ABUSIVE EMULATION AND JUSTIFICATORY BORROWING

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“He had found a Nutri-Matic machine which had provided him with a plastic cup filled with a liquid that was almost, but not quite, entirely unlike tea. The way it functioned was very interesting. When the Drink button was pressed it made an instant but highly detailed examination of the subject's taste buds, a spectroscopic analysis of the subject's metabolism and then sent tiny experimental signals down the neural pathways to the taste centers of the subject's brain to see what was likely to go down well. However, no one knew quite why it did this because it invariably delivered a cupful of liquid that was almost, but not quite, entirely unlike tea.”¹

INTRODUCTION

How might a canny would-be autocrat implement new measures in service of an illiberal or authoritarian agenda, when overtly illiberal or authoritarian measures are likely to attract international condemnation? Writing in 2016, Kim Lane Scheppele suggested that one answer was the conscious adoption of “constitutional worst practices”:² practices that are extant in jurisdictions with (apparently) unimpeachable

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1 DOUGLAS ADAMS, *THE HITCHHIKER'S GUIDE TO THE GALAXY*.

2 Kim Lane Scheppele, *Worst Practices and the Transnational Legal Order (Or How to Build a Constitutional 'Democracy' in Plain Sight)*, WRIGHT LECTURE, UNIVERSITY OF TORONTO (2016).

constitutionalist credentials, but which undermine the operation of constitutionalism in their transplanted context. Yet even “constitutional worst practices” face a problem: it is not always feasible to change the constitution. Even if it were possible to do so, the very fact that a change to the constitution has occurred will inevitably result in greater scrutiny.

There are two plausible solutions to this problem. First, one might adopt the “worst practices” approach at a sub-constitutional level, with ordinary law: esoteric enough to evade most scrutiny, and sufficiently resembling norms or institutions in jurisdictions with ironclad “rule of law” credentials to pass muster. Call this “abusive emulation.” Alternatively, if abusive emulation seems like too much effort, one might simply point to supposed similarities in other jurisdictions (regardless of the validity of such comparisons), a sort of “justificatory borrowing.”

This chapter begins by discussing previous work on similar phenomena, focusing on the discussion of “constitutional worst practices” in comparative constitutional law and the literature on “isomorphic mimicry” in sociology and development studies. I then address the practices of abusive emulation and justificatory borrowing respectively, with reference to illustrative examples. I conclude with some tentative suggestions on how to identify instances of abusive emulation and justificatory borrowing.

PRIOR LITERATURE

Constitutional Worst Practices

The idea that autocratic regimes choose to adopt “worst practices” from other jurisdictions, or to put together a perverse combination of “best practices,” has previously been explored in the context of comparative constitutional law. Kim Lane Scheppele and David Landau have both written about the use of constitutional changes by authoritarians, both to consolidate their authority and to cover their tracks.³

However, I argue that this focus on *constitutional* worst practices does not capture the full spectrum of abusive legalist conduct. Explicit changes to a country's constitution are far more likely to attract scrutiny than changes to that country's law of defamation, or its administrative law.

Even

doctrinal capture,”⁴ where the text of the constitution is not explicitly changed but incumbent-friendly interpretations are adopted, is unlikely to avoid scrutiny – especially if (for instance) the autocrat-friendly interpretations are delivered by a constitutional court. The problem with messing with a constitution is that people notice when you're doing it.

³ See *id.*; David Landau, *Populist Constitutions*, 85 THE UNIVERSITY OF CHICAGO LAW REVIEW 521 (2018).

⁴ Landau, *supra* note 3, at 533–34.

Isomorphic Mimicry

Another antecedent to abusive emulation is the discussion of “isomorphic mimicry” in development studies. In a 2012 working paper, Matt Andrews, Lant Pritchett, and Michael Woolcock note that many reform initiatives in developing countries are characterised by “isomorphic mimicry.” They define the phenomenon as:

“[T]he tendency to introduce reforms that enhance an entity's external legitimacy and support, even when they do not demonstrably improve performance.”⁵

Andrews *et al* note that where a development project aims to emulate “best practices” from elsewhere, isomorphic mimicry is more common.⁶

The term “isomorphic mimicry” is itself based on a 1983 paper by Paul DiMaggio and Walter Powell,⁷ that lays out a theory of “institutional isomorphism.” DiMaggio and Powell set out to explain why there is such homogeneity of organisational forms and practices, and posit three mechanisms of institutional isomorphic change: (a) coercive isomorphism, due to pressures from external organisations and cultural expectations; (b) mimetic isomorphism, as a way to respond to uncertainty; and (c) normative isomorphism, linked with

⁵ Matt Andrews et al., *Escaping Capability Traps through Problem-Driven Iterative Adaptation (PDIA)*, CENTER FOR GLOBAL DEVELOPMENT Jun. 2012 2.

⁶ *Id.*

⁷ Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AMERICAN SOCIOLOGICAL REVIEW 147 (in JSTOR, 1983).

professionalisation.⁸ The first two mechanisms deserve to be explored further below.

In DiMaggio and Powell's account, an organisation A engages in coercive isomorphism as a reaction to formal and informal pressures exerted by other organisations upon which A depends, and to cultural expectations in the society in which A functions.⁹ These pressures may take the form of governmental mandates, force, or persuasion. In the context of development, for instance, pressure from foreign governments or donor organisations may result in a developing country engaging in coercive isomorphism.

Unlike coercive isomorphism, mimetic isomorphism is a response to uncertainty in "organisational technologies," goals, or the environment at large.¹⁰ In such circumstances, DiMaggio and Powell argue, an organisation may choose to model itself on another organisation – typically one in the same field that it perceives to be more legitimate or more successful.¹¹ Doing so has a "ritual aspect," in that an organisation can at least be seen to be "trying to improve."¹²

Bojan Bugarič has since applied the language of "isomorphic mimicry" to discuss rule of law reforms in Eastern Europe.¹³ Writing in 2015, Bugarič argued that many post-Communist "rule-of-law" reforms, such as civil service laws and anti-corruption strategies, were

⁸ *Id.* at 150.

⁹ *Id.* at 150–51.

¹⁰ *Id.* at 151–52.

¹¹ *Id.* at 152.

¹² *Id.* at 151.

¹³ Bojan Bugarič, *The Rule of Law Derailed: Lessons from the Post-Communist World*, 7 HAGUE J RULE LAW 175 (2015).

instances of “isomorphic mimicry,” resulting in a plethora of “facade” institutions, devoid of importance or real substance.”¹⁴ However, Bugarič's discussion of “isomorphic mimicry” is confined to the context of institutional failures in post-Communist Eastern Europe. It suffers from being both too broad and too narrow – too broad in that it fails to address the phenomenon of “isomorphic mimicry” in sufficient detail, and too narrow in that it does not place isomorphic mimicry in the context of a broader set of abusive legalist tactics.

“Abusive Comparativism”

There has also been some – albeit limited – discussion of phenomena akin to justificatory borrowing.¹⁵ In his critique of how Turkish political elites have defended constitutional changes that undermined the country's constitutional order, Cem Tecimer observed:

“Turkish political elites, mostly but not exclusively MPs and Ministers of the governing party AKP, as well as President Erdogan have made numerous references to comparative law, and specifically to other constitutions, including Turkey's previous constitutions and current foreign constitutionalist systems, prior to the referendum, in an attempt to bolster the amendment package's legitimacy. Most – if not all – of these references to comparative law were shallow, incomplete,

¹⁴ *Id.* at 191.

¹⁵ See generally Michaela Hailbronner, *Constructing the Global Constitutional Canon: Between Authority and Criticism*, UNIVERSITY OF TORONTO LAW JOURNAL 1, 14 (2018).

downright inaccurate and/or self-contradictory with the actual policies pursued by the governing elites.”¹⁶

In particular, Tecimer noted that “references to ... other liberal democracies are made in an attempt to create the impression that Turkey still remains within a liberal constitutionalist legal space,”¹⁷ but that these references were “often shallow and incomplete, and sometimes downright inaccurate.”¹⁸ Renáta Uitz has also described similar developments in Hungary.¹⁹

[HOW DOES THIS RELATE TO ABUSIVE EMULATION
AND THE BROADER CANON OF ABUSIVE LEGALIST
PRACTICES?]

ABUSIVE EMULATION

I now consider the adoption of measures that, *on their face*, resemble those in other jurisdictions – but in reality operate very differently. Scheppele, writing about Hungary's “Frankenstate,” illustrates this dynamic in action:

16 Cem Tecimer, *Abusive comparativism: “Pseudo-comparativist” political discourse as a means to legitimizing constitutional change in Turkey*, Verfassungsblog (May 15, 2017), <https://verfassungsblog.de/abusive-comparativism-pseudo-comparativist-political-discourse-as-a-means-to-legitimizing-constitutional-change-in-turkey/>.

17 *Id.*

18 *Id.*

19 Renáta Uitz, *Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 279, 286–88 (2015).

“When Fidesz [the ruling party] restricted the competencies of the constitutional court, it argued to European bodies expressing concern that not all European countries had constitutional courts so Europe could not insist on particular competencies ... When Fidesz brought the media under its control, it noted that other countries in Europe had powerful media councils, too. When it changed the electoral laws, it justified each individual piece of what it did by pointing to some other unquestioned democracy that had done the same ... The problems came when the government did all of these things together, creating a system in which it is nearly impossible for the opposition to win an election.”²⁰

In each individual instance, Fidesz was able to point to analogous legislation in another jurisdiction with unimpeachable liberal democratic credentials. However, transplanted into the Hungarian context, they served a very different purpose.

Abusive Emulation (1): Anti-Corruption Campaigns

Another example of emulation in transplanted contexts – one that is particularly illustrative of *why* a government might wish to engage in it – is the development of anti-corruption campaigns in post-Communist European states. As with “rule of law promotion,” “anti-corruption” has become a growth industry with an emphasis on

²⁰ Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559 (2013).

technocratic “best practices.”²¹ Writing in 2006, Alina Mungiu-Pippidi noted that both the means of assessing corruption, and the strategies for combating corruption, were routinely “replicated from one country to another.”²² Such strategies frequently include, *inter alia*, the adoption of anti-corruption laws and anti-corruption programmes, and the creation of specialist anti-corruption agencies.²³ These reforms are frequently modelled on Western “best practices,” such as ombudsman's offices.²⁴

However, these strategies have met with limited success.²⁵ In a study of Albania, Bosnia-Herzegovina, Bulgaria, and Macedonia (now North Macedonia), Martin Tisné and Daniel Smilov noted that the results of these campaigns have been “generally perceived as unsatisfactory,”²⁶ with lack of high-level political backing for anti-corruption initiatives and anti-corruption agencies being a recurring problem.²⁷

Two phenomena that Tisné and Smilov discuss are especially relevant to the rule of law. First, in discussing Albanian anti-corruption legislation, Tisné and Smilov note that, in the absence of coherent public pressure groups to compel implementation of such legislation where it implicates officials' own interests, “the law runs a considerable

21 See Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17 JOURNAL OF DEMOCRACY 86 (2006).

22 *Id.* at 91.

23 Martin Tisné & Daniel Smilov, *From the Ground Up. Assessing the Record of Anticorruption Assistance in Southeastern Europe* (Center for Policy Studies, Central European University 2004) 40.

24 Mungiu-Pippidi, *supra* note 21, at 96.

25 Mungiu-Pippidi, *supra* note 21; Tisné & Smilov, *supra* note 23.

26 Tisné & Smilov, *supra* note 23, at 13.

27 See, e.g., *id.* at 47.

risk of being ignored.”²⁸ As I noted in [Chapter 2], congruence between declared rules and official conduct is a principle common even to “thin” conceptions of formal legality. Second, Tisné and Smilov specifically highlight the risk of partisan application of anti-corruption laws and institutions.²⁹ Newer empirical research suggests that this risk has materialised. In a study based on the Eastern European Corruption Prosecution Database, Maria Popova and Vincent Post concluded that “Party politics seems to affect the frequency of corruption indictments more than the structure and behavior of legal institutions.”³⁰ As I noted in [Chapter 2] – and as I will address further in [Chapter ???] – the partisan application of law is also inconsistent with even a relatively modest conception of the rule of law.

What caused these anti-corruption strategies to fail? The literature refers to two significant causes. First, reformers have misdiagnosed the problem. Mungiu-Pippidi and András Sajó both note that “corruption” in Eastern Europe is fundamentally different in character to the corruption encountered in developed countries.³¹ Rather than instances of “occasional individual corruption,”³² Eastern European states suffer from a *structural* form of corruption (“particularism” or “clientelism”).³³ Second, the strategies themselves

²⁸ *Id.* at 50.

²⁹ *Id.* at 53.

³⁰ Maria Popova & Vincent Post, *Prosecuting High-Level Corruption in Eastern Europe*, 51 COMMUNIST AND POST-COMMUNIST STUDIES 231, 243 (2018).

³¹ Mungi-Pippidi, *supra* note 21, at 87–91; András Sajó, *Corruption, Clientelism, and the Future of the Constitutional State in Eastern Europe Special Report*, 7 E. EUR. CONST. REV. 37, 38–39 (1998).

³² Mungi-Pippidi, *supra* note 21, at 96.

³³ *Id.* at 87–88 (“particularism”); Sajó, *supra* note 31, at 38–39 (“clientelism”).

were non-political in nature, and failed to acknowledge the political nature of clientelism. As a result, anti-corruption initiatives were “adopted and implemented in cooperation with the very predators who control the government and, in some cases, the anticorruption instruments themselves.”³⁴

In hindsight, it seems clear that these strategies were doomed to failure. Why, then, were they adopted in the first place? Tisné and Smilov refer to three objectives shared by the anti-corruption programmes implemented in Albania, Bosnia-Herzegovina, Bulgaria, and North Macedonia:

- (1) Developing the rule of law;
- (2) Making the countries more attractive to foreign investment by signalling their trustworthiness internationally; and
- (3) Paving the way for eventual EU accession.³⁵

All of these stated objectives involve appealing to foreign governments, inter-governmental organisations, donor NGOs, or private investors.

The stated desire to please external actors by implementing anti-corruption programmes seems to sit ill with the pervasive lack of high-level political support for such programmes. The answer to this apparent contradiction is that governments have endeavoured only to create the *appearance* of fighting structural corruption. As Tisné and Smilov note, “too often omnibus anticorruption programs provide seemingly tangible proof of action taken against corruption on the part

³⁴ Mungi-Pippidi, *supra* note 21, at 87.

³⁵ Tisné & Smilov, *supra* note 23, at 51–53.

of the government eager to follow donor recommendations.”³⁶ Sajó gives an even bleaker assessment of such efforts:

“These efforts remain, however, within the orbit of creating appearances that are "adequate" for some kind of Western acceptance. Anticorruption measures will serve propaganda purposes, while remaining the means of interelite fighting, unless efficient and influential social forces emerge that have a real and lasting interest in government transparency and in terminating sleaze...”³⁷

[ALVIN NOTE: THERE IS A NEW REPORT OUT ON WHAT “POLITICAL WILL” THAT I HOPE TO INCORPORATE HERE]

Abusive Emulation (2): Electoral Reforms in Hong Kong

[ALVIN NOTE: IF I FIND A MORE DETAILED EXPLANATION OF HOW THE EUROPEAN ANTI-CORRUPTION CAMPAIGNS TRY TO “LOOK EUROPEAN” I MAY EXCISE THIS EXAMPLE]

The anti-corruption example illustrates *why* a government might want to engage in this type of abusive emulation. However, the literature has said relatively little about *how* the emulation functions in greater detail. To answer the latter question, I turn to another example: that of the HKG's 2017 election reform proposals.

³⁶ *Id.* at 53–54.

³⁷ Sajó, *supra* note 31, at 45.

In November 2017, the HKG's Constitutional and Mainland Affairs Bureau (“CMAB”) issued a public consultation paper on the reform of electoral arrangements. The stated purpose of the consultation was to consider how to improve the conduct of elections in light of (*inter alia*) the 2015 District Council (local assembly) elections and the 2016 Legislative Council elections. To that end, it sought views on three specific categories of reforms: (a) the regulation of online electoral advertisements (including social media postings); (b) the regulation of electoral surveys; and (c) the shortening of polling hours. For each category, CMAB summarised corresponding practices in other common-law jurisdictions in annexes to the consultation paper.³⁸ For present purposes, however, I shall consider only the shortening of polling hours.

At the time of the consultations, polling hours for district and legislative elections ran for 15 hours, from 07:30 to 22:30.³⁹ Certain legislative members (not identified in the consultation paper) suggested that polling hours should be shortened.⁴⁰ In its consultation paper CMAB agreed that a slight reduction in polling hours would be desirable:

“... given the present long polling hours and the time needed for vote counting, it is indeed an exhausting experience for polling and counting staff, candidates and their agents, as well as

38 [Placeholder cite]

39 [Placeholder cite]

40 [Placeholder cite]

members of the media ... we consider that ... if the community reaches a consensus of slightly shortening the polling hours (e.g. by half an hour or one hour, in the start and/or close of poll), we can relay the relevant proposal to the EAC [Electoral Affairs Commission] to facilitate its consideration of the polling arrangements.”⁴¹

CMAB specifically noted that, of five other jurisdictions (Australia, Canada, New Zealand, Singapore, and the UK), only the UK adopted a 15-hour polling day.⁴²

At first glance, CMAB's suggestion that polling hours be shortened seems unobjectionable, particularly in light of the shorter polling days in the other jurisdictions studied. CMAB's consultation report shows that several political parties endorsed shorter polling hours, some of them doing so with reference to the jurisdictions cited by CMAB.⁴³ However, such a change would operate against a very different background:

- (1) In Hong Kong - unlike in many Western democracies - many electors had to work on Sundays, and employers generally did not grant leave to their employees to cast their votes;⁴⁴ and

41 [Placeholder cite]

42 [Placeholder cite]

43 [Placeholder cite]

44 [Placeholder cite]

- (2) Hong Kong did not make provision for advance polling (e.g. in the form of postal ballots).⁴⁵

In light of these two differences, a shorter polling day would have a much greater effect on Hong Kong voters than their counterparts in other jurisdictions. This objection factored heavily in public submissions to CMAB; ultimately, due to heavy public opposition, CMAB declined to pursue its proposal further.⁴⁶

Was CMAB's proposal to shorten polling hours an abortive attempt at abusive legalism? Three pieces of circumstantial evidence suggest that it was. First, the HKG as a whole was engaged in a crackdown on pro-democracy politicians and parties at the time of CMAB's consultation. In the wake of the 2016 legislative elections – in which pro-democracy politicians made an unexpectedly strong showing, despite attempts to prevent some of them from running in the first place – the HKG brought proceedings against six democratic legislators-elect, seeking to have them disqualified from office over additions or alterations to their oaths of office.⁴⁷

Second, it appears that the CMAB consultations were animated – at least in part – by alarm at the pro-democracy camp's performance in the 2016 elections. As noted above, one of the topics of consultation was the regulation of electoral surveys. In February 2016, Benny Tai – a professor at Hong Kong University's Faculty of Law and organiser of

⁴⁵ [Placeholder cite]

⁴⁶ [Placeholder cite]

⁴⁷ [Placeholder cite]

the Occupy Central pro-democracy protests in 2014 – announced the “ThunderGo” strategic voting plan for the legislative elections later that year.⁴⁸ Under the plan, participating voters would indicate their preferred pro-democracy candidate before the poll; they would then receive tactical voting information based on the survey.⁴⁹ After the legislative elections, pro-Beijing legislators proposed tighter regulation of election surveys – a move evidently aimed at the ThunderGo scheme.⁵⁰

Third, a shortening of polling hours would have disproportionately suppressed the turnout of pro-democracy voters. A study by Hong Kong-based FactWire, drawing on polling data by the Hong Kong University Public Opinion Programme, showed that more opposition voters voted later in the day, with the partisan split becoming most pronounced in the last hour of voting.⁵¹ Perhaps not coincidentally, the political parties and politicians in favour of shorter voting hours all had pro-Beijing leanings.⁵²

48 Chantal Yuen, *Tactical voting convenor Benny Tai says he “underestimated” the situation after misses in LegCo*, Hong Kong Free Press HKFP (Sept. 7, 2016), <https://www.hongkongfp.com/2016/09/07/tactical-voting-convenor-benny-tai-says-underestimated-situation-misses-legco/>.

49 *Id.*

50 Kris Cheng, *After pro-democracy camp wins, Hong Kong’s gov’t looks to rein in strategic voting*, Hong Kong Free Press HKFP (Dec. 14, 2016), <https://www.hongkongfp.com/2016/12/14/after-pro-democracy-camp-wins-hong-kongs-govt-looks-to-rein-in-strategic-voting/>; but see Yuen, *supra* note 48 (pro-democracy commentators blamed ThunderGo for causing politicians in their camp to lose seats). For completeness, the third topic of the consultation – regulating online electoral ads – appears to have been wholly innocuous.

51 FactWire, *Hong Kong government’s bid to cut voting hours likely to affect pro-democracy voters the most*, Hong Kong Free Press HKFP (Dec. 28, 2017), <https://www.hongkongfp.com/2017/12/28/hong-kong-governments-bid-cut-voting-hours-likely-affect-pro-democracy-voters/>.

52 [Placeholder cite]

JUSTIFICATORY BORROWING:

HIGH-SPEED RAIL CO-LOCATION IN HONG KONG

I now turn to examine the phenomenon of “justificatory borrowing” – instances in which a government attempts to defend an impugned measure by asserting that it resembles arrangements in place in another jurisdiction, despite the absence of any meaningful likeness. I begin by examining the circumstances leading to the opening of Hong Kong’s new express rail terminal, connecting it to Mainland China’s high-speed rail network. I argue that the way that the Hong Kong Government (“HKG”) chose to implement customs and immigration checkpoints, and the way in which this implementation was sold to the public, are a prime example of the former type of abusive emulation.

The problem with Hong Kong’s express rail checkpoints has its origins in the territory’s constitutional order. Under the Basic Law – Hong Kong’s constitutional document – and the Sino-British Joint Declaration of 1984, Hong Kong is empowered to retain its own laws,⁵³ including its own immigration law and border controls, despite being under Chinese sovereignty.⁵⁴ Further, Article 18 of the Basic Law expressly forbade Mainland law from applying in Hong Kong, with the exception of expressly enumerated laws that related to defence, foreign affairs, or other matters outside the scope of the territory’s autonomy.⁵⁵

53 [BL Art 8]

54 [BL Art 154; JD Annex I]

55 [BL Art 18]

Against that background, the problem becomes slightly clearer. Hong Kong maintains its own immigration controls, separate from those of Mainland China. Any railway connecting the two would therefore have to make provision for both Hong Kong and Mainland customs and immigration checkpoints; in the case of previous railway links, these checkpoints were located in Hong Kong and the Mainland respectively.⁵⁶

In 2009, the HKG sought funding approval from the territory's legislature to build the Hong Kong section of an express rail line connecting the territory to Guangzhou, the provincial capital of neighbouring Guangdong Province ("the Hong Kong Section"). The proposal drew vociferous opposition throughout 2009 and 2010 for several reasons, one of them being border checkpoints. Maintaining separate border checkpoints in the Hong Kong terminus and the Mainland border at Shenzhen would drastically reduce the time saved by the new express rail line, undermining its *raison d'être*. However, Basic Law Article 18 meant that a joint checkpoint arrangement could not be implemented in Hong Kong territory. Despite these misgivings – and despite not knowing what specific checkpoint arrangement the HKG proposed to adopt – the Legislative Council approved funding in early 2010.

⁵⁶ See, e.g., 港鐵城際直通車網上購票服務, MTR Corporation, <https://www.it3.mtr.com.hk/b2c/frnNotice.asp?strLang%3DBig5> [MTR Inter-City Through Train Online Ticket Purchasing Service] (explaining that exit procedures are conducted at the station of departure and entry procedures at the station of arrival).

The sceptics' fears were proved correct in mid-2017, when the HKG announced that it would adopt a "co-location" arrangement for border checkpoints.⁵⁷ Under the proposed arrangement (the "Arrangement"), parts of the rail terminus (the "Terminus") – physically located in Hong Kong – would be leased out to Mainland China. The vast majority of Mainland Chinese law, including criminal law, would apply in the leased parts of the terminus, as well as aboard all express rail trains operating within Hong Kong; Mainland courts would have jurisdiction over all such areas.

The immediate objection to this arrangement is that it infringes Basic Law Article 18; the logical solution to the problem would be either to adopt a different checkpoint arrangement, or to seek an amendment of Article 18. I address the former possibility further below. For present purposes, it suffices to say that the latter course of action was not open to the HKG. The final power to interpret, or to amend, the Basic Law rests with the National People's Congress Standing Committee ("NPCSC") in Beijing, a political body controlled by the Communist Party of China. Public and international distrust of the NPCSC has meant that every instance in which the NPCSC has invoked its powers to interpret the Basic Law have been mired in controversy. In such circumstances, an explicit amendment of the Basic Law would be so politically toxic as to be out of the question.

⁵⁷ See, e.g., Customs, Immigration and Quarantine Arrangements of the Hong Kong Section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link, LC Paper No. CB(2)1966/16-17(01) ¶ 1 (2017).

What the HKG did instead was to engage in a full-throated defence of the Arrangement. As part of that campaign, it repeatedly referred to “similar arrangements” involving the Eurostar trains between the United Kingdom and France, as well as co-location arrangements involving the United States and Canada,⁵⁸ in a bid to portray the Arrangement as legally unobjectionable.⁵⁹ It therefore falls to examine these respective arrangements in detail.

The Hong Kong Express Rail Arrangement

The legal underpinnings of the Arrangement consist of (1) a Co-operation Agreement between the Mainland and Hong Kong governments, signed on 18 November 2017 (“Co-operation Agreement”);⁶⁰ (2) a Decision of the Standing Committee of the

⁵⁸ See, e.g., LCQ3: *Co-location arrangements at XRL Hong Kong Section*, Government of the HKSAR: Press Releases (Mar. 29, 2017), <http://www.info.gov.hk/gia/general/201703/29/P2017032900489.htm>; LCQ5: *Co-location arrangements at XRL Hong Kong Section*, Transport and Housing Bureau, HKSAR Government 5 (Jan. 11, 2017), <https://www.thb.gov.hk/eng/psp/pressreleases/transport/land/2017/20170116a.htm>; Customs, Immigration and Quarantine Arrangements of the Hong Kong Section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link, LC Paper No. CB(2)1966/16-17(01), *supra* note 57.

⁵⁹ Notably, the HKG did not refer to other, similar arrangements involving electoral authoritarian or fully authoritarian regimes: see Progressive Lawyers Group, *法政匯思就有關高速鐵路香港段一地兩檢安排的陳述書* (*Submission on Express Rail Link Co-Location Arrangement*), Progressive Lawyers Group (法政匯思) ¶ 40 (Sept. 18, 2017), <https://hkplg.org/2017/09/18/%e6%b3%95%e6%94%bf%e5%8c%af%e6%80%9d%e5%b0%b1%e6%9c%89%e9%97%9c%e9%ab%98%e9%80%9f%e9%90%b5%e8%b7%af%e9%a6%99%e6%b8%af%e6%ae%b5%e4%b8%80%e5%9c%b0%e5%85%a9%e6%aa%a2%e5%ae%89%e6%8e%92%e7%9a%84%e9%99%b3/>.

⁶⁰ 內地與香港特別行政區關於 在廣深港高鐵西九龍站設立口岸 實施 “一地兩檢” 的合作安排, Nov. 18, 2017.

National People's Congress approving the Co-operation Agreement ("NPCSC Decision"); and (3) the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance, Cap. 632 ("Co-location Ordinance").

Article 2 of the Co-operation Agreement designates certain areas of the Hong Kong terminus, as well as the train compartments of express trains operating within Hong Kong, as the "Mainland Port Area" ("MPA").⁶¹ Under that Article, "The [MPA] will be made available by the HKSAR to the Mainland for use and for exercising jurisdiction in accordance with this Co-operation Arrangement."⁶² Under Articles 3, 4, and 7, the HKG retains jurisdiction over the following matters within the MPA:

- (1) The construction and maintenance of physical plant within the Hong Kong Section (except for plant provided by, or used exclusively by, Mainland authorities): Arts 3 and 7(2);
- (2) Performance of duties or functions by personnel designated by the HKG or the Hong Kong rail operator who enter, or pass through, the MPA, or matters related to such performance: Art 7(1);
- (3) The business affairs of the Hong Kong rail operator (including insurance, employment, and tax affairs): Arts 7(3) and 7(6);

⁶¹ *Id.* sec. 2.

⁶² *Id.*

- (4) The business affairs of service providers within the Hong Kong Section (save for service providers who do not provide services outside the MPA): Art 7(3);
- (5) Environmental and safety regulation: Art 7(4); and
- (6) “matters pertaining to the contractual or other legal relationships of a civil nature among the following bodies or individuals in the Mainland Port Area: the Hong Kong operator of the Guangzhou-Shenzhen-Hong Kong Express Rail Link, contractor(s) of construction works of the West Kowloon Station, material or service provider(s), staff member(s) of the above bodies, and passenger(s) of the Guangzhou-Shenzhen-Hong Kong Express Rail Link” (in the absence of contrary agreement): Art 7(5).

It will be evident that the *default* position is that Mainland law applies to the MPA.

Pre-Clearance in Canada

The US and Canada first made a pre-clearance agreement in 1974.⁶³ Under this original agreement, only the customs, immigration, agriculture, and public health laws of the inspecting country could be exercised in pre-clearance areas, and only to the extent consistent with the country in which pre-clearance physically took place.⁶⁴ As of the

⁶³ Agreement Between the Government of the United States of America and the Government of Canada on Air Transport Preclearance, May 8, 1974, 953 U.N.T.S. 255.

⁶⁴ *Id.* at 258 (Art. VIII).

end of November 2018, pre-clearance between the US and Canada is currently governed by the Preclearance Act 1999 and a 2001 treaty. Although the Preclearance Act and the 2001 treaty are due to be superseded by the Preclearance Act 2016 and a 2015 treaty respectively, it is not currently clear when the latter instruments will enter into force. This discussion will therefore proceed on the basis of the 1999 Act and 2001 treaty.

Section 6(1) of the 1999 Act permits preclearance laws to be administered in a preclearance area in Canada with respect to travellers seeking admission into the United States, and goods to be imported into the United States.⁶⁵ The scheme of the 1999 Act imposes four limits on the application of United States law in preclearance areas. First, the 1999 Act defines “preclearance laws” as “the law of the United States with respect to customs, immigration, public health, food inspection and plant and animal health that is applicable to the admission of travellers or the importation of goods to the United States.”⁶⁶ Second, preclearance officers may (with limited exceptions) only exercise their powers within preclearance areas.⁶⁷ Third, the application of preclearance laws remains subject to the Canadian Charter of Rights and Freedoms, the Canadian Bill of Rights, and the Canadian Human Rights Act.⁶⁸ Fourth, the 1999 Act expressly provides that Canadian officers are not precluded from enforcing Canadian law within a preclearance area.⁶⁹

⁶⁵ Preclearance Act § 6(1) (Canada 1999).

⁶⁶ *Id.* § 2.

⁶⁷ *Id.* §§ 11(1)-(2).

⁶⁸ *Id.* § 6(1).

⁶⁹ *Id.* § 6(3).

Article II of the 2001 Treaty also addresses the laws applicable within preclearance areas. In particular, it states that: (a) “the law of the Host Party applies in the preclearance area;”⁷⁰ (b) “preclearance shall be carried out in a manner consistent with the laws and constitutions of both Parties;”⁷¹ and (c) the purpose of preclearance is “to assure that persons and goods entering the territory of the Inspecting Party confirm to its laws concerning customs, immigration, public health, food inspection and plant and animal health as these laws apply to preclearance to the extent they are not considered criminal.”⁷²

Eurostar Pre-Clearance

Pre-Clearance for passenger travel via Eurostar trains is currently governed by:

- (1) The Sangatte Protocol of 1991 and the Additional Protocol to the Sangatte Protocol of 2000, in relation to travel between the UK and France; and
- (2) The Tripartite Agreement of 1993 (involving the UK, France, and Belgium) and a UK–Belgian Agreement of 2013, in relation to travel between the UK and Belgium.

The basic principles governing Eurostar pre-clearance are set out in Part II of the Sangatte Protocol. Under Article 5(1), the UK and French governments agree to establish “juxtaposed national control

⁷⁰ [2001 Treaty Art II(3)]

⁷¹ [2001 Treaty Art II(3)]

⁷² [2001 Treaty Art II(6)]

bureaux” in Frethun (in France) and Folkestone (in the UK), such that “for each direction of travel, the frontier controls shall be carried out in the terminal in the State of departure.”⁷³ The term “frontier controls” is defined in Article 1(2)(a) as “police, immigration, customs, health, veterinary and phytosanitary, consumer protection, and transport and road traffic controls, as well as any other controls provided for in national or European Community laws and regulations.”⁷⁴ The term “control bureaux” is not defined in Article 1. However, Article 1(2)(g) refers to “control zones,” defining them as “the part of the territory of the host State determined by mutual agreement ... within which the officers of the adjoining State are empowered to effect controls.”⁷⁵ Throughout Part II, juxtaposed control bureaux and control zones are declared to have powers relating to “frontier controls,” but not to any other laws of the adjoining State.⁷⁶ The Additional Protocol of 2000 extends the Sangatte Protocol scheme to other designated British and French railway stations,⁷⁷ but makes no changes to the powers of control zones.

The Tripartite Agreement applies a juxtaposed frontier control scheme similar to that of the Sangatte Protocol to trains travelling between the UK and Belgium that pass through French territory without making commercial stops in France.⁷⁸ Under Article 4 of the Agreement, British officers are empowered to exercise “frontier controls” (defined in terms identical to that in the Sangatte Protocol) in

⁷³ [Sangatte Protocol Art 5(1)]

⁷⁴ [Sangatte Protocol Art 1(2)(A)]

⁷⁵ [Sangatte Protocol Art 1(2)(G)]

⁷⁶ [Sangatte Protocol Arts 5–11]

⁷⁷ [Additional Protocol Art 2]

⁷⁸ [Tripartite Agreement Art 2(3)]

Belgian and French territory, and Belgian officers may do so in British and French territory.⁷⁹ As with the Sangatte Protocol, only laws and regulations relating to frontier controls of the inspecting State apply in juxtaposed control zones.⁸⁰ The 2013 Agreement extends the scheme to trains that travel from Belgium to the UK and make commercial stops in France.⁸¹ Under Article 3, British officers stationed in the Belgian juxtaposed control zone may perform immigration controls on passengers travelling to the UK on trains making commercial stops in France.⁸²

*Comparing Hong Kong Co-location to Canadian and Eurostar
Pre-Clearance*

It should now be clear that the Co-Location Arrangement is not as similar to the HKG's chosen comparators as might first be supposed. To begin with, the Co-Location Arrangement will operate in a very different context. The Eurostar and US-Canadian border arrangements both involve international agreements between two independent, democratic sovereign states; both arrangements are circumscribed by human rights guarantees. In contrast, the Co-Location Arrangement would involve the Mainland Chinese government in Beijing making an arrangement with a devolved authority (namely the HKG). Consequently, if the Co-Location Arrangement was inconsistent with the Basic Law, the HKG could not have power to enter into it. The

⁷⁹ [Tripartite Agreement Arts 1(1) and (4); Sangatte Protocol Art 1(2)(A)]

⁸⁰ [Tripartite Agreement Art 4; Sangatte Protocol Art 2]

⁸¹ [2013 Agreement Arts 2, 4]

⁸² [2013 Agreement Art 3]

constitutionality of the Co-Location Arrangement is outside the scope of this chapter. However, it suffices to say that – notwithstanding a Court of First Instance judgment upholding its constitutionality – it remains highly doubtful that, on a proper interpretation of the Basic Law, the Co-Location Arrangement in its current form is constitutionally permissible.⁸³

The more important point, however, is that – even leaving aside the vastly different constitutional contexts – the Co-Location Arrangement is nothing like the Canadian and European pre-clearance systems. The Canadian and European schemes both provide that only laws falling within certain enumerated categories (mostly relating to customs, immigration, and quarantine) shall apply within pre-clearance areas; in the case of the Canadian scheme, the application of US law within pre-clearance area is expressly stated to be “subject to Canadian constitutional safeguards.”⁸⁴ The Co-Location Arrangement, by contrast, applies Mainland law in full (subject only to a limited set of exceptions) within the MPA, with no Hong Kong judicial oversight.

Two points should be made here. First, the relative intricacy of these differences is what made the HKG’s campaign possible. As part of its strategy to promote the Co-Location Arrangement, the HKG offered up comparisons to pre-clearance arrangements in liberal democratic regimes that, at first glance, looked very similar – and deliberately downplayed or concealed the details that made all the difference.

⁸³ Alvin Y.H. Cheung, *The Express Rail Co-location Case: The Hong Kong Judiciary’s Retreat*, Lawfare (Jan. 10, 2019), <https://www.lawfareblog.com/express-rail-co-location-case-hong-kong-judiciarys-retreat>.

⁸⁴ [Placeholder cite]

Second, subsequent litigation over the Co-Location Arrangement demonstrates that the HKG itself knew that the comparisons were tenuous. In an Affirmation filed in judicial review proceedings challenging the Co-Location Arrangement, the Permanent Secretary for Transport and Housing (Transport):

- (1) Acknowledged that the Co-Location Arrangement was "unique internationally" in that the Canadian and Eurostar schemes involved entry clearance being done prior to embarkation;⁸⁵
- (2) Declared that "the Mainland authorities made it clear to the [HKG] that application of Mainland laws other than those on CIQ [customs, immigration, and quarantine] matters would be essential for safeguarding the integrity of border control and national security";⁸⁶ and
- (3) Asserted that a scheme under which only Mainland CIQ laws applied to the MPA would result in concurrent jurisdiction for Hong Kong courts, a scheme that was unacceptable due to additional legal protections afforded by the Hong Kong courts.⁸⁷

These admissions suggest that Hong Kong officials must have known – even as they were asserting publicly that the Canadian and European schemes were “similar arrangements” to the Co-Location Arrangement

⁸⁵ [Cite XRL litigation]

⁸⁶ [Cite XRL litigation]

⁸⁷ [Cite XRL litigation]

– that the pre-clearance schemes were fundamentally different in character.

THE LIMITS OF ABUSIVE EMULATION AND JUSTIFICATORY BORROWING

What do these examples say about the limits of abusive emulation and justificatory borrowing? I suggest that two points stand out. First, abusive emulation is more likely to work where the subject is relatively esoteric. In the case of immigration co-location, for instance, the degree of alleged similarity to other pre-clearance arrangements was relatively complex, allowing the HKG to focus attention on other issues, such as the time saved by co-location. In contrast, on topics that are easier for a lay audience to grasp – such as whether polling hours should be shortened – abusive emulation seems less likely to succeed.

Second, the anti-corruption campaigns in post-Communist Europe suggest that abusive emulation has a limited shelf life. Once the public began to perceive that these campaigns were not producing results, their superficial resemblance to "best practices" from elsewhere no longer mattered.⁸⁸

[DISTINGUISHING ABUSIVE EMULATION FROM
JUSTIFICATORY BORROWING]

⁸⁸ Tisné & Smilov, *supra* note 23.