ABUSIVE EMULATION (1): PRIVATE LAW FOR PUBLIC ENDS

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“Hong Kong people have the freedom of speech and of the press. At the same time, everyone has the right to be free from defamation. This right is protected by civil and criminal law, and those who make inaccurate allegations should be sanctioned by law.”

– Former Hong Kong Chief Executive C.Y. Leung¹

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 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

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1 Holmes Chan, *Ex-leader CY Leung sues Stand News and university professor for defamation*, Hong Kong Free Press (Aug. 24, 2018), <https://www.hongkongfp.com/2018/08/24/ex-leader-cy-leung-sues-stand-news-university-professor-defamation/>.

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).

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. Far better to 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.

This Part 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 will then address two particular variants of abusive emulation. The remainder of this chapter will address the abuse of private law. I will address various forms of abuse of executive discretion in Chapter 4, before concluding with some tentative suggestions on how to identify measures of abusive emulation, and on how to design institutions and norms to prevent abusive emulation.

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 Such changes may occur both through formal amendment processes – what Yaniv Roznai refers to as “unconstitutional constitutional amendments.”⁴ Alternatively, authoritarian regimes may compel courts to adopt constitutional interpretations that are actively hostile to electoral democracy, in what David Landau and Rosalind Dixon have described as “abusive judicial review.”⁵

However, I argue that this focus on *constitutional* worst practices does not capture the full spectrum of abusive legalist conduct. There are two main problems with a focus on constitutional changes. First, the mere fact that one is altering the *constitution* will attract more scrutiny than, for instance, changes to administrative law or the law of defamation. Even “doctrinal capture”⁶ or “abusive judicial review,”⁷ 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 See YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 5–10 (2017).

5 See David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 UC DAVIS LAW REVIEW (forthcoming), 4–5 (2020).

6 Landau, *supra* note 4, at 533–34.

7 See Landau & Dixon, *supra* note 6, at 5–22 (referring to “constitutional interpretation by judges that intentionally attacks the minimum core of electoral democracy”).

The second point – somewhat related to the first – is that the *purpose* of constitutional amendments is also more difficult to disguise than amendments to “ordinary” law. An explicit amendment that has the effect of stripping jurisdiction from the courts, for instance, is difficult to disguise as something innocuous. Abusive judicial review also runs up against these limitations. As Landau and Dixon acknowledge, the effectiveness of abusive judicial review depends, in part, on the perception that judges are engaged in a “legal” rather than a political process.⁸ Cases where judges are called upon to interpret constitutional provisions in an illiberal, anti-democratic way are inherently more likely to draw suspicions of political foul play than actions that appear to be (say) suits between private persons involving only questions of private law.

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:

⁸ See *id.* at 59.

“[T]he tendency to introduce reforms that enhance an entity's external legitimacy and support, even when they do not demonstrably improve performance.”⁹

Andrews *et al* note that where a development project aims to emulate “best practices” from elsewhere, isomorphic mimicry is more common.¹⁰

The term “isomorphic mimicry” is itself based on a 1983 paper by Paul DiMaggio and Walter Powell,¹¹ that lays out a theory of “institutional isomorphism.” DiMaggio and Powell set out to explain the relative 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 professionalisation.¹² I explore the first two mechanisms further below.

In DiMaggio and Powell's account, an organisation A engages in coercive isomorphism in 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.¹³ These pressures may take the form of governmental mandates, force, or persuasion. In the context of development, for instance, pressure from foreign

⁹ Matt Andrews et al., *Escaping Capability Traps through Problem-Driven Iterative Adaptation (PDIA)*, CENTER FOR GLOBAL DEVELOPMENT Jun. 2012 2.

¹⁰ *Id.*

¹¹ 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).

¹² *Id.* at 150.

¹³ *Id.* at 150–51.

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.¹⁴ 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.¹⁵ Doing so has a “ritual aspect,” in that an organisation can at least be seen to be “trying to improve.”¹⁶

Bojan Bugarič has since applied the language of “isomorphic mimicry” to discuss rule of law reforms in Eastern Europe.¹⁷ Writing in 2015, Bugarič argued that many post-Communist “rule-of-law” reforms, such as civil service laws and anti-corruption strategies, were instances of “isomorphic mimicry,”¹⁸ resulting in a plethora of “façade” institutions, devoid of importance or real substance.”¹⁹ 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,

¹⁴ *Id.* at 151–52.

¹⁵ *Id.* at 152.

¹⁶ *Id.* at 151.

¹⁷ Bojan Bugarič, *The Rule of Law Derailed: Lessons from the Post-Communist World*, 7 HAGUE J RULE LAW 175 (2015).

¹⁸ See also Wojciech Sadurski, *Transitional Constitutionalism: Simplistic and Fancy Theories*, in RETHINKING THE RULE OF LAW AFTER COMMUNISM 9 (Adam Czarnota et al. eds., 2005) (noting the demand in Central and Eastern Europe for “normal constitutional rule-of-law,” based on the “[real or imagined] state of affairs in Western Europe or North America”).

¹⁹ Bugarič, *supra* note 18, at 191.

and too narrow in that it does not place isomorphic mimicry in the context of a broader set of abusive legalist tactics.

PRIVATE LAW FOR PUBLIC ENDS

I now turn to examine one particular type of abusive emulation: the abuse of private law by regime incumbents to achieve partisan political objectives.

What This Chapter Is Not (Exactly) About

Before addressing the abuse of private law to resolve political disputes in detail, I should explain what I will *not* be discussing in this chapter.

Strategic Lawsuits Against Public Participation (SLAPPs)

There has been considerable discussion of SLAPPs, although much of it has focused on the United States and Canada.²⁰ This chapter departs from most previous academic discussion of SLAPPs in two ways. First, it focuses exclusively on SLAPPs brought by public

²⁰ See, e.g., Ralph Michael Stein, *SLAPP Suits: A Slap at the First Amendment*, 7 PACE ENVTL. L. REV. 45 (1989–1990); Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417 (1990–1991); GEORGE PRING & PENELOPE CANAN, *SLAPPs: GETTING SUED FOR SPEAKING OUT* (1996); James A. Wells, *Exporting SLAPPs: International Use of the U.S. SLAPP to Suppress Dissent and Critical Speech Notes & Comments*, 12 TEMP. INT'L & COMP. L.J. 457 (1998); Pamela Shapiro, *SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International*, 19 REVIEW OF EUROPEAN COMMUNITY & INTERNATIONAL ENVIRONMENTAL LAW 14 (2010); BYRON SHELDRICK, *BLOCKING PUBLIC PARTICIPATION: THE USE OF STRATEGIC LITIGATION TO SILENCE POLITICAL EXPRESSION* (2014).

authorities or officials, or those brought by “paper plaintiffs” whose actions can be attributed to political incumbents. Second, its discussion is not focused on one particular jurisdiction.

Juristocracy

Some of the concerns I address in this chapter are shared with those expressed in earlier work on juristocracy and the judicialisation of politics.²¹ In particular, criticisms of “juristocracy” have revolved around whether “political” subject matter has been inappropriately moved into the courts. Although these critiques have focused on judicial review proceedings, the underlying rationale – that the courts are an inappropriate arena for the resolution of questions that are political in nature – holds doubly true where the *nature* of the action is also itself obfuscated.

Private Law Actions by Public Actors

I now move on to address the most obvious situation in which private law is abused in the furtherance of public ends: the use of private law actions by public actors. Such lawsuits have previously been grouped together with lawsuits by private parties in the literature on SLAPPs. As a result, the particular abuse associated with the use of

²¹ See, e.g., RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2007); Ran Hirschl, *The Judicialization of Politics*, THE OXFORD HANDBOOK OF LAW AND POLITICS (2008).

private law by a *public* actor (whether an individual official or a public corporation) has not been sufficiently emphasised.

The Logic of Private Law Actions (1): Private Law Actions vs. Public Law Actions

There are two main reasons why a regime incumbent might use private law actions to resolve political disputes. The first reason adopts and extends Landau's and Dixon's discussion of abusive judicial review as a regime strategy; the second draws on discussions of SLAPPs. I will address each reason separately below.

The first reason is that private-law actions provide the appearance that the dispute is "purely" legal, rather than political. Landau and Dixon argue that one reason authoritarians turn to abusive judicial review is that courts enjoy presumptive legitimacy in interpreting constitutions, in the sense that they are perceived to be engaging in a process involving *legal* (as opposed to merely *political*) judgment.²² However, abusive judicial review still retains a visible political element: constitutional interpretation necessarily involves *some* element of political judgment.²³ Private law actions take Landau's and Dixon's argument one step further: by framing a lawsuit in purely private law terms, a regime can entirely conceal the underlying political elements to the dispute.

Abusive private law actions differ from abusive judicial review, or other types of abusive constitutionalism, in at least three ways. First,

²² See Landau & Dixon, *supra* note 6, at 23–26.

²³ See *id.* at 23–24.

such actions concern the partisan mis-application of “ordinary” law, typically areas of private law that cannot be abolished entirely. For instance, one might reasonably make the case that a jurisdiction should eliminate *criminal* defamation. However, the idea that all *civil* defamation should be non-actionable is far less plausible.

Second, constitutional changes are climactic events: they tend to be relatively dramatic events that culminate in a challenge before a constitutional court. In contrast, private law actions appear to be more mundane and take the form of protracted litigation in ordinary courts.

Third, there will rarely be a smoking gun with abusive private law suits. The cause of action may bear little resemblance to the underlying political grievance – indeed, it may be a pretext designed to draw attention *away* from it. The plaintiff itself may even appear, on casual observation, to have no obvious ties to the regime.

The Logic of Private Law Actions (2): Private Law Actions as SLAPPs

The second reason why a regime incumbent might bring private law actions is the same reasoning behind bringing SLAPPs in general: to exhaust defendants’ time and resources.²⁴ For many SLAPP plaintiffs, ultimate legal victory is beside the point; the objective is to draw out the case, forcing defendants to spend time and legal costs in defending an action. These considerations also apply here.

²⁴ See, e.g., SHELDRIK, *supra* note 21, at 2.

Defamation: The Singapore Sting

The most widely-known instance of such lawsuits is the use of defamation suits by politicians, with Singapore being a particularly notorious example. Officials in the People's Action Party (PAP), which has ruled the country continuously since its independence in 1959,²⁵ have not hesitated to bring defamation actions against political opponents, ranging from opposition party leaders to bloggers.²⁶

Why has the PAP so frequently invoked defamation law against political opponents? Part of the answer lies in the plaintiff-friendly features of Singaporean defamation law – many of which are shared with English law (prior to the entry into force of the Defamation Act 2013).²⁷ First, words calculated to disparage a plaintiff “in any office, profession, calling, trade or business” are actionable *per se*, without the need to plead or prove special damage.²⁸ Second, the plaintiff need only prove that a statement was made by the defendant, and that it was defamatory;²⁹ it is then incumbent on the defendant to establish defences (such as those of justification or fair comment).³⁰

25 *Prosperity Versus Individual Rights? Human Rights, Democracy, and the Rule of Law in Singapore* (International Bar Association Human Rights Institute), Jul. 2008 13.

26 See, e.g., *id.* at 26–39; *Singapore government threatens critics and independent media with defamation claims*, Global Voices Advocacy (Dec. 11, 2018), <https://advox.globalvoices.org/2018/12/11/singapore-government-threatens-critics-and-independent-media-with-defamation-claims/>.

27 [THE 2013 ACT, AMONG OTHER THINGS, REPLACES THE COMMON LAW DEFENCES OF JUSTIFICATION AND FAIR COMMENT WITH STATUTORY DEFENCES OF TRUTH AND HONEST OPINION]

28 [SG DEFAMATION ACT S 5; UK DEFAMATION ACT 1952 S 2]

29 [NEED CITES HERE]

30 [ADD CITE HERE]

More significant, however, is the interaction between Singapore's defamation law and its constitutional provisions governing membership of Parliament. Section 45 of the Constitution lays out bases for disqualifying an individual from being a Member of Parliament. These bases include being an undischarged bankrupt (in which case the disqualification remains in place until the bankruptcy is discharged), and being convicted of an offence and sentenced to imprisonment for no less than a year, *or* a fine of not less than SG\$2,000 (in which case the disqualification remains in place for a five-year period).³¹ As the International Bar Association noted in 2008:

“Therefore, if a potential candidate is either convicted of defamation as a criminal offence and is either imprisoned for one year or fined with at least S\$2,000, or if they are liable to pay damages in a civil suit so large as to bankrupt them, the Constitution in Singapore provides that they are ineligible to stand for elections. ... these provisions have the potential to be used to prevent political opponents from standing for office for significant periods of time.”³²

As with Singapore's defamation law, the constitutional provisions for disqualification bear some resemblance to those in other jurisdictions.³³ However, in operation, the Singaporean provisions have

³¹ [ADD CITE HERE]

³² *Prosperity Versus Individual Rights?*, *supra* note 26, at 28.

³³ *Id.* at 28–29.

been used as part of a broader strategy by the PAP to exclude political opponents from civic life, resulting in a pervasive culture of self-censorship.³⁴ In addition to the substantial time and costs involved in defending a defamation action, opposition politicians and media figures must also reckon with the likelihood that they will lose – and be ordered to pay particularly hefty damages. Interviewed in 2002, Australian barrister Stuart Littlemore noted that the PAP had never lost a libel action brought in Singapore, and that the average damages award for a PAP plaintiff was 12 times the Singaporean average.³⁵

The strategic abuse of defamation suits by political incumbents is not confined to Singapore. In a 2017 report on civil defamation law in Hungary, Bea Bodrogi noted “an increase in legal actions by public officials and politicians who seek redress in the courts for attacks on their reputations, **and who seek to put an end to political and societal disputes by means of a court judgement**” (emphasis added).³⁶ Of the defamation cases specifically discussed in that report, a majority were brought by politicians from the governing party.³⁷ Government officials

³⁴ *Id.* at 30.

³⁵ Eric Ellis, *Singapore Authorities Use Libel Laws to Silence Critics*, THE AUSTRALIAN, Sept. 26, 2002.

³⁶ Bea Bodrogi, *Civil Defamation and Media Freedom in Hungary* (International Press Institute), Feb. 2017 11.

³⁷ *See id.* at 12–14.

have also resorted to defamation suits elsewhere, including in Guyana,³⁸ Venezuela,³⁹ and Canada.⁴⁰

“Copyfraud”: Abusive intellectual property claims

As noted above, defamation suits have been fertile ground for abusive private-law litigation. Yet, to date, the potential for other areas of private law to serve as a means of political suppression has remained largely untapped. For instance, Jason Mazzone considers numerous instances of frivolous intellectual property suits or copyright takedown notices filed for the apparent purpose of silencing criticism or stifling political debate.⁴¹ However, he focuses largely on the United States, and appears content to assume that private entities, in the form of creators and publishers, are the primary abusers of intellectual property law.⁴²

One potential avenue for governmental abuse of intellectual property law is Crown or government copyright, a feature of several

38 Guyana | Freedom House, <https://freedomhouse.org/report/freedom-world/2018/guyana> (suits against journalists in retaliation against critical coverage).

39 Committee to Protect Journalists, Venezuela’s Supreme Court orders La Patilla to pay US\$5m in damages to Cabello, <https://cpj.org/2019/06/venezuelas-supreme-court-orders-la-patilla-to-pay-.php> (suit against newspaper).

40 SHELDRIK, *supra* note 21, at 71–83 (suit brought by Premier of Quebec against former Justice Minister).

41 See, e.g., JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 75 (2011) (content takedown notices filed by, *inter alia*, a litigious medical research firm and the Church of Scientology); *id.* at 78–81 (automated takedown notices by television networks directed at footage of then-Presidential candidate John McCain); *id.* at 153–54 (discussing frivolous trademark claims against Ralph Nader and Al Franken).

42 See, e.g., MAZZONE, *supra* note 42, at ix (“why **creators and content providers** overreach”) (emphasis added).

Commonwealth jurisdictions.⁴³ Although Crown copyright regimes vary widely by jurisdiction,⁴⁴ they reflect a tension between access to governmental information and the desire to exert control over governmental materials.⁴⁵ As Elizabeth Judge notes in her critical discussion of Canadian Crown copyright law, Crown copyright “may ... work to deter and delay the circulation of law in accessible formats.”⁴⁶ Malicious regime incumbents might view this aspect of Crown copyright as a feature, rather than as a bug.

The litigation between the State of Georgia and Public.Resource.Org (“*Georgia v. Public Resource*”) is illustrative of how Crown (or in this case State) copyright can be weaponised by governments.⁴⁷ Under an agreement between State of Georgia (“Georgia”) and a LexisNexis subsidiary (which I refer to as “LexisNexis” below), the latter prepares and maintains the Official Code of Georgia, Annotated (“the Annotated Code”).⁴⁸ Under the terms of that agreement:

1. Georgia specifies what types of annotations should appear in the Annotated Code, and how such annotations should be created and arranged;

43 See Elizabeth F. Judge, *Crown Copyright and Copyright Reform in Canada*, in IN THE PUBLIC INTEREST 551 (Michael Geist ed., 2005) (referring to Crown copyright in Canada, the UK, Australia, and New Zealand).

44 See *id.* at 550.

45 See *id.* at 551.

46 *Id.*

47 Code Revision Commission v. Public.Resource.Org, Inc., No. 17–11589 (U.S. 11th Cir.) (cert. granted June 24, 2019).

48 See *id.* at 6–7.

2. Georgia's Code Revision Commission supervises LexisNexis' work in preparing the Annotated Code, and retains final editorial control;
3. LexisNexis has the exclusive right to publish the Annotated Code; and
4. Georgia retains the copyright to the *annotations* in the Annotated Code. (Georgia conceded that it could not copyright the *statutory text* in the Annotated Code.)

Public.Resource.Org ("Public Resource") purchased the full print edition of the Annotated Code, scanned it, and uploaded it to its website so that the Annotated Code would be freely accessible to the public.⁴⁹ Georgia filed suit against Public Resource, seeking an injunction against the latter's free distribution of the Annotated Code.⁵⁰ The district court gave partial summary judgment in favour of Georgia, ordering that Public Resource cease to distribute the Annotated Code.⁵¹ It did so on the basis that the annotations lacked the force of law, and therefore did not fall within the public domain.⁵²

On appeal, the 11th Circuit concluded that the annotations could **not** be copyrighted. The annotations were created under the supervision of the Code Revision Commission; in addition, the Georgia General Assembly was required to vote annually to adopt the Annotated

⁴⁹ See *id.* at 9.

⁵⁰ See *id.* at 9–10.

⁵¹ See *id.* at 10–11.

⁵² See *id.* at 10.

Code (including the annotations).⁵³ Although the annotations themselves did not carry the force of law in the same way as the text of the statutes, they were nonetheless “law-like” in having official status⁵⁴ and had been repeatedly relied upon by state courts in interpreting state statutes.⁵⁵ Based on these factors, the 11th Circuit concluded that the annotations had in reality been drafted by the legislature as “an official exposition on the meaning of the laws of Georgia.”⁵⁶ The Supreme Court granted *certiorari* on 24 June, 2019; oral argument is due to take place in the October 2019 term.⁵⁷

Two particular features of *Georgia v. Public Resource* warrant attention. First, Georgia conceded that the text of the statutes themselves was not copyrightable.⁵⁸ This would not be true in Commonwealth jurisdictions that recognise Crown copyright – meaning that such jurisdictions could bring copyright infringement proceedings in respect of the *text* of statutes (subject to the specifics of that jurisdiction’s Crown copyright regime). Second, Georgia’s lawyers referred to the dissemination of the Annotated Code as a “strategy of terrorism.”⁵⁹ Assuming that this is not merely hyperbole, this assertion underscores the impropriety of addressing quintessentially public

53 See *id.* at 34–35.

54 See *id.* at 41–46.

55 See *id.* at 46–48.

56 *Id.* at 57.

57 *Georgia v. Public.Resource.Org Inc.*, SCOTUSblog, <https://www.scotusblog.com/case-files/cases/georgia-v-public-resource-org-inc/>.

58 See *Georgia v. Public Resource* at 8.

59 Adam Liptak, *Accused of ‘Terrorism’ for Putting Legal Materials Online*, THE NEW YORK TIMES, May 26, 2019, <https://www.nytimes.com/2019/05/13/us/politics/georgia-official-code-copyright.html>.

questions – such as whether legislative annotations should be publicly available – through lawsuits ostensibly involving private law.⁶⁰

Trademark law may also lend itself to the suppression of political opposition. In February 2010, a lunar new year stall in Hong Kong began selling t-shirts bearing a satirical variation of the name and logo of the territory's largest pro-Beijing political party. The variations to the name and logo were such that there was no serious risk of confusion. Nonetheless, the Customs and Excise Department confiscated the t-shirts, following a complaint from the impugned political party.⁶¹ The Customs and Excise Department subsequently declined to pursue further proceedings against the creators of the t-shirts; however, it also refused to return the confiscated shirts.⁶² Although the incident itself involved the exercise of criminal law powers relating to allegedly counterfeit goods, it suggests that frivolous trademark infringement proceedings may be a means to target other instances of satirical political expression.

Legal Astroturfing

Thus far I have only addressed instances in which political incumbents have brought ostensibly civil actions in their own names, in

⁶⁰ See also Leslie Street & David R. Hansen, *Who Owns the Law? Why We Must Restore Public Ownership of Legal Publishing*, 26 *J. Intell. Prop. L.* 205 (2019), preprint 221–38 (LawArXiv), Apr. 29, 2019.

⁶¹ 民建聯投訴「禮義廉」T恤被扣海關搜社民連年宵檔指涉侵權, MINGPAO, Feb. 13, 2010, <http://dailynews.sina.com/bg/chn/chnpolitics/mingpao/20100213/12431196677.html>.

⁶² 李八方, 隔牆有耳: 海關知衰 唔告禮義廉, APPLE DAILY, Nov. 10, 2010.

a bid to disguise political repression. However, it is also possible to add a further layer of indirection by using a paper plaintiff.

The 2014 clearance of Umbrella Movement pro-democracy protesters is a striking example of such legal “astroturfing.”⁶³ After police deployed tear gas rounds against pro-democracy protesters on 28 September 2014, demonstrators occupied parts of the Mong Kok and Admiralty districts, including (in the case of the latter) the environs of Citic Tower, adjacent to Government Headquarters. On 20 October 2014 – almost a month after the occupations began – three sets of plaintiffs each applied *ex parte*, in separate actions, for injunctions against the demonstrators:⁶⁴ (a) two taxi operators’ associations, in respect of the Mong Kok occupations (“the Taxi Operators’ Action”); (b) a minibus company, in respect of the Mong Kok occupations (“the Minibus Company Action”); and the owners of Citic Tower, in respect of the Citic Tower occupation (“the Citic Tower Action”). In each of these three actions, injunctions were granted *ex parte* on 20 October 2014.⁶⁵ After *inter partes* hearings on 24 and 27 October, the Court of First Instance ordered that the injunctions remain in place, with minor

63 See, e.g., Adam Bienkov, *Astroturfing: What is It and Why Does It Matter?*, THE GUARDIAN, Feb. 0, 2012, <https://www.theguardian.com/commentisfree/2012/feb/08/what-is-astroturfing> (defining “astroturfing”); for a detailed procedural history of the clearances, see Shen Yang, *In the Name of the Law: Legal Frames and the Ending of the Occupy Movement in Hong Kong*, 44 LAW & SOCIAL INQUIRY 468, 474–77 (2019).

64 See *Chiu Luen Public Light Bus Co., Ltd. v. Persons Unlawfully Occupying or Remaining on the Public Highway Namely, the Westbound Carriageway of Argyle Street Between the Junction of Tung Choi Street and Portland Street and/or Other Persons Hindering or Preventing the Passing or Repassing of Argyle Street*, [2014] 6 HKC 298 ¶ 1 (Hong Kong Court of First Instance 2014).

65 *Id.*

revisions to the injunctions relating to the Mong Kok occupations.⁶⁶ Police cleared the Mong Kok and Citic Tower protest sites, in purported enforcement of the injunctions rather than pursuant to public order powers.⁶⁷

Several features of the three actions are unusual. First, all three sets of plaintiffs applied for injunctions *ex parte*. Such applications are typically only permitted in cases of urgency.⁶⁸ However, all three actions were brought weeks after the occupations began. The Court of First Instance concluded that all three applications could nonetheless be made *ex parte*, after substantial delay, because the “risks of personal safety”⁶⁹ could not be predicted. Nonetheless, it is not clear why these risks were materially different at the time of the applications, as compared to when they first materialised nearly a month prior.⁷⁰ As a result, the plaintiffs were able to obtain interlocutory injunctions *in the absence of any opportunity for the demonstrators to make submissions in opposition*. By the time the defendants were able to make submissions at the *inter partes* hearing, the status quo was already in the plaintiffs’ favour by virtue of the *ex parte* injunctions.

Second, the causes of action – at least in relation to the Mong Kok actions – are inconsistent with the lawsuits being genuine “private law” actions. Of the three actions, only the Citic Tower action involved a claim in private nuisance (in addition to a claim in public nuisance);

⁶⁶ *Id.* para. 152.

⁶⁷ Yang, *supra* note 64, at 475.

⁶⁸ [TO ADD: CITE TO HONG KONG CIVIL PROCEDURE]

⁶⁹ *Chiu Luen*, [2014] 6 HKC ¶ 105.

⁷⁰ *Id.* paras. 103–105.

the Taxi Operators' Action and Minibus Company Action were both based *exclusively* on public nuisance.⁷¹

Public nuisance remains a creature of common law in Hong Kong. Two points bear noting about the common law of public nuisance. First, the nuisance in question has to affect the public at large. It must involve a state of affairs that "*endangers the lives, safety, health, property or comfort of the public; or obstructs the public in the exercise or enjoyment of any right that is common to members of the public.*"⁷² Second – a corollary of the *public* nature of the act – the government is generally the proper party to bring suit in public nuisance; a private individual can only bring suit if she has suffered particular damage beyond that suffered by the public at large.⁷³ Both of these principles are well established at common law,⁷⁴ and remain in place in other jurisdictions.⁷⁵

In its *inter partes* decision, the Court of First Instance paid lip service to the unusual nature of public nuisance, and to the general

⁷¹ *Id.* para. 3.

⁷² *Leung Tsang Hung & Anor v. The Incorporated Owners of Kwok Wing House*, 10 HKCFAR 480 ¶ 14 (Hong Kong Court of Final Appeal 2007).

⁷³ *Id.* para. 12.

⁷⁴ *See, e.g.*, David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 *ECOLOGY LAW QUARTERLY* 883, 883–84 (1989) (discussing historic common law position, and noting that there was an absolute bar on private actions for public nuisance until 1536); Wilfred Estey, *Public Nuisance and Standing to Sue*, 10 *OSGOODE HALL LAW JOURNAL* 563, 566–69 (1972) (discussing significant limits in Canada on private plaintiffs' ability to bring suit for public nuisance).

⁷⁵ *See, e.g.*, *B.C. v. Canadian Forest Products*, 2004 SCC 38 ¶ 66 (Canada SCC 2004) (nature of public nuisance and Attorney-General being proper party to sue); *Wildtree Hotels Limited and Others v. London Borough of Harrow*, (2000) [2001] 2 AC 1 (UKHL) ("a public nuisance, such as an interference with the use of a public highway, is a wrong to the public as a whole and the ordinary common law remedy was a prosecution on indictment. To support an action for damages, the plaintiff has to prove that he suffered particular damage greater than that suffered by members of the public in general.").

principle that only the government could sue in public nuisance. It acknowledged that “*generally* only ... the Secretary for Justice (“SJ”) can bring a claim in public nuisance for and on behalf of the general public” (original emphasis),⁷⁶ in keeping with its common law origins. It also acknowledged the historic limits on private plaintiffs’ standing to bring suits in public nuisance, noting that the plaintiffs had to have an arguable case that they had suffered “particular, substantial and direct damage” as a result of the public nuisance.⁷⁷

Nonetheless, the Court of First Instance honoured this principle largely in the breach. A careful reading of the judgment suggests that none of the Mong Kok plaintiffs suffered any “particular, substantial and direct damage” that would have gone beyond that suffered by any member of the general public resident in that district.⁷⁸ Nor was the Secretary for Justice ever involved in the proceedings, either by taking the three actions over,⁷⁹ or by being joined as a plaintiff to any of the three actions.⁸⁰

Third, the actions were assigned (at the *inter partes* stage) to a judge who typically presides over constitutional and administrative law

⁷⁶ *Chiu Luen*, [2014] 6 HKC ¶ 16.

⁷⁷ *See id.* paras. 16–38.

⁷⁸ *Id.* paras. 23–27.

⁷⁹ *See* Joyce Ng, *Top Court Judge Questions “odd” Injunction*, SOUTH CHINA MORNING POST, Nov. 13, 2014, <http://www.scmp.com/news/hong-kong/article/1638381/top-court-judge-questions-odd-injunction?page=all>.

⁸⁰ *Chiu Luen*, [2014] 6 HKC ¶ 17.

cases.⁸¹ This would be highly unusual for ordinary civil lawsuits involving private parties.

These irregularities begin to make sense if one takes into account the *nature* of the plaintiffs in all three actions. Goldon Investment, the plaintiff in the Citic Tower action, is controlled by the Citic Group,⁸² a Chinese state-owned enterprise⁸³ described as the Chinese Communist Party's "window to the outside world."⁸⁴ Maggie Chan Man-ki, solicitor for the minibus operator,⁸⁵ was a member of a pro-Beijing political party⁸⁶ and attended a closed-door meeting with President Xi Jinping in late September 2014,⁸⁷ in which Xi reportedly took a hard line on political reforms in Hong Kong.⁸⁸ In addition, it appears that the Hong Kong Government had encouraged (through an intermediary) at

81 See Geoffrey Ma, Speech by the Chief Justice at the Ceremonial Opening of the Legal Year 2015 (2015) ("The various injunction proceedings ... heard over a number of days by the Judge in charge of the Constitutional and Administrative Law List...").

82 Julie Makinen & Violet Law, *Masked Men Set off Clashes with Police in Hong Kong*, LOS ANGELES TIMES, Nov. 18, 2014, <https://www.latimes.com/world/asia/la-fg-hong-kong-protest-site-20141117-story.html>.

83 See *CITIC chief confirms talks to buy assets of troubled CEFC*, Nikkei Asian Review, <https://asia.nikkei.com/Business/Companies/CITIC-chief-confirms-talks-to-buy-assets-of-troubled-CEFC>.

84 See GERRY GROOT, *MANAGING TRANSITIONS: THE CHINESE COMMUNIST PARTY, UNITED FRONT WORK, CORPORATISM AND HEGEMONY* 108 (2004) (citing Party literature).

85 See *First Occupy site cleared as angry Hong Kong protesters stand watch*, South China Morning Post (Nov. 0, 2014), <https://www.scmp.com/news/hong-kong/article/1647943/operation-mong-kok-3000-police-standby>.

86 See Samson Yuen & Edmund W. Cheng, *Neither Repression Nor Concession? A Regime's Attrition against Mass Protests*, 65 *POLITICAL STUDIES* 611, 624 (2017).

87 See Michael Forsythe & Alan Wong, *Chinese President Sends Signal Against Political Change in Hong Kong*, N.Y. TIMES, Sept. 23, 2014, <https://www.nytimes.com/2014/09/24/world/asia/chinese-president-sends-signal-against-political-change-in-hong-kong.html>.

88 See *id.*

least one of the plaintiffs to bring suit.⁸⁹ Viewed in conjunction with the numerous oddities in the actions themselves, the three actions appear to have been instances of legal astroturfing, designed to obscure the role of the regime in clearing demonstrators.⁹⁰

There is, however, a further sting in the tale. In the case of the Mong Kok injunctions, over a hundred demonstrators were arrested for their failure to vacate areas subject to the injunctions;⁹¹ several were later sentenced to prison sentences for criminal contempt.⁹² An ostensibly private-law matter, involving ostensibly private persons,⁹³ thus led to the imprisonment of political opponents of the Hong Kong Government.

CONCLUSION

The problem with tampering with a constitution – even if an authoritarian scrupulously mimics overseas “best” practices when doing so – is that foreign investors and governments notice. The abuse of “private law” provides one possible solution for regime incumbents. As with other forms of isomorphic mimicry, abusive private law suits closely resemble more innocuous civil suits in other jurisdictions. They

⁸⁹ See Yuen & Cheng, *supra* note 87, at 624; Then-Secretary for Justice Rimsky Yuen also met directly with the plaintiffs: Joyce Ng, *Justice Secretary Rimsky Yuen Rejects Criticism He “indulged” Government over Occupy Central*, SOUTH CHINA MORNING POST, Dec. 17, 2014, <http://www.scmp.com/news/hong-kong/article/1663358/justice-secretary-rimsky-yuen-rejects-criticism-he-indulged>.

⁹⁰ See Yuen & Cheng, *supra* note 87, at 624; Yang, *supra* note 64, at 475.

⁹¹ Holmes Chan, *Five Hongkongers found guilty of criminal contempt for blocking clearance of Occupy Mong Kok site*, Hong Kong Free Press (Aug. 31, 2018), <https://www.hongkongfp.com/2018/08/31/five-hongkongers-found-guilty-criminal-contempt-blocking-clearance-occupy-mong-kok-site/>.

⁹² *Id.*

⁹³ See Ng, *supra* note 90.

invoke causes of action, or doctrines, that resemble those found elsewhere; in areas of law that are indispensable in a modern society. Unlike abusive constitutionalism, abuses of private law do not involve climactic confrontations between government and opposition before a constitutional court. Rather, as the Umbrella Movement injunctions demonstrate, they may not even officially involve the government at all. Nonetheless, these actions force defendants to expend time and resources – and, despite their ostensible private law nature, can result in political opponents being excluded from political life due to bankruptcy, or imprisoned pursuant to contempt proceedings.

However, abuses of private law also have limits. Even though the logic of SLAPPs suggests that plaintiffs need not be overly concerned with the underlying merits of the suits they file, such suits need at least a modicum of apparent merit if they are not to be thrown out by the courts, or regarded with suspicion by investors or aid agencies. And – even where political incumbents seek to hide their tracks with paper plaintiffs – the identity of the plaintiffs may itself raise eyebrows at home and abroad. In light of these limitations, would-be authoritarians may well turn to other avenues for abusive legalism.