cora Chan, *Implementing China and Hong Kong's Preliminary Reference System: Transposability of Article 267 TFEU Principles*, 2014 PUB. L. 642, 655 (2013) (“[I]n deciding whether arguments for seeking reference are at least arguable, the court would inevitably have to consider whether the necessity and classification conditions are arguably satisfied. So, contrary to the CFA's analysis in *Ng Ka Ling*, arguability should not be treated as a separate stage of analysis.”).

<sup>46</sup> *Id.* at 654 (suggesting that “whenever the meaning of a provision can potentially affect the outcome of the present case, the provision is applicable and relevant to the case, and the necessity test is passed, regardless of whether the meaning of the provision is clear”).

<sup>47</sup> The CFA has been utterly inconsistent about the placement of the arguability test. *Congo*, citing *Ng Ka Ling*, put the test last. See *supra* note 39 and accompanying text. *Ng Ka Ling* had actually put arguability first, saying, “if the Court decides that it is arguable, the Court would then consider whether the classification and necessity conditions are satisfied.” *Ng Ka Ling*, *supra* note 22, at 100. In actual application, the CFA has done neither of the above. In *Ng Ka Ling*, arguability was applied second, after classification but before predominant provision. See *id.* (“In the present case, it is arguable that an excluded provision (Article 22(4)) is relevant to the interpretation of a non-excluded provision (Article 24).”). In *Congo*, arguability was applied third, right before necessity. See *Congo*, *supra* note 35, at 404 (“We consider questions relating to Articles 13 and 19 clearly arguable.”); *id.* at 405 (“The only issue is whether the necessity condition is satisfied and it is to that issue we now turn.”).

need to interpret Article 22(4) that affected the final judgment in the case. The plain meaning of Article 158(3) makes clear that such interpretation should be referred to the NPCSC. To take any other view, according to Chen, would be “inconceivable.”<sup>48</sup> Furthermore, the NPCSC has a legitimate constitutional role to play in making authoritative interpretations of excluded provisions like Article 22(4). Po Jen Yap argues that “[w]here there are two conflicting Basic Law provisions, one which falls within the prerogative of the central government, ipso facto this conflict should be resolved by the Standing Committee.”<sup>49</sup>

The predominant provision test has been soundly discredited by authors like Chen,<sup>50</sup> Yap, Pui Yin Lo,<sup>51</sup> and Lawrence Li.<sup>52</sup> But why would the CFA, a body of prominent and respectable judges, make up a legal test that it knew to be absurd from the start?<sup>53</sup> The most logical explanation is that the CFA was trying desperately to avoid a reference because it regarded references to the NPCSC generally to be repulsive<sup>54</sup>—a view that persists to the present day.<sup>55</sup> However, this is not consistent with the clear intention of the Basic Law,<sup>56</sup> and this view must change if this area of constitutional law is to have any coherence.

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<sup>48</sup> See Chen, *supra* note 44, at 115 (“If one takes [the facts of the case] and reads again the relevant text of Article 158(3) . . . having regard to its ordinary, natural and plain meaning, I think it is inconceivable for one not to conclude that the CFA in this case was bound under Article 158(3) to refer the interpretation of Article 22(4) to the NPC Standing Committee.”).

<sup>49</sup> Yap, *supra* note 32, at 172.

<sup>50</sup> See Albert Chen, *Ng Ka Ling and Article 158(3) of the Basic Law*, 2001–2002 J. CHINESE & COMP. L. 222, 227.

<sup>51</sup> Pui Yin Lo argues that the predominant provision test cannot be an objective legal test because it is inherently biased. See PUI YIN LO, *THE JUDICIAL CONSTRUCTION OF HONG KONG’S BASIC LAW: COURTS, POLITICS AND SOCIETY AFTER 1997* 378 (2014) (“[The predominant provision test] is an exercise dependent on the proponent’s point of view.”).

<sup>52</sup> See Lawrence Li, *Dual System of Constitutional Interpretation: A Hong Kong Experience*, 5 VIENNA J. INT’L CONST. L. 572, 584 (2011) (“[T]he ‘arguability’ or ‘predominant’ tests cannot justify a refusal to refer an excluded provision if the necessity condition . . . is satisfied.”).

<sup>53</sup> The CFA never took the predominant provision test seriously. See Yap, *supra* note 32, at 172 (“[T]he CFA has been disingenuous about the application of [the predominant provision] test, as it paid scant attention as to how the predominant provision may be identified.”).

<sup>54</sup> See LO, *supra* note 51, at 375 (arguing that the court in *Ng Ka Ling* had to find a way not to refer because of the significant symbolic value of that case to autonomy and judicial independence).

<sup>55</sup> See *id.* at 391 (arguing that, up through the case of *Ng Siu Tung v. Director of Immigration*, [2002] 1 H.K.L.R.D. 561 (C.F.A.), there is apparently “an entrenched institutional reluctance on the part of the Court of Final Appeal to make judicial references”); LO, *supra* note 51, at 460 (arguing that the CFA actively tries to insulate itself from mainland influence).

<sup>56</sup> In its interpretation, the NPCSC criticized the CFA for failing to make the reference when it should have. See BASIC LAW, *supra* note 5, at Instrument 17.

### III. A COMPARATIVE APPROACH

A few things are apparent. The jurisprudence of Article 158(3) is convoluted and unclear. Certainly, it does not exemplify predictability and transparency, which are values in the common law tradition. If there is no fresh direction, judges and scholars may spend many more years trying to untangle the problems with the judicial reference procedure. By then, people may have lost patience with the Basic Law.

However, it may not be necessary to dwell on the shortcomings in CFA case law if we take a slightly different approach to understanding Article 158(3). In particular, it is possible to take a comparative approach by returning to the original intention of the Basic Law text and gaining a straight-forward understanding of the judicial reference procedure.

#### A. Similarities between Article 158(3) of the Basic Law and Article 267 of the TFEU

The official introduction to the Basic Law confirms that Article 158(3) is adapted from TFEU Article 267:

[The method of judicial reference] is adopted after consulting the measures for interpreting laws taken by the European Community . . . . [It] effectively helps to resolve the contradiction caused by the fact that the power of interpretation and the power of final adjudication are not vested in the same institution and ensures the unified understanding and implementation of the European Community laws in its Member States, which is worth our consideration.<sup>57</sup>

The introduction goes on to note that, in general, E.U. practice has not impaired the judicial independence of lower courts.<sup>58</sup>

Given the clear and deliberate transplant of TFEU Article 267 into Article 158(3), it should be no surprise that they look similar:

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<sup>57</sup> See BASIC LAW, *supra* note 5.

<sup>58</sup> *Id.* at 217.

TFEU Article 267 (excerpted)	Basic Law Article 158(3) (excerpted)
Where any such question [concerning the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union] is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. <sup>59</sup>	[I]f the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the [NPCSC] through the Court of Final Appeal of the Region. <sup>60</sup>

The similarities are self-evident. First, preliminary references are confined to certain subject matters that affect the rights and obligations of the higher-level government. In the case of the E.U., those subject matters encompass E.U. treaty articles, acts of E.U. institutions, and anything that forms part of the E.U. legal order.<sup>61</sup> In the case of Hong Kong and the PRC, those encompass provisions concerning “affairs which are the responsibility of the Central People’s Government” and “the relationship between the Central Authorities and the Region.”<sup>62</sup> Matters that relate to exclusive powers of the lower-level government do not require a reference to the higher-level government. Also, preliminary references are only required where there is no further judicial remedy in the lower jurisdiction. Some other requirements in Article 158(3) that relate to judicial economy (namely, those regarding the need to interpret a

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<sup>59</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 267, Oct. 10, 2012, 2012 O.J. (C 326) 165 [hereinafter TFEU].

<sup>60</sup> BASIC LAW, *supra* note 5.

<sup>61</sup> DAMIAN CHALMERS, EUROPEAN UNION LAW: TEXT AND MATERIALS 160–61 (3d ed. 2014) (“Although Article 267 TFEU, thus, only talks of the Court giving rulings on the Treaties and acts of the EU institutions, the Court has, consequently, interpreted it more broadly to include anything which forms part of the wider EU legal order. This includes international agreements concluded prior to the establishment of the European Communities to which the Union has succeeded the Member States and general principles of law and fundamental rights.”).

<sup>62</sup> See WANG, *supra* note 1.

provision that will affect the judgements on the cases) have parallels not in TFEU Article 267 but in early E.U. case law.<sup>63</sup>

Similarity is a natural and desired consequence of adaptation. Adaptation makes sense because the intended functions of preliminary reference are the same in both jurisdictions. In the E.U., Member States confer power upward to the E.U., while in China, the central government confers power downward to Hong Kong. But regardless of which direction the conferral of power flows, the function of preliminary reference is equally valid. In the E.U., preliminary reference seeks to achieve a uniform interpretation of E.U. laws and the effective implementation of those laws across all Member States with their different legal traditions.<sup>64</sup> The Basic Law is law in Hong Kong and in the PRC at large, and, as such, its interpretation and implementation must not clash with the other laws and Constitution of the PRC.<sup>65</sup> Legal uniformity in the PRC means a consistent interpretation of relevant PRC law as applied to Hong Kong and to other parts of the PRC.

Most interpretations and implementations of the Basic Law will not create conflict with the other laws and Constitution of the PRC. The very intention of “One Country, Two Systems” is to provide for a significant separation of legal systems such that the systems seldom clash. The provisions of the Basic Law that are likely to interact with the laws and Constitution of the PRC are the “excluded provisions” (again, provisions concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region). Excluded provisions, by definition, affect the government of Hong Kong as well as the rights and duties of the central government. Where the practices of multiple governments intersect, there ought to be a mechanism for achieving a consistent understanding of law between them.

From time to time, the similarity of Basic Law Article 158(3) and TFEU Article 267 has been noted in the scholarly literature.<sup>66</sup> However, most authors regard the similarities as being merely superficial. A few authors see limited

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<sup>63</sup> See Section III.B.1–3, *infra*.

<sup>64</sup> See, for example, Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lübeck-Ost*, 1987 E.C.R. 4199, ¶ 15 (“[T]he main purpose of the powers accorded to the Court by [TFEU Article 267] is to ensure that Community law is applied uniformly by national courts.”).

<sup>65</sup> Regarding the necessity of NPCSC interpretation, see WANG, *supra* note 1, at 213 (“[O]nly when the Central Authorities have the power to interpret the Law can unified understanding and implementation of the Law be guaranteed throughout the country.”).

<sup>66</sup> See, for example, *Firma Foto-Frost*, *supra* note 64; WANG, *supra* note 1.

applications in the comparison.<sup>67</sup> Most authors focus on fatal differences between the Hong Kong setup and the E.U. setup, and conclude that no comparison is useful.<sup>68</sup> Here again, the complaints are primarily that the NPCSC is not a judicial body and that it makes interpretations outside the course of litigation.

It ought to strike more people that neither complaint, at least formalistically, condemns the Basic Law regime. Constitutions do not have to be solely interpreted by courts. Elsewhere in the world, they are interpreted by legislatures, including in Finland, where a committee of the Finnish Parliament, not a court, is the final interpreter.<sup>69</sup> In other countries like the U.K. that have a principle of parliamentary sovereignty, legislatures pass ordinary legislation to reverse constitutional judgments of courts (leaving previously rendered judgments unaffected, of course).<sup>70</sup> Furthermore, in some countries, courts render advisory opinions outside the course of litigation. For example, in Canada, the Supreme Court entertains “reference questions” about constitutional issues from the federal cabinet and provincial governments.<sup>71</sup> Ten states of the U.S. allow their supreme courts to provide advisory opinions to the state’s executives or legislatures, usually about constitutional issues.<sup>72</sup> All of the above jurisdictions are paragons of the rule of law.

Finally, the fact remains that Basic Law Article 158(3) was intended to emulate TFEU Article 267, so a coherent legal practice should strive to give effect to that intent. None of the foregoing complaints undermine the major goal of preliminary references—to achieve uniform interpretation of laws where multiple levels of government have rights and obligations. Comparison between

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<sup>67</sup> See, for example, Chan, *supra* note 45, at 655 (seeing room for adoption of the doctrine of *acte éclairé* but not *acte clair*); Chen, *supra* note 44, at 121 (seeing value in E.U. law for learning the meaning of “necessity”).

<sup>68</sup> See, for example, JAMES CRAWFORD, RIGHTS IN ONE COUNTRY: HONG KONG AND CHINA 9 (2005); Mark Elliott & Christopher Forsyth, *The Rule of Law in Hong Kong: Immigrant Children, the Court of Final Appeal and the Standing Committee of the National People’s Congress*, 2000 ASIA PAC. L. REV. 53, 72 (2016).

<sup>69</sup> See Markku Suksi, *Finland*, in HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY 87 (Dawn Oliver & Carlo Fusaro eds., 2011).

<sup>70</sup> See Zhenmin Wang, *A Decade of Hong Kong Basic Law Actualization*, in CHINA’S HONG KONG TRANSFORMED: RETROSPECTS AND PROSPECTS BEYOND THE FIRST DECADE 155, 165 (Ming K. Chan ed., 2008).

<sup>71</sup> See Tsvi Kahana, *Canada*, in HOW CONSTITUTIONS CHANGE, *supra* note 69, at 9. The similarity between Hong Kong and Canada was also noted by Pui Yin Lo. See LO, *supra* note 51, at 412 n. 180.

<sup>72</sup> MEL A. TOPF, A DOUBTFUL AND PERILOUS EXPERIMENT: ADVISORY OPINIONS, STATE CONSTITUTIONS, AND JUDICIAL SUPREMACY ix (2011).

Basic Law Article 158(3) and TFEU Article 267 remains valid, and it ought to be explored much more deeply.

## B. Preliminary Reference Procedure of the E.U.

At today's historical juncture, given the similar origins, structures, and functions of Basic Law Article 158 and TFEU Article 267, it is sensible to ask again whether Hong Kong's judicial reference procedure can be improved by more closely following the E.U.'s example.

The relevant law of the E.U. can be summed up briefly: when national courts encounter a question about E.U. law, they can initiate a discretionary or non-discretionary referral to the Court of Justice of the European Union (European Court of Justice, or ECJ).<sup>73</sup> Discretionary referrals are available to any court, of any level, at any stage of proceedings. In effect, the right of discretionary referral empowers every court in the E.U. to be an active participant in E.U. law.<sup>74</sup> Discretionary referrals impose no obligations on any courts, and they are not consequential to the topic of this article.

Non-discretionary referrals are required by TFEU Article 267 whenever a national court faces a question of E.U. law and there is no further judicial remedy. However, there are three exceptions of judicial economy in the case law: irrelevant question, *acte éclairé*, and *acte clair*.

### 1. Irrelevant Question

The irrelevant question doctrine proposes that national courts should not refer questions that are not relevant to the outcome of a case. The concept was clearly stated in *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*:<sup>75</sup>

[The] mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to [refer it to the Court of Justice]. . . .

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<sup>73</sup> PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 468 (6th ed. 2015) ("Article 267 TFEU draws a distinction between courts or tribunals with a discretion to refer to the CJEU, Article 267(2), and courts or tribunals 'against whose decisions there is no judicial remedy under national law', Article 267(3), which have an obligation to refer, provided that a decision on a question is necessary to enable judgment to be given.").

<sup>74</sup> CHALMERS, *supra* note 61, at 170 ("All national courts are granted equal possibilities to make a reference to the Court of Justice and no national court can disenfranchise another national court. . . . For lower courts, scornful of higher courts or feeling unduly constrained by national judicial hierarchies, the EU judicial order is one which offers them many opportunities.").

<sup>75</sup> Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, 1982 E.C.R. 3415 [hereinafter *CILFIT*].

[National] courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.<sup>76</sup>

Importantly, it is up to the national court's own discretion whether a question is relevant or not.<sup>77</sup>

## 2. Acte Éclairé

The *acte éclairé* doctrine says that national courts do not have to refer a question where the answer is already clear from a previous ruling of the ECJ. The concept was articulated in the case of *Da Costa en Schaake v. Nederlandse Belastingadministratie*.<sup>78</sup>

Although [TFEU Article 267] unreservedly requires [national courts of final instance] to refer to the Court every question of interpretation raised before them, the authority of an interpretation under [Article 267] already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.<sup>79</sup>

*Acte éclairé* is valid even if the previous ruling was directed to a different court in a different member state, or even if the questions of interpretation are not strictly identical.<sup>80</sup> One can think of *acte éclairé* as a sort of *stare decisis* in E.U. law.

## 3. Acte Clair

The *acte clair* doctrine allows national courts to omit referrals where the interpretation of E.U. law is so obvious from the text that there is no room for reasonable doubt.<sup>81</sup> Obviousness, of course, is viewed from the perspective of the ECJ and the entire E.U.<sup>82</sup> Again, the main authority is *CILFIT*:

The correct application of Union law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court

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<sup>76</sup> *Id.* at ¶¶ 9–10.

<sup>77</sup> *Id.* at ¶ 10.

<sup>78</sup> Cases 28-30/62, *Da Costa en Schaake v. Nederlandse Belastingadministratie*, 1963 E.C.R. 31.

<sup>79</sup> *Id.*

<sup>80</sup> See CRAIG & DE BÚRCA, *supra* note 73, at 451.

<sup>81</sup> Case 495/03, *Intermodal Transports BV v. Staatssecretaris van Financiën*, 2005 E.C.R. I-8151, ¶ 39.

<sup>82</sup> *Id.*

of Justice. Only if those conditions are satisfied may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.<sup>83</sup>

The exception provided by *acte clair* is a narrow one, and it is debated whether national courts are truly capable of knowing what is “obvious” to the ECJ.<sup>84</sup> Some scholars argue that *acte clair* is actually a political “valve,” disguised as a legal rule to let national courts escape referrals when they are unwilling to make them.<sup>85</sup> Others say that *acte clair* might induce courts of different levels to cooperate more by promoting trust between them.<sup>86</sup> Still others speculate that some national courts may have abused *acte clair*,<sup>87</sup> but so far there has been no complaint from the ECJ.

#### IV. LESSONS FOR HONG KONG FROM THE E.U.

The E.U. treaty and rules of judicial economy have much to teach Hong Kong about the practice of preliminary references because there is a complete parallelism between the procedures of the E.U. and Hong Kong. The text of TFEU Article 267 echoes the functions that the CFA tries to achieve with its “classification” test. The E.U. case law echoes the functions of the “necessity” and “arguability” tests, except that the E.U. rules are much more developed. There is no E.U. parallel to the “predominant provision” test, which has been discredited and serves no legitimate purpose.

By making comparisons to the E.U. law, it becomes easy to understand at least two major mistakes in the current scholarship about preliminary references in Hong Kong: first is the continuing argument over order of operations; second is the overly restrictive attitude towards implementing E.U.-style rules of judicial economy. This section addresses both of these mistakes.

##### A. No Order of Operations

In E.U. law, there is no fixed ordering to the preliminary reference rules or exceptions. A national court need only follow logic and expediency, so if it finds any one reason not to refer, it can dispose of the argument on that basis alone. This point should be instructive for Hong Kong.

In fact, there is nothing in the text or the fundamental logic of the Basic Law that demands an order of operations. If a referral can be rejected based on

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<sup>83</sup> *CILFIT*, *supra* note 75, at ¶ 16.

<sup>84</sup> *CHALMERS*, *supra* note 61, at 189.

<sup>85</sup> *Id.* at 189.

<sup>86</sup> *CRAIG & DE BÚRCA*, *supra* note 73, at 457.

<sup>87</sup> *CHALMERS*, *supra* note 61, at 190.

any one condition, then there is no point in looking at any others. A legal test should address what is logically necessary to dispose of the question; no more, no less.

As mentioned earlier, the CFA itself has never acknowledged a strict order of operations. Its existence is more a product of misunderstanding by others. However, it has attracted much scholarly attention, and it is high time that scholars, or the CFA itself, call for an end to it. Certainly, the ECJ finds no value in an order of operations, and neither should Hong Kong.

## B. Judicial Economy

This Article argues that all the E.U. rules for judicial economy can be emulated in Hong Kong. The irrelevant question doctrine is already in force in Hong Kong because it is implied by the “necessity” and “arguability” tests. It is also reasonable to say that the CFA, being a common law court, will not refer hypothetical questions that are not genuinely disputable or are not necessary for deciding a concrete case.

The *acte éclairé* doctrine, if applied to Hong Kong, suggests that the CFA should use previous interpretations of the NPCSC to resolve substantially similar questions in the future, without further reference. The CFA has not had any opportunity to put such doctrine into practice, although it would probably not be controversial.<sup>88</sup>

The *acte clair* doctrine, if applied to Hong Kong, suggests that the CFA should be able to decide a case without reference if it is obvious how the NPCSC would interpret the relevant provision. Clearly, a court should be cautious before presuming to know what another court would decide, and this practice would be especially controversial in Hong Kong.

The current view in the literature is that Hong Kong cannot use *acte clair*<sup>89</sup> because the CFA and NPCSC use completely contradictory forms of interpretation. For example, the CFA only ever uses the English version of the Basic Law while the NPCSC uses the Chinese version, yet it is the Chinese version that prevails in case of discrepancy.<sup>90</sup> Even more problematic is the fact that the CFA and NPCSC operate under completely different legal systems; the CFA does not have the institutional competence to understand the Basic Law

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<sup>88</sup> See Chan, *supra* note 45, at 655 (“The exception of *acte éclairé* . . . is applicable to Hong Kong. In fact . . . it necessarily flows from . . . the text of art.158(3).”).

<sup>89</sup> *Id.* at 654 (“[T]here is no room for the CFA to apply any form of [*acte clair*] once it has determined that the meaning of an excluded provision can potentially affect the outcome of the case.”); see also LO, *supra* note 51, at 432 (discussing *acte clair* but not advocating for its application to Hong Kong).

<sup>90</sup> Chan, *supra* note 45, at 658.

using Chinese legal principles.<sup>91</sup> One Chinese legal principle that is often maligned is the use of legislative intent. Legislative intent calls for the use of materials that are outside of the statutory language, and sometimes, as applied by the NPCSC, it changes the final result that the CFA otherwise found.<sup>92</sup> If the CFA and the NPCSC use such fundamentally different systems of interpretation, scholars argue, then the CFA can never be sure, without reasonable doubt,<sup>93</sup> how the NPCSC would interpret anything.

Clearly, there are stark differences between the legal traditions of the CFA and NPCSC. However, overemphasizing the differences in their forms of legal interpretation is problematic. First, it is too dismissive of the CFA's intellect. The Basic Law is a PRC statute, but so too are NPCSC interpretations (which have statutory force under the Chinese legal system). If the CFA is incompetent to read the Basic Law for itself, can it read NPCSC interpretations? Can the CFA implement instructions from a body that it cannot purport to understand? The CFA must be given more credit. Secondly, focusing on the differences between forms of legal interpretation does not promote judicial economy. In any legal system, there must be consideration for the efficient use of judicial resources. If the CFA cannot presume to know anything about Basic Law interpretation, how can it decide what questions are "necessary" or "arguable"?<sup>94</sup> If the CFA has to refer even the most trivial questions, how does that square with autonomy and judicial independence?

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<sup>91</sup> See *id.* at 654 ("But the CFA is not a Chinese court. There is no constitutional basis for it to adopt Chinese methods of interpretation. Nor is it institutionally equipped to second-guess how a Chinese body may interpret a provision.").

<sup>92</sup> The judgment in *Ng Ka Ling* was questioned by the Chief Executive, then overturned by the NPCSC, because the CFA's result was inconsistent with legislative intent. See Information Note from the Legislative Council Secretariat, Interpretation of the Basic Law under Article 158(1) (IN29/11-12), at 2.1-2.2 ("The HKSAR Government considered that CFA's interpretation of the relevant provisions of the Basic Law was not consistent with the legislative intent. On 18 May 1999, the Chief Executive reported to the State Council the problems he had encountered in the implementation of the Basic Law and sought for its assistance to seek an interpretation from NPCSC on the legislative intent of Articles 22(4) and 24(2)(3)."); BASIC LAW Instrument 17 ("[T]he interpretation of the Court of Final Appeal is not consistent with the legislative intent."). The CFA later refused to follow what was known to be an expression of legislative intent and decided the case by itself in *Ng Siu Tung v. Director of Immigration*, [2002] 5 H.K.C.F.A.R. 1.

<sup>93</sup> Cf. *Intermodal Transports*, *supra* note 81, at ¶ 34 (that the standard of review must be "no reasonable doubt" as to how the law is to be interpreted).

<sup>94</sup> Cora Chan draws two contradictory conclusions: first, rejecting adoption of *acte clair* in Hong Kong for reasons mentioned above; and second, encouraging the CFA to "draw inspiration from the . . . principles on *acte clair*," such as looking at different language versions of the Basic Law, to determine arguability. Chan, *supra* note 45, at 661. It is not clear why the CFA on its own should have competence to read the Basic Law for arguability but not for clear meaning, since the skills involved would be the same.

It is the opinion of this Article that Hong Kong can and should emulate the doctrine of *acte clair*. Doing so would require lawyers and judges to adjust their mindset, but the overall task is not as impossible as some people have feared. The following subsections describe how it can be done.

### 1. Distinguish Legal Acts from Political Acts

Some complain that the NPCSC sometimes makes Basic Law interpretations in an arbitrary manner. Part of this perception comes from too narrow an understanding of the NPCSC's role. Lawyers need to recognize the mixed legislative and judicial roles of the NPCSC. The NPCSC is unlike anything that exists in the common law because it is at once the parliament and the constitutional court of the PRC. Since the NPCSC has multiple functions, it is important to distinguish its political acts from its judicial acts. Its acts regarding the Basic Law may be either, or both.

When commentators debate about "interpretations" of the Basic Law by the NPCSC, often they are referring to eight documents that are appended to the Basic Law, known as Instruments 17 through 23 and 25.<sup>95</sup> Although these instruments express the NPCSC's views on the Basic Law, they are not all interpretations in the legal sense. The NPCSC itself is careful to distinguish them by name. Three of the Instruments (19, 21, and 23) are called "decisions" and are political (that is, legislative) in nature; the other five (17, 18, 20, 22, and 25) are called "interpretations" and are legal (that is, judicial) in nature.

Instruments 19, 21, and 23 of the Basic Law are NPCSC decisions regarding election reform in Hong Kong. They are political acts. Certain election methods are hard-wired into the Basic Law itself, and changes to them require constitutional amendments. The substance of constitutional amendments cannot be found in any law because they are political questions, requiring political consensus from many different parties. In Hong Kong, election reform is a joint decision of the NPCSC, the Chief Executive of Hong Kong, and the Legislative Council of Hong Kong. Instruments 19, 21, and 23 are political statements of the NPCSC, in which the NPCSC expresses what it is willing to amend as one of the stakeholders in the Basic Law. In contrast, Instruments 17, 18, 20, 22, and 25 are interpretations in the legal sense. For example, in Instrument 22, the NPCSC

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<sup>95</sup> BASIC LAW, *supra* note 5, at Instrument 17 (interpreting article 22(4) and article 24); *id.* at Instrument 18 (interpreting Annex I article 7 and Annex II article III); *id.* at Instrument 19 (ruling on issues related to Chief Executive and Legislative Council elections); *id.* at Instrument 20 (interpreting article 53(2)); *id.* at Instrument 21 (ruling on issues related to Chief Executive and Legislative Council elections and on issues related to universal suffrage); *id.* at Instrument 22 (interpreting article 13(1) and article 19); *id.* at Instrument 23 (ruling on issues related to election of the Chief Executive by universal suffrage and on Legislative Council elections); *id.* at Instrument 25 (interpreting article 104).

ruled on the nature and scope of sovereign immunity in Hong Kong lawsuits.<sup>96</sup> These are more consistent with what common law lawyers recognize as legal acts.

It is important to distinguish between political and legal acts of the NPCSC because legal doctrines such as *acte clair* can only be applied to legal interpretation. While Hong Kong lawyers may have trouble understanding the NPCSC's political decisions, they are much more familiar with the legal interpretations. With this caveat, understanding how the NPCSC interprets laws and applying *acte clair* in Hong Kong is not unmanageable.

## 2. Expand the Concept of Hong Kong Law

In order to implement *acte clair*, the CFA must be competent to interpret laws from the point of view of the NPCSC.<sup>97</sup> To some commentators, this appears to be a perverse task because the CFA has no understanding of Chinese legal methods.<sup>98</sup> However, there are significant precedents for the CFA to follow.

Hong Kong's former colonial master, the U.K., seamlessly adapted to civil law in the E.U. prior to Brexit. Since 1973, English common law has been subordinated to a "new legal order" under the (mostly civil) E.U. law, including giving up certain powers of final interpretation to the ECJ. Such a combination of English common law with E.U. law was once a very radical thing,<sup>99</sup> but it is no longer. Early on, eminent jurists encouraged English lawyers to adapt to a new way of thinking, for, as Lord Denning pointed out, the techniques in civil law are not utterly incomprehensible to common lawyers.<sup>100</sup> Those skeptical of comparative techniques will argue that a hybrid approach, such as of a common law lawyer practicing civil law, will never yield exactly what the civil law intended, and perhaps this is true. However, for many decades, English lawyers

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<sup>96</sup> BASIC LAW, *supra* note 5, at Instrument 22 (ruling that Hong Kong law's rules on state immunity "must be subject to such modifications, adaptations, limitations or exceptions as are necessary so as to be consistent with the rules or policies on state immunity that the Central People's Government has determined").

<sup>97</sup> LO, *supra* note 51, at 432 ("The question that should be asked is: Maybe it is clear to us, but how about to them?").

<sup>98</sup> See, for example, Chan, *supra* note 45, at 654 ("[T]he CFA is not a Chinese court. There is no constitutional basis for it to adopt Chinese methods of interpretation. Nor is it institutionally equipped to second-guess how a Chinese body may interpret a provision.").

<sup>99</sup> For example, Lord Denning once noted that the practice of the ECJ was "completely shocking to the old-fashioned English." Wang, *supra* note 70, at 168 (quoting ALFRED DENNING, WHAT NEXT IN THE LAW 293 (1982)).

<sup>100</sup> Lord Denning said, "Just as in Rome you should do as Rome does, so in the European Community, you should do as the European Court does." Zhenmin Wang, *supra* note 70, at 168 (quoting ALFRED DENNING, THE DISCIPLINE OF LAW 21 (1979)).

have been practicing E.U. law successfully, and nobody nowadays finds it untoward. What is done by English lawyers can be done by Hong Kong lawyers, too.

To use *acte clair*, Hong Kong lawyers must adapt to Chinese methods of legal interpretation. The idea has not always been anathema. Shortly after the handover, some lawyers were optimistic that such a thing could be done. In the famous 1997 case *HKSAR v. Ma Wai Kwan David*,<sup>101</sup> Justice Mortimer said in *obiter*:

[The Basic Law] is Chinese law applicable to Hong Kong which falls initially to be interpreted by Hong Kong courts used to interpreting laws passed in the common law tradition, applying common law principles. No doubt, from time to time, difficult questions of interpretation will arise, but not, it seems to me, from any inherent difficulty arising between the two traditions. The common law principles of interpretation, as developed in recent years, are sufficiently wide and flexible to purposively interpret the plain language of this semi-constitutional law. The influence of international covenants has modified the common law principles of interpretation.<sup>102</sup>

Therefore, Hong Kong lawyers do not have to be puzzled by Chinese civil law. For example, when faced with a question of legislative intent under Chinese law, common law lawyers may find, as Justice Mortimer did, that “legislative intent” is not so radically different in function from the “purposive interpretation” that is used under common law.

From time to time, reputable Hong Kong lawyers find themselves interpreting Chinese law. On one occasion, the Hong Kong Bar Association had the confidence to analyze and construe an NPCSC decision, in Chinese, with reference to the intent of the drafter, couched in the terms of legal reasoning that are familiar to every common law lawyer.<sup>103</sup> The Bar Association felt compelled to discuss the drafter’s intent because “the Court of Final Appeal has consistently emphasized that, in constitutional interpretation, one must have regard to the context and purpose of the instrument and the relevant provision of the instrument to be construed.”<sup>104</sup> The Bar Association’s analysis was precisely the kind of exercise that would prepare its members to apply *acte clair*.

All of this is to argue that Hong Kong lawyers should learn Chinese methods of legal interpretation, even if it requires some effort. What might also

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<sup>101</sup> *HKSAR v. Ma Wai Kwan David*, [1997] H.K.L.R.D. 761 (C.A.).

<sup>102</sup> *Id.* at 364-C.

<sup>103</sup> The Hong Kong Special Administrative Region Government, Consultation Document on Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016: Submission of the Hong Kong Bar Association, at 20 (discussing the difference between the Chinese terms “may/可” and “must/須” in the Basic Law).

<sup>104</sup> *Id.*

be helpful is more “judicial dialogue” between the CFA and NPCSC so that lawyers can observe interpretation of the Basic Law in action. The successful mingling of different legal systems takes a bit of time and experience.

However, it is absolutely necessary for the CFA’s practice and the NPCSC’s practice to become compatible with each other, because, under the unique legal order of the Basic Law, Hong Kong law is no longer *merely* common law, in the same way that English law is no longer *merely* common law. Certain aspects of PRC law find their way into Hong Kong law via Article 158(3) and other provisions. To be fully competent in today’s Hong Kong law necessarily requires knowledge of PRC law. This implicates a major change from the current legal education model in Hong Kong.

If Hong Kong could come to grips with its unique legal order and practice it successfully, then it could truly use the experience of TFEU Article 267 that it was intended to inherit. Hong Kong could then fully adopt the E.U. doctrines for judicial economy, which would strengthen the CFA’s role as an active builder of Basic Law jurisprudence.

## V. DOCTRINE OF SINCERE COOPERATION

When using E.U. law as a model, it is important to remember that all E.U. treaty provisions exist against a background of certain general principles. In the context of judicial references, the most relevant principle is the doctrine of sincere cooperation.<sup>105</sup> Sincere cooperation imposes crucial duties upon all participants.<sup>106</sup> On the one hand, the ECJ trusts national courts to apply E.U. law correctly and to refer questions without hesitation. On the other hand, national courts also trust the ECJ to give high-quality, reasoned opinions that are easily understood and applied. Sincere cooperation can be viewed as a kind of institutional comity, where every institution performs its duties and obligations to all others.

There is no written equivalent of sincere cooperation in the Basic Law. However, if Basic Law Article 158(3) is intended to be a true imitation of TFEU Article 267, which the drafting history suggests it to be, then it is reasonable to infer that Article 158(3) must reflect sincere cooperation in practice. The

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<sup>105</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 3, Oct. 26 2012, O.J. (C 326 13).

<sup>106</sup> Case C-2/88, Imm. J. J. Zwartveld & Others, 1990 E.C.R. I-4406, ¶¶ 17–18 (“[The principle of sincere cooperation] not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law, . . . but also imposes on Member States and the Community institutions mutual duties of sincere cooperation. This duty of sincere cooperation imposed on Community institutions is of particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system.”).

questions then become, how should Hong Kong practice sincere cooperation, and what problems would it solve?

In the context of Article 158(3), sincere cooperation calls for increasing the institutional comity between the CFA and the NPCSC and, more generally, comity between the legal systems of Hong Kong and mainland China. In fact, there are several legal principles in Hong Kong that point in the direction of institutional comity.

One of the legal principles that calls for institutional comity is the “high degree of autonomy.” This phrase is repeated in the Sino-British Joint Declaration and the Basic Law itself.<sup>107</sup> It represents a commitment by the Central People’s Government, though everyone lives under the Constitution of the PRC, to entrust most of the running of Hong Kong to local authorities. That is to say, the central authority will not contradict the regional authority on regional matters, but the regional authority must defer to the central authority on the few areas that remain central matters. This principle has largely been respected. In the vast areas of the Basic Law that concern local affairs, over which the CFA exercises final interpretation and adjudication, the NPCSC has not interfered.<sup>108</sup>

Another principle that echoes institutional comity is the exhortation to “love the motherland and Hong Kong.” This phrase was coined by Deng Xiaoping to explain that China expected Hong Kong’s leaders to<sup>109</sup> respect the nation, uphold One Country, Two Systems, and protect Hong Kong’s prosperity and stability after 1997.<sup>110</sup> Deng’s phrase has become controversial lately because of its appearance in the even more controversial White Paper of June 2014.<sup>111</sup> Among other things, the White Paper reaffirmed, using Deng’s words, that

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<sup>107</sup> See Sino-British Joint Declaration on the Question of Hong Kong, China-U.K., ¶ 3(2), Dec. 19, 1984, 1399 U.N.T.S. 33; BASIC LAW, *supra* note 5, at art. 2.

<sup>108</sup> See generally Yap, *supra* note 32, at § V.

<sup>109</sup> Xiaoping Deng, *Maintain Prosperity and Stability in Hong Kong*, in 3 SELECTED WORKS OF DENG XIAOPING 80, 82 (1984) (“There is only one requirement for [administrators of Hong Kong after 1997]: they must be patriots, that is, people who love the motherland and Hong Kong.”).

<sup>110</sup> Xiaoping Deng, *One Country, Two Systems*, in 3 SELECTED WORKS OF DENG XIAOPING, *supra* note 109, at 68, 70 (“It must be required that patriots form the main body of administrators, that is, of the future government of the Hong Kong special region. . . . A patriot is one who respects the Chinese nation, sincerely supports the motherland’s resumption of sovereignty over Hong Kong and wishes not to impair Hong Kong’s prosperity and stability. . . . We don’t demand that they be in favour of China’s socialist system; we only ask them to love the motherland and Hong Kong.”)

<sup>111</sup> Information Office of the State Council of the People’s Republic of China, *The Practice of the “One Country, Two Systems” Policy in the Hong Kong Special Administrative Region (White Paper)* (June 10, 2014) <https://perma.cc/8UDT-SLX5>.

government officials, including judges, ought to be “patriots” with “loyalty to one’s country.”<sup>112</sup>

To some people in Hong Kong, “loyalty to one’s country” sounds sinister, but legal scholars should not read controversy into these words. Elsewhere, central government officials have emphasized that loyalty to the country means “supporting the principle of One Country, Two Systems;” it includes “not opposing the central government,” which means not advocating for the overthrow of the Central Government, the Constitution of the PRC, or the respective political and economic systems of mainland China and Hong Kong.<sup>113</sup> Respect for the other governments and upholding the basic constitutional structure would seem to be minimum expectations preceding institutional comity.

The principle of sincere cooperation would also require a more constructive use of the judicial reference process. First, the CFA should openly accept its constitutional duty of judicial referral and put the duty into practice. It cannot claim that it understands Article 158(3) but then avoid references using dubious legal theories. Second, the NPCSC should provide sufficient reasoning and analysis for its interpretations, so as to educate the end user about its methods and concerns. It is not the NPCSC’s habit to do so.<sup>114</sup> Recently, the NPCSC took a step in the right direction when it issued a separate, explanatory document on its ruling about the scope of sovereign immunity.<sup>115</sup> Future explanations could be even more detailed, in the manner of common law judicial opinions, and incorporated into the text of the interpretation itself. In the interest of sincere cooperation, the NPCSC should equip the CFA with sufficient knowledge to be able to use *acte clair* or to interpret the Basic Law consistently.

Sincere cooperation requires focused effort from many sides, but it is valuable to the development of Hong Kong constitutional law if it can be realized. Sincere cooperation would build up a sufficient body of Basic Law interpretations from which lawyers can learn and extrapolate. Ultimately, it

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<sup>112</sup> *Id.* at § V.3.

<sup>113</sup> See, for example, Kahon Chan, *Definition of “Love the Country Love Hong Kong” Very Clear*, CHINA DAILY ASIA (Dec. 20, 2013).

<sup>114</sup> See Anthony Mason, *The Rule of Law in the Shadow of a Giant: The Hong Kong Experience*, 33 SYDNEY L. REV. 623, 642 (2011) (“[The NPCSC] provides little in the way of reasoning for its interpretive conclusion [so they] have not constructed a corpus of constitutional law on which the Hong Kong courts could draw, even assuming it to be legitimate to do so.”).

<sup>115</sup> Fei Li, *The Explanations on the Draft Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress*, 22nd Sess. Standing Committee of the Eleventh National People’s Congress (Aug. 24, 2011).

would create a reputable and prestigious jurisprudence that would make the Basic Law worthy of its “constitutional” name.

## VI. RESPONSIBILITIES OF THE COURT OF FINAL APPEAL

This Article has made a number of suggestions that require effort from many different actors, but one actor is the most important of all: the CFA. Meaningful change will not begin without movement from the CFA. To that end, this Article recommends several actions that the CFA should undertake at the earliest opportunity.

First, the CFA should abandon the *Ng Ka Ling* test. It is an unfortunate relic that is no longer defensible. The CFA should start afresh and base its rules on doctrines that are consistent with the intent and design of the constitutional order. The CFA has the opportunity to demonstrate that it has a sophisticated understanding of its constitutional interplay with the NPCSC and shape new jurisprudence to suit the needs of Hong Kong.

Second, the CFA should remember and draw inspiration from the origins of Article 158(3). The CFA should establish a new preliminary reference jurisprudence that is based on the most important aspects of E.U. law. The two most obvious and immediate targets are the irrelevant question and *acte éclairé* doctrines. The CFA is well-placed to implement these on its own.

Third, the CFA should take the initiative to understand Chinese legal interpretive methods. It should lead by example, addressing these methods in its judgments, and in doing so encourage practitioners to use Chinese legal arguments. Once the CFA achieves a high level of understanding of Chinese interpretive methods, the NPCSC would then have a basis to trust that the CFA is a competent partner implementing the Basic Law in Hong Kong. In other words, the CFA would gain the benefit of the doubt, and the NPCSC would be more content to let the CFA do its work.

Finally, the CFA should engage in constructive dialogue with the NPCSC. To do so, the CFA should make preliminary references liberally, even enthusiastically. At the same time, the CFA should ask the NPCSC for legal reasoning. At a suitable time, with a sufficient *acquis* and a firm grasp of Chinese interpretive methods, the CFA should attempt a doctrine of *acte clair*. In this way, the CFA would practice *acte clair* in a convincing way that makes scholars, practitioners, and the NPCSC believe in this transplant from E.U. law.

## VII. CONCLUSION

The Basic Law has been in practice for twenty years, yet critical aspects of Hong Kong’s Constitution remain disappointingly primitive. In particular, the law regarding the interaction between Hong Kong and PRC legal systems, stemming from Article 158(3), is underdeveloped at best and misguided at worst.

A major impediment has been the Hong Kong judiciary's unwillingness to respect the role of the NPCSC under the Basic Law's constitutional order.

Given the clear historical transplant of TFEU Article 267 into the Basic Law's Article 158(3), it is worth giving serious thought to how the E.U. experience with preliminary references can help develop Hong Kong's constitutional jurisprudence. The similarities between Article 267 and Article 158(3) are not just superficial; they implicate the very forms and purposes of these constitutional provisions. Hong Kong should embrace the opportunity for direct comparison.

Hong Kong courts can adopt all the rules of judicial economy, including the doctrines of irrelevant question, *acte éclairé*, and *acte clair*. Doing so would encourage a more inclusive view of what modern Hong Kong law is—not merely common law but a common law with aspects of Chinese law as well. Hong Kong should also recognize a fundamental principle of sincere cooperation. It would require an active judicial dialogue between the CFA and the NPCSC. It would require the CFA to refer questions of interpretation in good faith, and it would require the NPCSC to give reasoned, instructive interpretations. The constitutional design of the Basic Law expects nothing less than full cooperation and mutual respect.

Developing the Basic Law was never going to be easy. But, as one respected Hong Kong constitutional scholar has said:

[I]f 'one country, two systems' is to work, it is necessary to develop a jurisprudence that is acceptable to both sides and one that reconciles the differences or at least provides principles and norms that define what differences are tolerable.<sup>116</sup>

A return to Article 158(3)'s E.U. roots would accomplish just that. It would convert the Basic Law into a constitutional system with productive judicial dialogue, clear precedents, coexistence of two systems in one country, and continued impact beyond 2047.

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<sup>116</sup> Albert Chen, *Another Case of Conflict Between the Court of Final Appeal and the NPC Standing Committee?*, 31 H.K.L.J. 179, 185 (2001).