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Dual System of Constitutional Interpretation A Hong Kong Experience

ABSTRACT

After the People's Republic of China resumed her sovereign control over Hong Kong, the Hong Kong Special Administrative Region was established pursuant to the Basic Law of Hong Kong, which is the constitutional document for Hong Kong. The Basic Law of Hong Kong defines the scope of autonomy enjoyed by Hong Kong as a region within a unitary state under the policy of 'one country, two systems.' However, the policy has never been clear, and it leads to controversy surrounding the application of the 'dual system' of constitutional interpretation in Hong Kong, as the highest appellate court in Hong Kong, the Court of Final Appeal, may be required to refer to the Chinese Government for interpretation of the Basic Law. In this article, the referral mechanism in the Basic Law and the scope of constitutional jurisdiction enjoyed by the Hong Kong Court of Final Appeal after the two landmark cases, *Ng Ka Ling v Director of Immigration* and *Democratic Republic of the Congo v FG Hemisphere Associates LLC*, will be discussed with reference to the similar mechanism under Article 177 of the Treaty Establishing the European Economic Community (now Article 267 of the Treaty on the Functioning of the European Union), to ascertain who will interpret the 'mini-constitution' of Hong Kong.

INTRODUCTION

On 1 July 1997, the People's Republic of China (PRC) resumed sovereignty over Hong Kong, and the Hong Kong Special Administrative Region (HKSAR) was established. The constitutional document related to the establishment of the HKSAR is the Basic Law of the HKSAR (Basic Law),¹ which is considered to be its 'mini-constitution.'² The Basic Law is not only a product of the Sino-British Joint Declaration signed on 19 December 1984 between the United Kingdom and the PRC, but also a Chinese national law which governs the HKSAR pursuant to Article 31 of the PRC Constitution. Further, the Basic Law is the fundamental law

1 The English text of the Basic Law is accessible from <http://www.basiclaw.gov.hk/en/basiclawtext>.

2 R J Morris, 'Forcing the Dance: Interpreting the Hong Kong Basic Law Dialectically' in H Fu, L Harris and NM Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan, New York 2007) 99.

in the HKSAR governing different aspects of Hong Kong, including the powers and duties of the HKSAR Government and its relationship with the sovereign. Hence, it has been observed that the Basic Law 'has at least three dimensions: international, domestic and constitutional.'³

The power to interpret the Basic Law is provided in Article 158 of the Basic Law (Article 158). Since the Hong Kong Court of Final Appeal (CFA)⁴ handed down its judgment in *Ng Ka Ling v Director of Immigration (Ng Ka Ling)*,⁵ Article 158 has been a controversial issue, as it involves a submission of jurisdiction to the Standing Committee of the National People's Congress (SCNPC), an organ representing the sovereign. A 'dual system' for interpreting the Basic Law is therefore created since both the SCNPC and the Hong Kong courts may interpret the Basic Law.⁶

On 8 June 2011, the CFA decided to make the first reference for interpretation in a civil case *Democratic Republic of the Congo v FG Hemisphere Associates LLC (Congo)* concerning the nature and scope of state immunity,⁷ which is described by Justice Bokhary PJ as a day when the court is asked 'to give a decision on judicial independence.'⁸ Therefore, interpreting the Basic Law is not merely a question of interpretation; it is also relevant to the degree of autonomy enjoyed by Hong Kong and is considered to be one of the 'front lines' in defending the rule of law in Hong Kong.

The purpose of this article is to evaluate the scope of autonomy enjoyed by the CFA in interpreting the Basic Law under Article 158 in the context of the special political relationship between the PRC and the HKSAR. Part I sets out the two fundamental policies of the Basic Law, which are 'one country, two systems' and 'high degree of autonomy.' Parts II through IV examine the operation of Article 158, focusing on the tests for determining when a reference shall be made and the comparison with the referral mechanism under Article 177 of the Treaty Establishing the European Economic Community, which is now Article 267 of the Treaty on the Functioning of the European Union. Part V illustrates the actual application of the discussion in the previous parts using the *Congo* case. Part VI describes the impact of the SCNPC's interpretation of the Basic Law on the autonomy of the CFA in interpreting the Basic Law from other perspectives.

3 *HKSAR v Ma Wai Kwan David* (29/07/1997, CAQL1/1997) [1997] 2 HKC 315 (HK, CA), 324 (Chan CJHC, as he then was). Official judgments of the Hong Kong courts are accessible online through <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp>.

4 The CFA is the highest appellate court in the HKSAR. As provided by the Basic Law art 82, the CFA exercises the 'power of final adjudication' and its determination of a case should be final notwithstanding a subsequent re-interpretation of the Basic Law (see also Basic Law art 158(3), which will be discussed below).

5 (29/01/1999, FACV14/1998), [1999] 1 HKLRD 315 (HK, CFA).

6 G Zhu, 'Article 158 of the Basic Law of Hong Kong and Legislative Interpretation' [2008] 2 Chinese Journal of Law 3, 10.

7 (08/06/2011, FACV5/2010), [2011] 4 HKC 151 (HK, CFA).

8 Ibid.

**PART I
THE TWO UNDERPINNING POLICIES OF THE BASIC LAW OF HONG KONG**

A. 'One Country, Two Systems'

The PRC is a unitary state⁹ and there is presumably only one legal system in the country. The National People's Congress (NPC) is the 'highest organ of state power' in the PRC,¹⁰ and its permanent body, the SCNPC, may exercise some of the powers exercisable by the NPC when the NPC is not in session.¹¹ Subject to the principle of the PRC being a unitary state, Article 31 of the PRC Constitution provides that special administrative regions may be established and the NPC is to enact the law for such regions 'in the light of the specific conditions.'¹² In order to preserve the status of the PRC as a unitary state but without unnecessarily undermining the autonomy of Hong Kong, 'one country, two systems' was proposed, which is the first underpinning policy of the Basic Law. It is also against such background that the HKSAR was established and the Basic Law was enacted in the HKSAR.

'One country, two systems' embraces two concepts. 'One country' emphasises the fact that Hong Kong is 'an inalienable part' of the PRC as provided by Article 1 of the Basic Law. 'Two systems,' as stressed by its proposer Xiaoping Deng during his talk with members of a Hong Kong industrial and commercial delegation in 1984, is for preserving the capitalist system and the way of living in Hong Kong as distinguished from the socialist system in the mainland China.¹³ It therefore appears that the autonomy given to Hong Kong as one of the 'two systems' is only for preserving the two distinct social systems, as the 'two systems' cannot be distinct relative to each other politically.¹⁴

The constitutional status of Hong Kong is therefore different from a federal system, such as that in the United States. In the United States, it may be said that each state retains its ultimate sovereignty such that it has the residual powers as distinguished from powers delegated to the federal government; or alternatively, that there is a division of powers between the federal and state governments.¹⁵ Hong Kong does not have its own distinct sovereignty as a state in a federal system.

9 The Preamble to the PRC Constitution states, *inter alia*, that: 'The People's Republic of China is a unitary multi-national state built up jointly by the people of all its nationalities.' There has been some debate as to whether the PRC is theoretically or practically a unitary state, but since it is beyond the scope of discussion of this essay and therefore the position as stated in the Preamble is adopted.

10 PRC Constitution art 57.

11 PRC Constitution art 57, 67.

12 The PRC Constitution art 31 provides that: 'The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions.'

13 A Lawrence, *China since 1919: Revolution and Reform: a Sourcebook* (Routledge, London 2004) 247.

14 S Wang, *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd edn Law Press, Beijing 2009) 186.

15 N Aroney, 'Towards a General Theory of the Formation and Amendment of Deferal Constitutions: A Comparative Study' in A Soeteman, *Pluralism and Law (20th IVR World Congress)*, Volume 2: *State, Nation, Community, Civil Society* (Franz Steiner Verlag, Amsterdam 2003) 90.

B. 'High degree of Autonomy'

The constitutional guarantee of the HKSAR enjoying a 'high degree of autonomy' as provided in Article 2 of the Basic Law¹⁶ is another important policy. This may be considered as a policy of 'non-interference' as it is not merely concerning with maintaining two different social systems but also with distinguishing the HKSAR from other provinces and local administrative regions within the PRC since it has a relatively higher degree of autonomy.¹⁷ Thus, the combined effect of 'one country, two systems' and 'high degree of autonomy' is that the powers exercisable by the HKSAR Government are *granted* by the Chinese Government, but these powers may be *freely exercised* by the HKSAR Government if the powers are within the autonomy of the HKSAR. Such powers include 'executive power' in Article 16, 'legislative power' in Article 17(1) and 'judicial power' (including final adjudication) in Article 19(1).

The Chinese Government, as the sovereign, may determine the scope of autonomy of the HKSAR, while the HKSAR does not enjoy residual power as a federal state. This view gains support from Article 20 of the Basic Law, which states that other powers may be 'granted' by the Chinese Government.¹⁸ If the power is in the 'grey area' and arguably within the 'high degree of autonomy' under Article 2 despite not being explicitly conferred by the Basic Law, Article 20 may apply and such power may be enjoyed only if the HKSAR is granted such power.¹⁹ Nevertheless, there is another view that residual powers could have been left with the HKSAR. Yash Ghai observed that Article 31 of the PRC Constitution provides that the PRC may establish special administrative regions when necessary, which is 'undoubtedly intended to free special regions from the shackles and restraints of the mainland political and constitutional system.'²⁰ To reconcile these two views, it may be suggested that powers being necessary to uphold 'one country, two systems,' such as powers for the maintenance of capitalist system in Hong Kong or for filling the gap due to the general exclusion of Chinese national laws under Article 18(2) of the Basic Law,²¹ should have been implicitly granted

16 The Basic Law art 2 provides that: 'The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.'

17 W Xiao, 'What's Legal Status of Hong Kong' [1996] 2 China Law 90, 91. The author also distinguishes Hong Kong from other administrative regions in the PRC by the way the administrative region is classified and sub-divided systematically.

18 The Basic Law art 20 provides that: 'The Hong Kong Special Administrative Region may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government.'

19 For a detailed discussion of residual power in Hong Kong, see the *Final Report on Residual Power by the Special Group on the Relationship between the Central Government and the SAR* (1987).

20 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) 223-4.

21 The Basic Law art 18(2) provides that: 'National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.' Therefore,

under the general category of executive, legislative or judicial power. If a kind of power cannot be classified as executive, legislative or judicial power, or an outcome cannot be achieved by exercising one of these powers, it can hardly be said to be within the autonomy of the region. Therefore, this 'residual power' has only a relatively narrow scope. Article 20 may also be purely permissive such that the HKSAR Government may enjoy powers *beyond* the scope of 'high degree of autonomy' as granted.

PART II
ARTICLE 158 OF THE BASIC LAW

The above two policies are highly relevant to the interpretation of Article 158, which provides for the power to interpret the Basic Law. At an outset, Article 158 provides that the power to interpret the Basic Law belongs to the SCNPC, but the Hong Kong courts are authorised to interpret the Basic Law when adjudicating cases. The two policies are relevant not only because 'judicial power' as granted under Article 19(1) is within the 'high degree of autonomy' subject to 'one country, two systems';²² it is also relevant because of the obligation on the CFA of the HKSAR to refer to the SCNPC of the PRC for interpretation of the Basic Law in some circumstances. Reference to a superior governmental body beyond the special administrative region raises a question as to the scope of autonomy enjoyed by the HKSAR.

Article 158 mainly resolves two issues: whose power it is to interpret the Basic Law, and when the CFA shall make a reference to the SCNPC for interpretation (and its consequence). The text of the article is as follows:

- (1) The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.
- (2) The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.
- (3) The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law 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.

only the relevant provisions in the PRC Constitution and those national laws promulgated or implemented through local legislation in Annex II to the Basic Law will have a direct legal effect on the legal system of Hong Kong.

22 For example, the Chinese Government has retained the power to determine issues relating to 'acts of state' such as 'defence and foreign affairs' in a case before any courts of Hong Kong pursuant to the Basic Law art 19(3). The scope of this exclusion is discussed in depth in *Congo* (n 7).

(4) The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

Three principles can be observed from the above provision:

1. *The power to interpret the Basic Law belongs to the SCNPC* – Paragraph (1) clearly states that the power to interpret the Basic Law is granted by the NPC to the SCNPC. The CFA has also admitted that the SCNPC has unlimited power under Article 158 to interpret the Basic Law, and the interpretations issued by the SCNPC pursuant to Article 158 shall be binding on all Hong Kong courts.²³
2. *By the SCNPC's authorisation, all Hong Kong courts may interpret any provisions of the Basic Law* – Paragraph (2) authorises all Hong Kong courts to interpret any provisions in the Basic Law as long as such provisions are within the autonomy of the HKSAR. Paragraph (3) further authorises the courts to interpret 'other provisions' of the Basic Law subject to the condition stated therein, which is applicable only when the courts are making 'their final judgments which are not appealable.' Given that there is no further clarification for 'courts of the Hong Kong Special Administrative Region,'²⁴ all Hong Kong courts are authorised to interpret any provisions of the Basic Law. For example, a magistrate may determine an offence charged to be unconstitutional.²⁵ Chinese national laws applicable to Hong Kong as listed in Annex III to the Basic Law may also be interpreted by the Hong Kong courts.²⁶

Only the CFA has the obligation to refer to the SCNPC for interpretation if and only if the provision to be interpreted is an 'excluded provision' and is material to the adjudicating case. – Only the CFA has been given the power of final adjudication pursuant to Article 82 of the Basic Law and only its judgments are non-appealable.²⁷ Therefore, it is obligated under paragraph (3) to make a reference to SCNPC when there is a need to interpret an 'excluded provision' (which is a

23 *Ng Ka Ling v Director of Immigration (No 2)* (26/02/1999, FACV14/1998) [1999] 1 HKLRD 577 (HK, CFA).

24 The Basic Law art 81 provides that: 'The Court of Final Appeal, the High Court, district courts, magistrates' courts and other special courts shall be established in the Hong Kong Special Administrative Region. The High Court shall comprise the Court of Appeal and the Court of First Instance.' These should be the law courts which are empowered to interpret the Basic Law. Furthermore, 'courts' in the Basic Law art 35 refers to 'courts of law' and does not include tribunals or disciplinary committees: *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (06/04/2006, FACV22/2005) [2006] 2 HKLRD 518 (HK, CFA), 537 (Ribeiro PJ).

25 *Secretary for Justice v Yau Yuk Lung* (17/07/2007, FACC12/2006) [2007] 3 HKLRD 903 (HK, CFA) [68]-[76] (Ribeiro PJ). It may also be noted that the Basic Law art 11(2) provides that: 'No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene [the Basic Law].'

26 See, for example, *Azan Aziz Marwah v Director of Immigration* (09/12/2008, HCAL38/2008) [2009] 3 HKC 185 (HK, CFI), in which the Nationality Law of the PRC was interpreted.

27 Judgments which later become non-appealable due to the lapse of the right to appeal are appealable *per se* and should not be subject to the referral mechanism as stipulated in the Basic Law art 158(3). It follows that all courts in Hong Kong, except the CFA, may interpret any provisions in the Basic Law without the need to refer to the SCNPC. Nevertheless, if a court may give a judgment which is non-appealable, the Basic Law art 158(3) is designed to also cover such situation.

provision 'concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region')²⁸ when adjudicating cases and such interpretation will 'affect the judgments.'

It should be noted that this is an *authorisation* instead of delegation or separation of powers, which forms the basis of the dual system of interpretation. Reserving the ultimate power to interpret the Basic Law is a sign of sovereignty since, as mentioned above, the Basic Law is a Chinese national law providing for the establishment of the HKSAR. The resulting regime is therefore a balance of considerations between reserving the power to interpret the constitutional document to the sovereign and granting the necessary power for the domestic courts in adjudicating cases.

Nevertheless, the SCNPC does not supersede the CFA in deciding the case; it may only make a binding interpretation of the Basic Law.²⁹ The application of such interpretation to the case is left up to the CFA. Paragraph (3) provides that the SCNPC's interpretation shall only be followed in the present adjudication and future cases. It has no retroactive effect on judgments which have already been handed down.³⁰ The phrase 'judgments' only refers to the orders made for the parties to the settled litigation and the precedential value of those judgments can be erased.³¹

PART III TESTS APPLIED FOR DECIDING WHETHER REFERENCE SHALL BE MADE

Ng Kg Ling laid down the test to determine when reference to the SCNPC for interpretation of the Basic Law is necessary.³² It involves a two-limb test, but there are other conditions that must be satisfied if more than one provision is to be considered.

A. The Ng Ka Ling Case

Before discussing the tests and conditions, it is useful to understand the background of *Ng Ka Ling*. In essence, some Chinese nationals came to Hong Kong using a passport issued by the Chinese Government called 'two-way permits'³³ and overstayed. They later claimed their right of abode in Hong Kong

28 The term 'excluded provision' is adopted from the judgment by Li CJ in *Ng Kg Ling* (n 5), 342. This term will be frequently referred to in this article.

29 HY Chen, 'Ng Ka-ling and Article 158(3) of the Basic Law' (2002) 5 *Journal of Chinese and Comparative Law* 221, 224-5.

30 *Lau Kong Yung (An Infant) v Director of Immigration* (03/12/1999, FACV10/1999) [1999] 4 HKC 731 (HK, CFA), 759 (Li CJ).

31 *Ng Siu Tung v Director of Immigration* (10/01/2002, FACV1/2001) [2002] 1 HKLRD 561 (HK, CFA), 585-6 (Li CJ, Chan and Ribeiro PJJ and Sir Mason NPJ).

32 *Ng Kg Ling* (n 5), 342 (Li CJ).

33 'Two-way permit' is the short-form for the 'Exit-Entry Permit for Travelling to and from Hong Kong and Macao.' Chinese nationals who wish to visit Hong Kong shall generally apply for one,

as permanent residents under Article 24(2)(3) of the Basic Law.³⁴ However, Article 22(4) of the Basic Law³⁵ and the Immigration Ordinance³⁶ together impose a requirement that 'people from other parts of China' need approval from the Chinese Government and that they should be issued with a 'one-way permit' in order to settle in Hong Kong.³⁷ This was a requirement that the applicants had not met.

When the case was appealed to the CFA, it held that the requirement of a one-way permit by the Immigration Ordinance was unconstitutional under Article 24(3).³⁸ Accordingly, Chinese nationals under Article 24(2)(3) could have the right of abode in Hong Kong notwithstanding the absence of a one-way permit so long as they were permanent residents of Hong Kong residing in the mainland China. For Article 22(4), the CFA held that the phrase 'people from other parts of China' did not include permanent residents of Hong Kong. Thus, giving full effect to Article 22(4) would not encroach on the right of abode granted under Article 24.³⁹

but this does not grant the right to settle in Hong Kong. For settlement in Hong Kong, a 'one-way permit' is required, subject to approval from the mainland authorities. See Hong Kong Immigration Department, 'Arrangement for Entry to Hong Kong from Mainland China' <http://www.immd.gov.hk/ehtml/hkvisas_9.htm> accessed 18 May 2011 for details ('two-way permit' is referred to as 'exit-entry permit').

- 34 The Basic Law art 24(2)(3) refers to Chinese nationals born outside Hong Kong of permanent residents of permanent residents of Hong Kong. So far as being material, the Basic Law art 24 provides that: 'The permanent residents of the Hong Kong Special Administrative Region shall be: (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region; (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region; (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);...'
- 35 The Basic Law art 22(4) provides that: 'For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region.'
- 36 The Immigration Ordinance s 2AA(1)(a) provides that: 'A person's status as a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 can only be established by his holding of... a valid travel document issued to him and of a valid certificate of entitlement also issued to him and affixed to such travel document...' Schedule 1 of the Ordinance has the similar wording as the Basic Law art 24(2), and paragraph 2(c) is corresponding to category (3) in the Basic Law art 24(2).
- 37 An extra requirement is therefore added to the Basic Law art 24(2)(3) that persons of such category shall also been issued a valid travel document and a valid certificate of entitlement, i.e., one-way permit. Otherwise, they would not be entitled to the right of abode in Article 24(3), as the Immigration Ordinance s 2AA(2) provides that: 'A person's right of abode in Hong Kong by virtue of his being a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 can only be exercised upon the establishment of his status as such a permanent resident in accordance with subsection (1) and, accordingly, where his status as such a permanent resident is not so established, he shall, for the purposes of this Ordinance, be regarded as not enjoying the right of abode in Hong Kong.'
- 38 The Basic Law art 24(3) provides that: 'The above-mentioned residents [i.e., those mentioned in Article 24(2)] shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode.'
- 39 *Ng Kg Ling* (n 5), 346 (Li CJ).

In that case, the first and former Chief Justice Li CJ laid down the test to determine when reference to the SCNPC for interpretation of the Basic Law is necessary.⁴⁰ Two conditions have to be satisfied: the 'classification condition' as to whether the provision is an excluded provision, and the 'necessity condition' as to whether its interpretation is material to the adjudication and judgment of the case. It shall be up to the CFA to decide whether the conditions are both satisfied.⁴¹ The CFA's conclusion was that the test was not satisfied and reference to the SCNPC was therefore unnecessary.⁴²

However, this was not the end of the matter. On 26 June 1999, the SCNPC issued an interpretation of Articles 22(4) and 24(2),⁴³ which was made in response to the request by the Chief Executive of the HKSAR.⁴⁴ In its interpretation, the SCNPC stated that the CFA had not sought an interpretation from the SCNPC pursuant to Article 158 before making its final judgment where it involved 'relevant provision(s)'⁴⁵ being excluded provision(s). It was declared that, for persons under Article 24(2)(3), approval from the relevant Chinese authorities of their residential districts must be sought as required by Article 22(4). The effect of the interpretation would not, however, affect the right of abode acquired under *Ng Kg Ling* 'by the parties concerned in the relevant legal proceedings.'

B. The Two-limb Test

Although the SCNPC's interpretation partly reversed the outcome of the CFA's interpretation of the Basic Law, it did not 'overrule' the two-limb test. In *Director of*

40 Ibid 342 (Li CJ).

41 Ibid.

42 Ibid 345 (Li CJ). This will be discussed in depth below when considering the two-limb test.

43 The interpretation is titled 'The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.' Its official translation is accessible through http://www.basiclaw.gov.hk/en/materials/1999_6_26.html.

44 Although there is no explicit mechanism in the Basic Law for the Chief Executive of the HKSAR to invite the SCNPC to interpret the Basic Law, the Chief Executive made the reference to the State Council of the PRC, which then invited the SCNPC to make an interpretation, pursuant to the Basic Law art 43(2) and 48(2). The Basic Law art 43(2) provides that 'The Chief Executive of the Hong Kong Special Administrative Region shall be accountable to the Central People's Government and the Hong Kong Special Administrative Region in accordance with the provisions of this law.' The Basic Law art 48(2) provides, *inter alia*, that: 'The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions:... To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the Hong Kong Special Administrative Region...'

45 As to the use of 'relevant provision(s)' in the interpretation, HY Chen, a member of the Committee for the Basic Law from Hong Kong, suggested that it was in fact intended to avoid mentioning which 'provision' or 'provisions' (it may be noted that there is no singular or plural form of 'provision' in Chinese) the CFA did not refer to the SCNPC, and that Xiaoyang Qiao, the official of the SCNPC who was responsible for the drafting of the interpretation, only stated that Basic Law art 22(4) and 24(2)(3) are inseparable. It is also possible that only the former one is the 'relevant provision'. The CFA took this view in *Chong Fung Yuen* (n 46 *infra*), 550 (Li CJ). On the other hand, Jianfan Wu, a member of the Committee for the Basic Law from the PRC, believed that Qiao's speech in fact indicated that both art 22(4) and 24(2)(3) are those 'relevant provisions' for the CFA to arrive at its decision (see *Chong Fung Yuen* [n 46 *infra*], 550 [Li CJ]).

Immigration v Chong Fung Yuen (Chong Fung Yuen),⁴⁶ which is another case on the right of abode in Hong Kong, the CFA further clarified the two-limb test. For the 'classification condition,' it is the character of the provision in question, and not the substantive effect of the implementation of the provision, which determines whether a provision is an excluded provision.⁴⁷ It was held that Article 24(2)(1) (not Article 24(2)(3) as in *Ng Ka Ling*) is not an excluded provision as '[i]ts character is that of a provision defining one category of permanent residents who are entitled to the right of abode.'⁴⁸ It appears that the subject matter being governed by the provision in question is the focus of the classification condition as to whether the provision is an excluded provision.

This suggests that there can be a list of excluded provisions. The character of a provision will unlikely be different unless it is being amended by the NPC or interpreted by the SCNPC. It will also not be affected by the context of the case since a provision is drafted for general purpose. If a provision of the Basic Law has been interpreted by the CFA without making a reference or being explicitly stated otherwise by the SCNPC, it will not be an excluded provision.

For the 'necessity condition,' the question is formulated as whether 'the Court in adjudicating the case needs to interpret the excluded provision, and such interpretation will affect the judgment on the case.'⁴⁹ This condition however has not yet been fully explored by the CFA,⁵⁰ although in *Congo* the majority held that the condition is satisfied when 'the case cannot be resolved without a determination of the questions of interpretation affecting the meaning of [the excluded provisions].'⁵¹

Given that the necessity to interpret a provision may easily arise,⁵² a test of proximity may further be applied to determine the substantive effect of the provision. The subject matter of the provision should be proximate to the subject matter of the litigation. For instance, Article 19(1) of the Basic Law conferring judicial power on Hong Kong courts is relevant to the relationship between the Chinese Government and the HKSAR as it concerns with the scope of authorisation by the Chinese Government, but there is obviously no clear boundary. This provision is also arguably within the 'high degree of autonomy' enjoyed by Hong Kong as the power has already been given. Yash Ghai observed that it is impractical to make a reference for provisions of such kind each time, and the consequence of doing so is that 'little would be left of regional autonomy, and the courts would be denuded of most of their constitutional jurisdiction,' which is inconsistent with

46 (20/07/2001, FACV26/2000) [2001] 2 HKLRD 533 (HK, CFA).

47 Ibid 551 (Li CJ).

48 Ibid 551-2 (Li CJ).

49 Ibid 541 (Li CJ).

50 It was observed that the CFA in *Ng Ka Ling* (n 5) did not continue to consider the necessity condition after holding that the classification condition was not satisfied (see HY Chen [n 29], 236-7). In *Chong Fung Yuen* (n 46), it was accepted by the parties before the CFA that the necessity condition was satisfied (at 547-8 [Li CJ]).

51 *Congo* (n 7) [406].

52 It is partly because the language used in the Basic Law is vague as most of its provisions are statements of principles. See Y Ghai (n 20) 192.

the legislative intent of the Basic Law.⁵³ Therefore, only provisions which are close enough in proximity to the subject matter of the litigation should be referred.

C. Relevance of the TFEU

In drafting the referral mechanism of the Basic Law, the Drafting Committee of the Basic Law considered the referral mechanism to the European Court of Justice (ECJ) by national courts in the European Community as provided by Article 177 of the Treaty Establishing the European Economic Community,⁵⁴ which provides that:

- (1) The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
 - (a) the interpretation of this Treaty;
 - (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
 - (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
- (2) Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
- (3) Where any such question 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 of Justice.

This is now Article 267 of the Treaty on the Functioning of the European Union (TFEU).⁵⁵ Despite the amendments made to the new provision, the substance of the two versions concerning the ECJ's power to interpret the Treaty and the necessity to bring the question of interpretation to the ECJ before 'there is no judicial remedy under national law' remains the same. For convenience, Article 267 of the TFEU will be referred to instead of the previous version.

Article 267 of the TFEU allows the ECJ to have the jurisdiction to issue a preliminary interpretative ruling of the TFEU, which substantively binds the domestic courts of the Member States, but without deciding the case for the domestic courts. As stated by the ECJ in *Pigs Marketing Board v Raymond*, the national courts are in the best position to apply the interpretation as it has the 'direct knowledge of the facts of the case and of the arguments put forward by the parties.'⁵⁶ It also requires a domestic court to make a reference when 'there is no judicial remedy under national law,' such as when the decision is not appealable.

This is similar to Article 158 in terms of seeking an interpretation from the SCNPC, but Article 158 does not contain a provision similar to Article 267(2) of

53 Ibid.

54 Drafting Committee for the Basic Law, *The Draft Basic Law of the HKSAR of the PRC (For Solicitation of Opinions)* (Hong Kong 1988) 24.

55 Some words in the first three paragraphs are amended and paragraph (4) is added, which provides that: 'If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.' However, since it is Article 177 of the Treaty Establishing the European Economic Community which the Drafting Committee of the Basic Law has referred to, the changes brought by the new TEFU will not be considered.

56 (Case 83/78) [1978] ECR 2347 (ECJ) [25].

the TFEU. The Hong Kong courts, apart from the CFA, have not been encouraged to refer an excluded provision to the SCNPC for interpretation. Nevertheless, the European system provides a good reference as to when the 'necessity condition' is met.⁵⁷ Comparing Article 267 of the TFEU with Article 158, Albert HY Chen observed that the necessity condition is satisfied if a provision is not 'clear, unambiguous and free from doubt,' if there is a need to 'interpret' it instead of 'applying' it, and if the interpretation of the provision is 'conclusive' or 'substantially determinative' in the outcome of the case.⁵⁸ As formulated by Lord Denning MR in *HP Bulmer Ltd v J Bollinger SA (No 2)*, the test may be further reduced to a question as to whether there may exist a different interpretation of the applicable provision which can lead the court to give a different ruling.⁵⁹

However, as observed by Sir Anthony Mason NPJ sitting at the CFA in *Lau Kong Yung (An Infant) v Director of Immigration (Lau Kong Yung)* in a different context, the reference under Article 158 is not made to a court but to the SCNPC, which is a permanent body of the NPC representing the sovereign. The SCNPC is not subject to separation of power and has also been given different powers including the 'free-standing power' to interpret the Basic Law.⁶⁰ This makes the referral mechanism under Article 158 different from that under Article 267 of the TFEU in at least two aspects. First, the ECJ stated in *de Geus en Uitdenbogerd v Robert Bosch GmbH* that its jurisdiction depends 'solely on the existence of a request for a preliminary ruling within the meaning of Article 267.'⁶¹ The SCNPC, however, has unlimited power to interpret the Basic Law even when the CFA does not refer a case for its consideration.⁶² Secondly, instead of litigation or court proceedings, the SCNPC's interpretation is, according to Article 158(4), made after consulting with the Committee for the Basic Law of the HKSAR. Therefore, the authoritativeness of the SCNPC's interpretation and the factors considered during the preparation of the interpretation can be much different from those by the ECJ.

PART IV WHEN MORE THAN ONE PROVISION IS TO BE INTERPRETED

In *Ng Ka Ling*, the interaction between Article 22(4) and Article 24 led the court to declare two other tests. The CFA first considered whether it is 'arguable' that one provision is relevant to another, which is the 'arguability' test, and it is only when the relevance is arguable will the CFA apply the two-limb test as it is only 'considering whether the Court is obliged to make a reference under [Article 158].'⁶³ However, the two-limb test may not be applied to both provisions as

57 Since the TFEU art 177(1)(a) allows the European Court of Justice to interpret the whole Treaty, there is little weight to be placed on a factor akin to 'classification condition' under the Basic Law.

58 HY Chen (n 29) 232-4.

59 [1974] 2 CMLR 91 (Eng, CA), 115 (Lord Denning MR).

60 *Lau Kong Yung* (n 30), 778-9 (Sir Mason NPJ).

61 (Case 13/61) [1962] ECR 45 (ECJ), 50.

62 *Ng Ka Ling (No 2)* (n 23).

63 *Ng Kg Ling* (n 5), 344 (Li CJ).

there is another 'predominant test' to be applied that reference to the SCNPC is necessary only if the predominant provision for adjudication of the case satisfies the two-limb test.⁶⁴

The CFA concluded that although Article 22(4) (which was an excluded provision) was 'arguably relevant' to Article 24 (which was not excluded), the predominant provision was Article 24 and no reference was necessary as the classification condition for Article 24 was not satisfied notwithstanding that 'an excluded provision is arguably relevant to the construction of the non-excluded provision even to the extent of qualifying it.'⁶⁵

Some scholars stated that the necessity condition should not be ignored even when the classification condition was not satisfied; indeed, it is impossible to know the 'provision in question' without identifying the provision necessary to be interpreted. The necessity condition should therefore be the predominate condition as in Article 267 of the TFEU.⁶⁶ Others opined that if one of the provisions in the Basic Law which needs to be interpreted is an excluded provision and materially affects the interpretation of other provisions, the excluded provision and the provisions being affected should all be referred to the SCNPC for interpretation.⁶⁷ The CFA nevertheless avoided fully embarking on this question in the subsequent cases, but it stated in *Chong Fung Yuen* that it 'merits serious consideration' as to whether the necessity condition ought to be the predominant condition instead of the classification condition.⁶⁸ In *Congo*, it was also held that the predominant test is applicable only when 'the scope of a non-excluded provision in the Basic Law was said to be qualified by reference to the scope of an excluded provision.'⁶⁹

A. 'Arguability' and 'Predominant' Tests

It is submitted, with respect, that the 'arguability' or 'predominant' tests cannot justify a refusal to refer an excluded provision if the necessity condition as formulated by Chen or Lord Denning MR aforementioned is satisfied. If the court can interpret a non-excluded provision without relying on an excluded provision at all, it is unnecessary to consider such non-excluded provision at all. However, if the excluded provision has material impact on the interpretation of the predominant yet non-excluded provision, the interpretation of the non-excluded provision, and therefore determination of the case, cannot be properly done without relying on the excluded provision and the conditions in Article 158 are satisfied. The phrases 'relevant provisions' and 'in adjudicating cases' in

64 Ibid.

65 Ibid.

66 HY Chen, 'The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law' in MM Chan, H Fu and Y Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press, Hong Kong 2000) 124-5.

67 PY Lo, 'Rethinking Judicial Reference: Barricades at the Gateway' in H Fu, L Harris and NM Young (n 2) 160.

68 *Chong Fung Yuen* (n 46), 552 (Li CJ).

69 *Congo* (n 7) [403] (Chan and Ribeiro PJJ, Sir Mason NPJ).

Article 158 simply cannot bear the meaning inherent in the 'arguability' and 'predominant' tests.

B. Provisions to be Referred

Nevertheless, even if the excluded provision is relevant to the interpretation of the non-excluded provision, it may not be necessary to refer both provisions to the SCNPC. By analogy with the referral mechanism to the ECJ, the distinction between excluded provisions and non-excluded provision is similar to the distinction between Community law and domestic law. In *Costa v ENEL*, the ECJ refused to give a preliminary ruling on 'the validity of a provision of domestic law in relation to the Treaty,' but it held that it could extract from the referred questions 'those questions which alone pertain to the interpretation of the Treaty.'⁷⁰ One may therefore expect that it is not obligatory for the CFA to refer a non-excluded provision, as the classification condition is not satisfied. The SCNPC may, notwithstanding its general power to interpret any provisions of the Basic Law, just issue an interpretation concerning the excluded provision referred only. It will then be the CFA's task to interpret the non-excluded provision in light of the SCNPC's interpretation of the excluded provision.

PART V THE CONGO CASE AS ILLUSTRATION

Being the first case in which reference to the SCNPC was made, *Congo* can serve as a good illustration of the conditions, tests and principles discussed above. The issue in this case can be very briefly stated as: whether the first appellant, the Democratic Republic of the Congo (DRC), enjoys absolute state immunity in a commercial dispute concerning an arbitral award before the Hong Kong courts following the policy of the Chinese Government in this regard.⁷¹ Much of the

70 (Case 6/64) [1964] ECR 585 (ECJ).

71 The background of the case may be summarised as follows: A company called Energoinvest DD obtained arbitral awards against the DRC under a joint venture in Congo. Since the arbitral awards were issued in France and Switzerland, they are also enforceable in Hong Kong as all these three jurisdictions are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. No payment was however made by the Congo Government under the awards, and Energoinvest DD in 2004 assigned the entire interest in the awards to the plaintiff, which was FG Hemisphere Associates LLC, a Delaware company. The plaintiff then brought an action against the first appellant as well as the China Railway Group Ltd, a Chinese group, together with some of its subsidiaries in Hong Kong, for an amount of money payable by the Chinese group to the first appellant under another joint venture. For a full account of facts, see *Congo* (n 7), [6]-[18] (Bokhary PJ, dissenting), [185]-[193] (Chan and Ribeiro PJJ, Sir Mason NPJ).

On 26 August 2011, the SCNPC issued the 'Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the HKSAR of the PRC by the SCNPC' as requested and declared that state immunity is covered by excluded provisions. It must be consistent with the policy of the Chinese Government and hence the Congo Government enjoys absolute immunity before the Hong Kong courts. The CFA subsequently confirmed its provisional judgment of allowing the

argument before the CFA was on this point,⁷² but the focus of this article will be limited to the application of Article 158 as to why the CFA decided to refer two provisions in the Basic Law for the SCNPC's interpretation.⁷³

The CFA decided by a 3-to-2 majority⁷⁴ that two provisions were to be referred to the SCNPC for interpretation pursuant to Article 158. Those two provisions were Article 13(1),⁷⁵ which provides that the Chinese Government shall be responsible for the 'foreign affairs' of the HKSAR, and Article 19, which allows the Hong Kong courts to exercise independent judicial power but excludes from their jurisdiction 'acts of state such as defence and foreign affairs,' when a certificate should be obtained from the Chief Executive of the HKSAR concerning the 'questions of fact concerning acts of state' approved by the Chinese Government.⁷⁶

appeal by the Congo Government on 8 September 2011 (see *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [08/09/2011, FACV5/2010]).

- 72 Ibid [220]-[222] (Chan and Ribeiro PJJ, Sir Mason NPJ). In short, the CFA held that the position of the English law of 'restrictive immunity' as stated in the State Immunity Act 1978 previously applicable to Hong Kong ceased to apply after the resumption of sovereignty of Hong Kong by the PRC and that the exception to commercial transaction no longer applies as the PRC adopts a policy of 'absolute immunity' as stated in three letters by the Office of the Commissioner of the Ministry of Foreign Affairs of the PRC placed before the CFA. In deciding so, the majority of the CFA observed that the PRC's policy on state immunity is not found in any national law; instead, it is an executive policy (at [259]). It may also be noted that the counsel for the plaintiff submitted that there is a potential 'threat to judicial independence' for reliance placed on the three letters submitted on behalf of the Chinese governmental body (see Part C.9d of the majority's judgment). In rejecting the argument, the majority held that those letters were considered, on the majority's own motion, for determining 'facts of state', regardless of whether they might be binding pursuant to the Basic Law art 19(3) (see [295]-[296] in particular). It seems that it is the truthfulness of the fact in the letters which persuaded the majority instead of other reasons which might fetter the court's discretion.
- 73 Ibid [394]-[408] (Chan and Ribeiro PJJ, Sir Mason NPJ).
- 74 Chan and Ribeiro PJJ and Sir Mason NPJ, in a joint judgment, held that reference shall be made pursuant to the Basic Law art 158. Bokhary PJ and Mortimer NPJ, in two separate judgments, held that reference shall not be made.
- 75 The Basic Law art 13 provides that: '(1) The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region. (2) The Ministry of Foreign Affairs of the People's Republic of China shall establish an office in Hong Kong to deal with foreign affairs. (3) The Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law.'
- 76 The Basic Law art 19 provides that: '(1) The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication. (2) The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. (3) The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.'

A. The Majority's Reasoning

The majority clearly adopted a prudent attitude by avoiding issues left open by precedents.⁷⁷ Nevertheless, it was held that the two conditions were satisfied, and factors considered by the majority may be inferred from the short reasoning. It was explicitly stated that the reason for making the reference was to ascertain the scope of 'acts of state such as defence and foreign affairs.'⁷⁸ For the classification condition, the two provisions were both held by the majority to be excluded provisions *by their nature*.⁷⁹ For the necessity condition, it was held that as state immunity was involved the case cannot be determined without knowing the meaning of Articles 13 and 19, and meaning of 'acts of state such as defence and foreign affairs' in particular.⁸⁰

B. The Dissenting Views

Justice Bokhary PJ and Justice Mortimer NPJ held a dissenting view. Justice Bokhary PJ extensively reviewed the law of state immunity in the common law as applicable to Hong Kong before and after the resumption of sovereignty.⁸¹ In concluding on the division of the task of interpretation, his Lordship stated the position of the Chinese Government under customary international law will not be considered,⁸² and that: 'The part of state immunity which involves recognition⁸³ is a matter of "country". And the part which involves whether immunity is absolute or restrictive is a matter of "systems".'⁸⁴ Therefore, when it comes to interpretation of the *law applicable in Hong Kong* as to the scope of state immunity where the recognition of the relevant foreign country is not in issue, it is completely within the autonomy of the HKSAR.

Justice Mortimer NPJ identified the core issue to be whether the court 'must grant absolute immunity'⁸⁵ and his Lordship stated that Article 13 refers to the

77 *Congo* (n 7), [403]-[404]. However, when considering the 'arguability' threshold, the majority stated that: '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. In addition, we have the division of opinion in this Court' (emphases added). It appears that the majority may indeed be referring to the fact that the interpretations of those provisions are 'arguable' instead of the arguability test of the relevance between two provisions as in *Ng Ka Ling*.

78 *Ibid* [406] (Chan and Ribeiro PJJ, Sir Mason NPJ).

79 It was held by the majority (at [403]) that: 'Here the two Articles of the Basic Law on which the argument is centred are both excluded provisions. The first, Article 13, is a provision of the Basic Law concerning affairs which are the responsibility of the CPG. The second, Article 19, plainly concerns the relationship between the Central Authorities and the Region.'

80 *Ibid* [406] (Chan and Ribeiro PJJ, Sir Mason NPJ).

81 *Ibid* [85]-[120] (Bokhary PJ, dissenting).

82 *Ibid* [121] (Bokhary PJ, dissenting).

83 'Recognition' in this context means whether a foreign country is recognised by the sovereign (*Ibid* [107] [Bokhary PJ, dissenting]), and it is 'of course a matter of foreign affairs for which the [Chinese Government] has sole responsibility' (*Ibid* [114] [Bokhary PJ, dissenting]).

84 *Ibid* [123] (Bokhary PJ, dissenting).

85 *Ibid* [519] (Mortimer NPJ, dissenting).

'executive responsibility for foreign affairs as between the [Chinese Government] and the HKSAR' and was 'never intended to, and nor does it, define the jurisdiction of the Hong Kong courts which is beyond its scope.'⁸⁶ Since the common law approving restrictive immunity in Hong Kong survived the resumption of sovereignty, it should also be applied in the present case.⁸⁷

C. Is Referral Necessary?

With respect to the dissenting judges, this would be a case where reference may be made so to avoid another interpretation initiated by the SCNPC itself. While it may be true that the nature of 'state immunity' can be a matter for the Hong Kong courts to determine, it may also not be. Further, if it was meant that 'foreign affairs' has a restrictive meaning that it covers only 'executive responsibility' but not commercial activities, this conclusion cannot be reached without interpreting the excluded provisions. Therefore, the interpretation of Articles 13 and 19 is decisive on this issue. Referring to Lord Denning MR's test in *HP Bulmer Ltd v J Bollinger SA (No 2)*, the necessity condition for referral should be satisfied. One may also observe that the subject matter of the interpretation, which is within the *scope* of 'foreign affairs,' is also proximate to the subject matter of the litigation, which is 'state immunity.' The essence of the argument is that one cannot apply the necessity condition only after the scope of the provision has been ascertained; it is satisfied even when the scope of the provision is to be ascertained.

The classification condition, which considers the *character* of the provision but not the subject matter of the litigation, should also be satisfied as the two provisions are clearly concerning the duties of the Chinese Government regarding diplomatic issues under the principle of 'one country' and it may indeed require a unified approach to state immunity. Regardless of which condition is to be applied first, or which provision is the predominant provision, the two-limb test is satisfied for each of the two provisions.

D. The Four Questions Referred

Four questions were formulated for the SCNPC's consideration.⁸⁸ All of them are yes-or-no questions beginning with 'whether' instead of requiring a general interpretation of the provision. This may therefore be able to limit the impact of the SCNPC's interpretation.

The first question concerned the Chinese Government's responsibility only as to whether the Central People's Government may 'determine the rule or policy of the PRC on state immunity.' The second question concerned with the relationship between the Chinese Government and the Hong Kong courts as to whether the Hong Kong courts must adhere to such policy or may depart from it. The third question was about the interpretation of an excluded provision as to whether a

86 Ibid [454], [520] (Mortimer NPJ, dissenting).

87 Ibid [514] (Mortimer NPJ, dissenting).

88 Ibid [407] (Chan and Ribeiro PJJ, Sir Mason NPJ).

policy on state immunity falls within 'acts of state such as defence and foreign affairs.' The last question, however, was seeking a determination of whether the common law previously in Hong Kong on state immunity shall follow the policy determined by the Chinese Government under Articles 8 and 160 of the Basic Law.⁸⁹ This last question was in the following terms:

'whether, upon the establishment of the HKSAR, the effect of Article 13(1), Article 19 and the status of Hong Kong as a Special Administrative Region of the PRC upon the common law on state immunity previously in force in Hong Kong (that is, before 1 July 1997), to the extent that such common law was inconsistent with the rule or policy on state immunity as determined by the [Chinese Government] pursuant to Article 13(1), was to require [the common law concerning state immunity] to be applied subject to such modifications, adaptations, limitations or exceptions as were necessary to ensure that such common law is consistent with the rule or policy on state immunity as determined by the [Chinese Government], in accordance with Articles 8 and 160 of the Basic Law and the Decision of the Standing Committee of the National People's Congress dated 23 February 1997 made pursuant to Article 160.'

While the first three questions are questions directly relevant to the issues partly beyond the autonomy of the HKSAR, it may not be necessary to refer to the last question.

The Basic Law itself does not provide an explicit procedure for overruling an unconstitutional common law precedent,⁹⁰ but the common law itself has already provided such mechanism as the highest appellate court (in the case of Hong Kong, the CFA) can overrule precedents of the lower courts and depart from its previous precedents.⁹¹ Therefore, given that the interpretation of Articles 13 and 19 has been clarified by the SCNPC in the answers to the first three questions,⁹² the determination of the status of the common law on state immunity in Hong Kong can be done by the CFA itself as there is no need to interpret any other provisions of the Basic Law and the necessity condition cannot be satisfied for any provisions of the Basic Law.

Further, together with the answers obtained from the previous questions (particularly the second question), an answer of 'yes' to the last question will inevitably determine the exact *content* of common law in Hong Kong. It is because the part 'to ensure that such common law is consistent with the rule or policy on state immunity as determined by the [Chinese Government]' goes further than clarifying the China-Hong Kong relationship and defines an explicit scope of the common law. The European experience does not support referral of such kind of questions, and this position is highlighted once again in *Netherlands v Ten Kate*

89 These two provisions provide that the laws previously in force in Hong Kong, which are 'the common law, rules of equity, ordinances, subordinate legislation and customary law,' shall be maintained, except for those which are in contravention of the Basic Law. Those laws shall be amended or cease to have force. For the Basic Law art 8, see also n 97 *infra*.

90 It may nevertheless be noted that the Basic Law art 11(2) provides that: 'No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene [the Basic Law].'

91 See *Solicitor (24/07) v Law Society of Hong Kong* (13/03/2008, FACV24/2007) [2008] 2 HKLRD 576 (HK, CFA), 590 (Li CJ).

92 See, in particular, paragraph (a) of the second question, which was: '...whether, on the true interpretation of Articles 13(1) and 19, the HKSAR, including the courts of the HKSAR, is bound to apply or give effect to the rule or policy on state immunity determined by the CPG under Article 13(1)...'

Holding Musselkanaal BV where the ECJ noted that 'the Court of Justice does not have jurisdiction to interpret the internal law of a Member State.'⁹³ One may also note that the Basic Law itself does not provide for the SCNPC interpreting local laws, which explains why the SCNPC did not mention the Immigration Ordinance in the interpretation after *Ng Ka Ling* was decided. Given that Article 19 of the Basic Law vests with Hong Kong courts independent judicial power for 'all cases in the Region' under the policy of 'one country, two systems,' the Hong Kong courts should be capable to determine the application of the SCNPC's interpretation to the status of the common law in Hong Kong.

It may also not be necessary to refer to the Decision of the Standing Committee of the National People's Congress dated 23 February 1997⁹⁴ (which is dated before the resumption of sovereignty of Hong Kong) at the end of the referred question. The CFA held in *Chong Fung Yuen* that the Basic Law should be interpreted by common law interpretation with reference to internal aids before relying on extrinsic aids including the pre-enactment materials from the SCNPC.⁹⁵ The approach towards unconstitutional common law can be derived if a purposive approach⁹⁶ is applied to interpret Article 8 of the Basic Law, which provides, *inter alia*, that the common law previously in force in Hong Kong 'shall be maintained, except for any that contravene this Law.'⁹⁷ Therefore, common law which is inconsistent with the Basic Law must either be amended or overruled, and this conclusion can be arrived at by referring to Basic Law itself.

PART VI OTHER PERSPECTIVES OF SCNPC INTERPRETATIONS

The discussion above focuses on the referral mechanism as stipulated by Article 158, but an interpretation of the Basic Law by the SCNPC also has other dimensions and impacts the autonomy of the Hong Kong courts or even the autonomy of the HKSAR. Some of these considerations are discussed below.

93 (Case C-511/03) [2006] 1 CMLR 50 (ECJ) [25].

94 So far as being material, paragraph 4 of this Decision provides that: 'Such of the laws previously in force in Hong Kong which have been adopted as the laws of the Hong Kong Special Administrative Region shall, as from 1 July 1997, be applied subject to such modifications, adaptations, limitations or exceptions as are necessary so as to bring them into conformity with the status of Hong Kong after resumption by the People's Republic of China of the exercise of sovereignty over Hong Kong as well as to be in conformity with the relevant provisions of the Basic Law. For example, the New Territories Land (Exemption) Ordinance should conform with the above principles in its application.' The full text is accessible at http://www.Legislation.gov.hk/blis_ind.nsf/CURALLENGDOC/8AB4C17B24B1AA96482575EE000E8402?OpenDocument.

95 For a discussion regarding consideration of the hierarchy of interpretations, see n 117 *infra*.

96 As to the meaning of 'purposive approach' in the context of the Basic Law, see n 120 *infra*.

97 The Basic Law art 8 provides that: 'The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.'

A. The CFA's Constitutional Jurisdiction

In *Ng Ka Ling*, the CFA held that it had the constitutional jurisdiction to examine whether acts by the NPC or SCNPC contravene the Basic Law even though those two organs represent the will of the sovereign.⁹⁸ The CFA considered that its power came from the NPC as it enacted Article 31 of the PRC Constitution and the Basic Law, which guarantees that Hong Kong will enjoy a high degree of autonomy. The CFA, being the highest court in Hong Kong, should be able to examine acts by the NPC relating to Hong Kong with reference to the Basic Law. This decision had the effect of partly overruling *HKSAR v Ma Wai Kwan David*, in which the Hong Kong Court of Appeal decided that there was no legal basis to query the validity of acts passed by the sovereign, such as acts by the NPC, since such jurisdiction was not there before the resumption of sovereignty of Hong Kong by the PRC.⁹⁹

The ruling concerning the CFA's constitutional jurisdiction attracted much debate, which subsequently drove the CFA to issue a clarification in the form of a judgment on 26 February 1999 as an 'exceptional course.'¹⁰⁰ It was stated that the CFA accepted and did not question the authority of the SCNPC to make an interpretation pursuant to Article 158, and the Hong Kong courts are also bound to follow the interpretation by the SCNPC. It will also not question acts done by the NPC or SCNPC 'in accordance with the provisions of the Basic Law and the procedure therein.'

It seems that the CFA maintained the stance that it will only adhere to acts done by the NPC or SCNPC if it is substantially and procedurally proper in accordance with the Basic Law. There can be no objection to such stance as this is the gist of the rule of law. It may however become problematic if an act is also done pursuant to the PRC Constitution. In this situation, the CFA may not, with respect, declare it unconstitutional. There are two reasons for this, the hierarchy of 'constitutions' and the source of constitutional jurisdiction.

For hierarchy of 'constitutions,' one must accept that even in the HKSAR under a high degree of autonomy, the most fundamental constitution is still the PRC Constitution, the constitution of the sovereign but not the 'mini-constitution,' which is the Basic Law. It cannot be argued that the PRC Constitution does not apply to Hong Kong. 'The Basic Law is a national law and is the constitution of the Region.'¹⁰¹ Article 11 of the Basic Law also makes it clear that the Basic Law and the systems of the HKSAR are established in accordance with Article 31 of the PRC Constitution.¹⁰² The Basic Law merely provides exceptions to the PRC

98 *Ng Ka Ling* (n 5), 337-8 (Li CJ).

99 *Ma Wai Kwan David* (n 3), 334-5 (Chan CJHC, as he then was). Chan CJHC held that a Hong Kong court may examine the existence of the alleged NPC's decision, the scope of the decision, and whether the act in dispute is done pursuant to the decision.

100 *Ng Ka Ling (No 2)* (n 23).

101 *Ng Ka Ling* (n 5), 337 (Li CJ).

102 The Basic Law art 11(1) provides that: 'In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law.'

Constitution.¹⁰³ If the PRC Constitution were inapplicable, the Basic Law would derive authority from nowhere and be a nullity as Hong Kong had no sovereign.

For the source of constitutional jurisdiction, the SCNPC can derive its authority from the PRC Constitution as applicable to Hong Kong and the Basic Law itself. The CFA, however, only derives its authority directly from the Basic Law instead of the PRC Constitution. Since the PRC Constitution is superior to the Basic Law, the CFA may not quash a decision of the sovereign made pursuant to the PRC Constitution, as the CFA has no constitutional jurisdiction over the PRC Constitution. One may also recall Sir Mason NPJ's observation in *Lau Kong Yung*: there is no separation of power applicable to the SCNPC.¹⁰⁴ Therefore, it cannot be assumed that the CFA could supervise the legislative act of the SCNPC. Instead, when there are contradictions between the PRC Constitution and the Basic Law, it should be the SCNPC or NPC that resolves the contradictions.¹⁰⁵ Although the CFA empowered itself in *Ng Kg Ling* to examine such acts of the NPC or SCNPC and declare them invalid for being unconstitutional if they are inconsistent with the Basic Law in substance or procedure,¹⁰⁶ Article 19(3) of the Basic Law explicitly excludes from the jurisdiction of the Hong Kong courts acts of state.¹⁰⁷

Therefore, when the CFA in *Ng Ka Ling* went on to hold that the requirement of a one-way permit is 'unconstitutional to the extent that it requires permanent residents of the Region residing on the Mainland to hold the one way permit before they can enjoy the constitutional right of abode,¹⁰⁸ it may, with respect, be too far-reaching as this could lead to a 'permanent resident' be subjected to the policy of the Chinese Government on one-way permits under Article 22(4) when he is still within mainland China but be free from such requirement had he come to Hong Kong by some other means. The inconsistency in applying the Basic Law across the border at least shows that Article 22(4) is *not completely* within the autonomy of the HKSAR, and its scope extends to another system of the 'two systems.' The CFA's ruling also has implicit effect of undermining the policies of the Chinese Government. This was the point where the autonomy of the HKSAR had been exceeded.

103 For example, the Basic Law art 22(1) prohibits Chinese authorities from interfering with the affairs of the HKSAR without approval by the Central Government.

104 See n 60.

105 The PRC Constitution art 62 provides, inter alia, that: 'The National People's Congress exercises the following functions and powers: (1) To amend the Constitution; (2) To supervise the enforcement of the Constitution...' Art 67(1) provides that: 'The Standing Committee of the National People's Congress exercises the following functions and powers: (1) To interpret the Constitution and supervise its enforcement...'

106 *Ng Kg Ling* (n 5), 337 (Li CJ). See also *Ng Ka Ling (No 2)* (n 23).

107 The Basic Law art 19(3) provides that 'The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.'

108 *Ng Kg Ling* (n 5), 348 (Li CJ).

B. Effect of SCNPC Interpretations

Interpretations of laws by the SCNPC or NPC in the PRC are legislative interpretations. They are similar to legislation as the interpretation may define the scope of a law with 'additional stipulations' or answering questions concerning the application.¹⁰⁹ Such legislative interpretations may be issued pursuant to Article 158, but also pursuant to Article 67(4) of the PRC Constitution.¹¹⁰ Therefore, if an interpretation by the SCNPC is issued pursuant also to the constitution of the sovereign, the CFA may not challenge its validity for its lack of constitutional jurisdiction as argued above.

This may undermine the autonomy of the HKSAR, as the Hong Kong courts cannot declare such legislative acts invalid when it is applicable to Hong Kong. It has also been stated that legislative interpretation should not be applied to Hong Kong.¹¹¹ However, this becomes, on the one hand, an issue of authoritativeness of the sovereign and, on the other, a question of trust and confidence. The authoritativeness of the sovereign is to be recognised, but it is urged that such power should be exercised cautiously. Nevertheless, the CFA may still examine the existence of an act of state before declining jurisdiction to adjudicate the case and, similar to the operation of Article 158, it is for the Hong Kong courts to decide whether an act of state is involved. The power to examine whether an act is an act of state has been well established since *HKSAR v Ma Wai Kwan David*,¹¹² and *Ng Kg Ling* does not reject the existence of such power.

Before *Congo*, there were four interpretations issued by the SCNPC,¹¹³ and two of them are relevant to the political reform in Hong Kong.¹¹⁴ These two interpretations have attracted much public debate in Hong Kong. To obtain a balance between autonomy and sovereignty, it is submitted that the Committee

109 H Wen, 'Interpretation of Law by the Standing Committee of the National People's Congress' in MM Chan, H Fu and Y Ghai (n 66) 189.

110 The PRC Constitution art 67 provides that: 'The Standing Committee of the National People's Congress exercises the following functions and powers:... (4) To interpret statutes...' Although this article is specific to the SCNPC, the PRC Constitution art 62 provides that 'The National People's Congress exercises the following functions and powers:... (15) To exercise such other functions and powers as the highest organ of state power should exercise.' Such 'other functions and powers' shall cover powers exercisable by the SCNPC, i.e., including the power to interpret the Hong Kong Basic Law.

111 Y Ghai, 'The NPC Interpretation and Its Consequences' in MM Chan, H Fu and Y Ghai (n 66) 204.

112 *Ma Wai Kwan David* (n 3).

113 There was another one issued before the Basic Law came into force concerning the authority of the Basic Law in the PRC Constitution and the Nationality Law of the PRC (see Y Ghai, 'The Political Economy of Interpretation' in H Fu, L Harris and NM Young (n 2) 130).

114 These two interpretations are both related to the Basic Law Annex I art 7 and Annex II art 3, dated 26 April 2004 and 29 December 2007. They are related to the progress of universal suffrage for the Chief Executive and Legislative Council. It is also provided in the Basic Law art 45(2) that '[t]he method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.'

for the Basic Law may be given the power to make a binding decision upon the interpretation issued by the SCNPC, as the constitution of the Committee for the Basic Law is more balanced in terms of the number of representatives from each side,¹¹⁵ and public consultation in Hong Kong may also be incorporated as a constitutional procedural requirement.

C. Hierarchy of Interpretations

Given that both the SCNPC and the CFA may also issue a binding interpretation of the Basic Law, a Hong Kong court shall take into account different authorities. This is the so-called 'crossover' of Chinese law and common law. Some scholars also expressed concern that the CFA's judgment may not be final where constitutional rights are concerned – going beyond parties to the litigation – since the HKSAR Government may request the SCNPC to reinterpret the relevant provision of the Basic Law.¹¹⁶

Nevertheless, the CFA may retain as much jurisdiction as allowed by adopting a common law approach in interpreting the Basic Law in the absence of a binding SCNPC interpretation. The question of hierarchy of authorities was visited by the CFA in *Chong Fung Yuen*.¹¹⁷ In that case, the applicant claimed to have the right of abode pursuant to Article 24(3)(1) of the Basic Law as his parents gave birth to him during their lawful stay in Hong Kong with two-way permits. The Director of Immigration contended that Article 24(3)(1) could not have applied to a Chinese national who was born to persons who temporarily stayed in Hong Kong and relied on an Opinion issued by the NPC before the resumption of the sovereignty of Hong Kong.¹¹⁸

The CFA however did not take the Opinion as an aid to its interpretation of Article 24(3)(1) as it considered the language of Article 24(3)(1) to be clear enough. The CFA held the hierarchy of authorities when interpreting the Basic Law as follows:¹¹⁹

- *Legislative interpretation issued by the SCNPC* – This includes interpretations issued pursuant to Article 158(1) of the Basic Law and Article 67(4) of the PRC Constitution and the supplementary laws within such legislative interpretation.

115 The 11th SCNPC has 175 members, but most of them are not from Hong Kong. To the contrary, the Committee for the Basic Law of the HKSAR, although having only 12 members, has half of its member coming from Hong Kong and another half coming from mainland China, with a number of legal professionals.

116 M C Davis, 'Interpreting Constitutionalism and Democratization in Hong Kong' in H Fu, L Harris and NM Young (n 2) 90.

117 *Chong Fung Yuen* (n 46).

118 The full title of the Opinion is 'Opinions on the Implementation of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China,' which was adopted at the Fourth Plenary Meeting of the Preparatory Committee for the HKSAR of the NPC on 10 August 1996.

119 *Chong Fung Yuen* (n 46), 545-6 (Li CJ)

- *The common law interpretation with reference to internal aids*¹²⁰ – The meaning of the language is given with considerations to its context and purpose, but never something 'the language cannot bear'.
- *Extrinsic aids, including the pre- or post-enactment materials* – A prudent approach is adopted to preserve the judicial independence in interpreting the law under the separation of powers.

If the SCNPC has issued an interpretation pursuant to Article 158(1), it can be said that such interpretation will have practically replaced the original text of the Basic Law.¹²¹ However, if the interpretation is not binding, such extrinsic aids will only be considered when the language is unclear as held in *Chong Fung Yuen*. This is consistent with the principle of 'one country, two systems' since the duty to interpret the appropriate provisions of the Basic Law is on the Hong Kong courts, and adopting a generous approach to interpret constitutional rights is a characteristic of the common law approach of statutory interpretation.¹²²

CONCLUSION

It has been illustrated how Article 158 affects the scope of autonomy enjoyed by the CFA in interpreting the Basic Law under the dual system of constitutional interpretation. Excluded provisions and legislative acts of the SCNPC are kept away from the constitutional jurisdiction of the CFA, but the Hong Kong courts still retain the power to determine whether they shall refer the provisions to the SCNPC. Article 267 of the TFEU may provide useful guidance as to when a reference shall be made.

The relationship between the SCNPC and the CFA in terms of the power to interpret the Basic Law remains dynamic. The CFA should refer an excluded provision to the SCNPC for interpretation if the provision is relevant to the litigation and satisfies the classification and necessity conditions. The purpose of maintaining a high degree of autonomy may also partly explain why in *Chong Fung Yuen* the CFA interpreted Article 24(2)(1) of the Basic Law without making reference to the SCNPC as '[i]t is a provision within the Region's autonomy and is not an excluded provision.'¹²³ The SCNPC should also exercise its power to interpret the Basic Law cautiously in order to uphold the principle of 'one country, two systems.'

120 Such common law approach is the purposive approach. According to Li CJ, the purposive approach is to to understand the context of the provision 'in its widest sense' and also to 'adopt an interpretation which is consistent with and gives effect to the legislative purpose' that '[an] interpretation which... does not serve that purpose should be avoided': *Town Planning Board v Society for the Protection of the Harbour Ltd* (09/01/2004, FACV14/2003) [2004] 1 HKLRD 396 (HK, CFA), 405. The reason why a purposive approach is adopted for interpreting the Basic Law is that 'gaps and ambiguities are bound to arise' since the Basic Law states only the principles: *Ng Kg Ling* (n 5), 325 (Li CJ).

121 See, for example, in *Lau Kong Yung* (n 30), 757-9 (Li CJ). The CFA basically referred to the interpretation by the SCNPC only.

122 *Chong Fung Yuen* (n 46), 546 (Li CJ).

123 *Ibid* 551-2 (Li CJ).

While it is always difficult to strike a balance between autonomy and sovereignty, relaxing the autonomy enjoyed by Hong Kong as much as possible without derogating the power of the NPC as the sovereign may always be an option. The effect of *Congo* on the future application of Article 158 is not yet certain, but it is only through this dynamic process that one may ascertain the optimum way to apply Article 158 and appreciate the differences between the legal and social systems.

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