LEGAL WHATABOUTISM

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INTRODUCTION

Chapters [3, 4, and 5] discussed tactics that exploit necessary features of a contemporary legal system. The Umbrella Movement injunctions relied on the tort of public nuisance – which, despite extensive scholarly criticism,[1] seems unlikely to be abolished. The prospects of scrapping *civil* defamation (as opposed to criminal defamation) seem equally remote. Similarly, the complete eradication of administrative rule-making or administrative discretion is a pipe dream.

Suppose, however, that a regime incumbent wants to make changes to legal norms or institutions that *cannot* be disguised as administrative rules or otherwise hidden from view. How might it justify such changes to its subjects and to the outside world?

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1 *See, e.g.*, J.R. Spencer, *Public Nuisance. A Critical Examination*, 48 THE CAMBRIDGE LAW JOURNAL 55 (*in* JSTOR, 1989); Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 JOURNAL OF TORT LAW ii (2011); Jason Neyers, *Reconceptualising the Tort of Public Nuisance*, 76 CAMBRIDGE LAW JOURNAL 87 (2017).

The literature on "constitutional worst practices" and "isomorphic mimicry" described in Chapter 3 suggests emulating "best" practices from other jurisdictions. Such emulation need not be thorough, or even sincere; it may suffice simply to assert that a proposed change resembles that in a jurisdiction with ironclad rule-of-law credentials – a form of legal "whataboutism."[2]

Suppose that the President of Erewhon has proposed Bill X, and has justified it by claiming that Act X' in another jurisdiction is similar. This might mean any number of things. Bill X and Act X' (or parts thereof) may vary in terms of how similar the texts really are. The contexts in which Bill X and Act X' (or parts thereof) apply may – or may not – resemble each other. Nor should it be assumed that Act X' itself is indisputably a "best practice," even within its home jurisdiction. For present purposes, I shall examine three situations, each representing an extreme on one of these three axes:

2 *whataboutism | Definition of whataboutism in English by Oxford Dictionaries*, Oxford Dictionaries | English, https://en.oxforddictionaries.com/definition/whataboutism.

1. **Borrowing worst practices:** Act X' is in substance a "worst practice" (regardless of how similar it is to Bill X and regardless of the contexts in which they operate);
2. **Radically different contexts:** Bill X in substance resembles Act X' (or alternatively parts of the former resemble parts of the latter), and the latter is not a "worst practice." Nonetheless, the contexts in which the two statutes operate is radically different. This is the "Frankenstate" scenario;[3] and
3. **Specious comparisons:** Bill X in reality does not resemble Act X' at all. Put differently, in this situation Erewhon is deliberately making a specious comparison.

BORROWING "WORST PRACTICES": MALICIOUS LEGAL TRANSPLANTS

The conscious borrowing of "worst practices" is relatively straightforward compared to the other two situations I describe above, in that there is a deliberate, undisguised attempt to transplant a norm or institution that is viewed as harmful, even in the context of its home jurisdiction. Although the phenomenon itself is not new, two recent

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

articles – one by Mathias Siems,[4] one by Rosalind Dixon and David Landau[5] – are among the first specifically to consider this phenomemon.

Siems refers to the phenomenon of "malicious legal transplants," which he defines in the following terms:

> *"… 'malicious legal transplants' have an objective element ('harm'), for example, where one group in society imposes its social norms on another one without need … In addition, the subjective element means that at least one actor of the transplant process recognises the use of the transplant in such a manner."*[6]

Siems does not refer in his definition to whether the transplanted norm is viewed as harmful even within its home jurisdiction. However, Siems' examples only encompass situations where a norm that is substantively illiberal – even within its home jurisdiction – has been deliberately transplanted.[7]

4 Mathias Siems, *Malicious Legal Transplants*, 38 LEGAL STUDIES 103 (2018).

5 Rosalind Dixon & David Landau, *1989–2019: From Democratic to Abusive Constitutional Borrowing*, 17 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 489 (2019).

6 Siems, *supra* note 5, at 105.

7 *See* Siems, *supra* note 5, at 105–6 (on the spread of racial segregation laws from the US to Nazi Germany and thence to Fascist Italy); *id.* at 106 (on the spread of repressive religious legislation from Saudi Arabia to other countries with Muslim

Siems' discussion of the determinants for malicious legal transplants, however, is less convincing. Siems argues that there are three determinants for such transplants: (a) the form or substance of the norm to be transplanted is viewed as attractive; (b) a "[d]eficient law-making process" or the influence of vested interests; and (c) political dynamics within the jurisdiction adopting the transplant (e.g. path dependency). However, these categories appear in Siems' account to overlap significantly.

Dixon and Landau, in their discussion of "abusive constitutional borrowing," suggest more clearly *why* a regime would choose to engage in such practices. In their discussion of the explicit adoption of authoritarian regimes as models for emulation,[8] Dixon and Landau suggest (in the context of Hungary's deliberate adoption of Russia as a constitutional model) four factors: (1) the foreign policy benefits to Hungary of cultivating a relationship with Russia as a way to push back against EU influence; (2) economic benefits from a closer relationship with Russia; (3) pressure from Putin on Hungary; and (4) as part of a rhetorical strategy to discredit liberal democracy, particularly to

populations); *id.* at 106–7 (on the criminalisation of homosexuality in former British colonies).

8 *See* Dixon & Landau, *supra* note 6, at 491–93.

domestic constituents.[9] Not surprisingly, *none* of these factors involves increasing the perceived compliance of Hungarian law with EU norms.

I now turn to the two remaining forms of legal whataboutism, both of which involve ostensible transplantation from liberal democratic jurisdictions.

RADICALLY DIFFERENT CONTEXTS: THE "FRANKENSTATE" REVISITED

In this situation, Bill X and Act X', or elements of the respective statutes, are substantially similar. However, they operate in a radically different context due to interactions with other statutory provisions, or due to extra-legal factors: individual measures may be (relatively) unobjectionable on their own, but taken in conjunction create oppressive results.[10]

Such forms of "borrowing" have been examined elsewhere. As noted previously, Scheppele refers to the result of these practices as a "Frankenstate." Dixon and Landau also consider such practices in the context of abusive constitutional borrowing from liberal democracies:

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9 *See id.*

10 *See* Scheppele, *supra* note 4, at 561 ("the devil is in the interactions").

> *"Abusive constitutional borrowing usually depends on a decoupling of the form and substance of a design or legal rule. In some cases, leaders adopt some liberal democratic institution … as a mere sham … In other cases … liberal democratic ideas are imported outside the context in which they normally function, or in a highly selective way, by bringing in only part of a legal rule."*[11]

Dixon and Landau observe that this type of abusive borrowing has two main benefits: it provides some veneer of legitimacy to some domestic and international observers, and it makes it much more difficult for outside observers to detect malign constitutional developments.[12] As Scheppele, Dixon, and Landau all refer to post-2010 Hungary as a prime example of the phenomenon, the case merits closer examination.

Example 1: Is Hungary Really a "Frankenstate"?

Scheppele uses the case of post-2010 Hungary as an example of a "Frankenstate," in which norms and specific measures have been

11 Dixon & Landau, *supra* note 6, at 494.
12 *Id.* at 494–95.

faithfully transposed – albeit into radically different contexts. The numerous legislative acts passed at the start of the Fidesz era, in her account, were "vetted so that … Fidesz defenders could say that there was some law just like it somewhere in Europe."[13] In particular, Scheppele refers to (a) limiting the competencies of the constitutional court; (b) the imposition of a new media regulatory regime; and (c) changes to electoral laws modelled on practices existing in democratic jurisdictions.[14] These measures, in her argument, allowed Hungary to (at least temporarily) survive international scrutiny.[15] For present purposes, I shall focus on the two aspects that are arguably sub-constitutional, namely media regulation and electoral changes.

Media Regulation

Scheppele's description of Hungary's media regulation focuses on the creation of a media council, which Fidesz apparently defended on the basis that "it noted that other countries in Europe had powerful media councils, too."[16] This description is an incomplete account of the

13 Scheppele, *supra* note 4, at 561.

14 *Id.*

15 ANDRÁS L. PAP, DEMOCRATIC DECLINE IN HUNGARY: LAW AND SOCIETY IN AN ILLIBERAL DEMOCRACY 4–5 (1 edition ed. 2017).

16 Scheppele, *supra* note 4, at 561; Dixon & Landau, *supra* note 6, at 563.

media law package Fidesz passed during the course of 2010, which included (a) constitutional amendments abolishing the protection of media pluralism; (b) the establishment of two statutory regulators, namely the National Media and Infocommunications Authority and the Media Council; (c) appointments to the new statutory bodies; (d) the "Press and Media Act," purporting to impose "duties" on the press; and (e) the "Media Law," setting out sanctions that can be imposed on mass media.[17] Following concern from the European Commission, Fidesz agreed to minor alterations to the media law package in February 2011, largely focusing on purported compliance with the Audiomedia Visual Services Directive.[18]

Nonetheless, it *does* appear that superficial similarities between the media law package and media regulation in other European states were key in securing the Commission's agreement. Speaking before the European Parliament on 16 February 2011, Commissioner Neelie Kroes drew particular attention to two features that (in her account) had other

17 Miklós Haraszti, *Notes on Hungary's media law package*, Eurozine (Mar. 1, 2011), https://www.eurozine.com/notes-on-hungarys-media-law-package/ (observations by former OSCE Representative on Freedom of the Media).

18 *Commission Vice-President Kroes welcomes amendments to Hungarian Media Law*, Text, European Commission (Feb. 15, 2011), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_89.

European counterparts. First, as far as the independence of Hungary's media regulator was concerned:

> *"Our preliminary analysis of the Hungarian law concludes that the procedures for nominating and electing the president and members of the media council are no different from those that are commonly accepted in Europe. We have to acknowledge – whether it furthers our case or not – that the governing party holds a two-thirds majority, and that, in a democracy, is a simple fact."*[19]

In practice, a combination of political capture of the Electoral Commission and partisan gerrymandering have ensured that the Hungarian media authorities remain firmly under Fidesz' control.[20]

Second, Kroes defended the nine-year tenure of Media Council members, again with reference to practices among other EU members:

19 Debates - Wednesday, 16 February 2011 - Media law in Hungary (debate), https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20110216+ITEM-013+DOC+XML+V0//EN&language=EN.

20 PAP, *supra* note 16, at 24–25.

> *"The main issues raised by the OSCE concern the new Media Authority, in particular the long duration of the term of office of its members and the regulation of the public service broadcaster. I have explained the Commission's point of view here, and I think that the terms of office of members of other broadcasting councils, for example in other Member States, range in some cases from five to nine years. One example but it is not the only one, is the Rundfunkräte (public broadcasting boards)."*[21]

Yet other features of the Hungarian media law package *do* appear to have been unprecedented. Writing in March 2011, Miklós Haraszti (a former OSCE Representative on Freedom of the Media) argued that *none* of the main features of the new regulatory regime had *any* European precedent.[22] Such features included:

1. The concentration of power in two statutory regulators, with members largely appointed by the ruling party and who enjoy

21 Debates - Wednesday, 16 February 2011 - Media law in Hungary (debate), *supra* note 20.

22 *See* Haraszti, *supra* note 18. *Contra* Debates - Wednesday, 16 February 2011 - Media law in Hungary (debate), *supra* note 20.

nine-year terms[23] – the very features that Kroes publicly defended as having European precedents;[24]

2. The extension of media regulatory powers to *all* forms of media;
3. Mandatory registration of *all* news providers (including print and online providers) within 60 days of commencing operations;[25]
4. Allowing the Media Council to order ISPs to block any online news outlet;[26] and
5. The imposition of a positive duty on content providers to "provide authentic, rapid and accurate information" on "local, national and EU affairs and on any event that bears relevance to the citizens of the Republic of Hungary and members of the Hungarian nation," in conjunction with the conferral of powers on the Media Council to punish Hungarian media for coverage-related issues.[27]

23 Haraszti, *supra* note 18.
24 Debates - Wednesday, 16 February 2011 - Media law in Hungary (debate), *supra* note 20.
25 Haraszti, *supra* note 18.
26 *Id.*
27 *Id.*

It would therefore be an exaggeration to assert, without qualification, all (or even most) of the Hungarian media law regime amounted to a straightforward "Frankenstate" scenario. Although Fidesz did engage in abusive "borrowing" in the form of acontextual or highly selective borrowing,[28] it appears to have been coupled with other norms that are "home-grown" or based on authoritarian models.

Electoral Changes

I now turn to the changes to the Hungarian election system between 2010 and 2014. In her *Frankenstate* article, Scheppele argued:

> *"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 (gerrymandering, ending second-round runoffs, limiting campaign advertising)."*[29]

In a later article for *The Nation*, Scheppele elaborated:

28 *See* Dixon & Landau, *supra* note 6, at 493–94.

29 Scheppele, *supra* note 4, at 561.

> *"The laws that provided the framework for the 2014 electoral system are a case in point. Orbán combined Germany's much-criticized rules for drawing electoral districts with Britain's highly disproportionate first-past-the-post rules for constituency elections, and topped it off with the widely used d'Hondt system for deriving proportional representation from party-list votes, a system that marginalizes small parties and bulks up plurality ones. The 2014 Hungarian system also allowed for blatant gerrymandering, an unusual new system of vote aggregation, and double and even triple standards in the way that different categories of citizens were treated …"*[30]

Even if one takes Scheppele's account at face value, Fidesz' changes to Hungarian electoral law are *not* all instances of "Frankenstate" transplantation. The German rules for redistricting are, by Scheppele's admission, "much-criticized"; so too are first-past-the-post elections in the British mould. The only transplanted change that appears *not* to have been a "worst practice" is the d'Hondt proportional representation system.

30 [Scheppele, *Hungary and the End of Politics*, The Nation, 2014]; see also Democracy International piece

Hungary: Not a Straightforward "Frankenstate"

On closer examination, neither Hungary's new media regulatory regime, nor the changes to its electoral system, are clear instances in which norms that are viewed as innocuous or even desirable in other jurisdictions have been perversely transplanted into radically different contexts. Although certain isolated features (e.g. the tenure of Media Council members, or proportional representation) have indeed been transplanted in this way, other key elements of both sets of changes involved the deliberate borrowing of "worst practices," or straightforward deception.[31]

I now turn to another scenario that involves the transplantation of norms and institutions into radically different contexts: anti-corruption campaigns.

31 *See, e.g.*, Kim Lane Scheppele, *Hungary, Misunderstood?*, Paul Krugman Blog (Jan. 21, 2012), https://krugman.blogs.nytimes.com/2012/01/21/hungary-misunderstood/ (on Hungary's use of misleading and incomplete translations of draft legislation during consultations with European bodies).

Example 2: Anti-Corruption Campaigns in Azerbaijan and Georgia

Anti-corruption campaigns give a clear opportunity for regime incumbents to exploit transplanted legal initiatives for political advantage.[32] The clearest-cut case is where regime incumbents use anti-corruption laws or agencies to purge rival politicians or factions. Such tactics are not at all new; the Soviet regime used allegations of corruption to purge members of the Uzbek Communist Party in the 1980s.[33] What may be more surprising is that Eastern European governments continue to succeed in using these tactics – under the auspices of EU-mandated reforms.

Azerbaijan and Georgia are both examples of how regime incumbents have co-opted demands by the EU and other international donors for anti-corruption measures.[34] Both countries developed anti-corruption strategies and action plans, introduced new anti-corruption legislation, and empowered prosecutors to investigate and prosecute

32 This phenomenon is not unique to anti-corruption initiatives motivated by "rule of law reform." *See, e.g.*, John Staples, *Soviet Use of Corruption Purges as a Control Mechanism: The Uzbekistan Case*, 2 PAST IMPERFECT (1993).

33 *See generally id.*

34 [I AM CHOOSING THESE TWO BECAUSE GEORGIA IS FREQUENTLY VIEWED AS ONE OF THE BETTER COUNTRIES IN THE REGION RE CORRUPTION AND AZERBAIJAN AS ONE OF THE WORST]

corruption-related offences[35] – reforms that, in both cases, received external recognition.[36] However, both countries placed their anti-corruption campaigns under strong executive control, allowing the executive to deploy corruption-related prosecutions against political opponents.

Azerbaijan provides a relatively clear example of the phenomenon. Writing in 2015, Transparency International acknowledged that the Azeri government had introduced "a number of important laws … over the past decade," including an asset declaration law.[37] In practice, however, these reforms have been implemented within a system that "is characterised by a dominant executive branch and strong law enforcement agencies."[38] The result is that the vast majority of corruption prosecutions involve low-level corruption or political opponents. Defendants include journalists,[39] human rights defenders,[40] and Azeri politicians who allegedly fell out with the ruling

35 *See* Tanja A. Börzel & Yasemin Pamuk, *Pathologies of Europeanisation: Fighting Corruption in the Southern Caucasus*, 35 WEST EUROPEAN POLITICS 79, 86–88 (2012).

36 *See id.* at 89, 92–93.

37 *The State of Corruption: Armenia, Azerbaijan, Georgia, Moldova and Ukraine* 15 (Transparency International), Jul. 2, 2015.

38 *Id.* at 16.

39 *Id.*

40 *Id.*

clique.[41] As a result, corruption in Azerbaijan continues to be viewed as "endemic and deeply institutionalised."[42]

At first glance, Georgia appears to have done rather better than its regional neighbours in tackling corruption.[43] Writing in 2015, Transparency International noted a raft of legal reforms beginning in 2003, "accompanied by strong enforcement and practical measures."[44] However, these efforts have not extended to the creation of an anti-corruption agency independent of the executive.[45] As a result, clientelism within the political elite has remained largely unaffected,[46] with prosecutions being selectively deployed against political opponents.[47]

41 *See* Börzel & Pamuk, *supra* note 36, at 90–91.

42 *The State of Corruption*, *supra* note 38, at 15.

43 *See, e.g.*, *id.* at 19; *Eastern Europe & Central Asia: weak checks and balances threaten anti-corruption efforts*, Transparency International (Jan. 29, 2019), https://www.transparency.org/news/feature/weak_checks_and_balances_threaten_anti_corruption_efforts_across_eastern_eu.

44 *The State of Corruption*, *supra* note 38, at 19.

45 *Id.*; *Eastern Europe & Central Asia*, *supra* note 44.

46 *See, e.g.*, *The State of Corruption*, *supra* note 38, at 19 ("more complex forms of corruption persist, including clientelism and cronyism, due to the concentration of power among the country's elite"); *Alarm over increasing signs of state capture and pressure on civil society in Georgia*, Transparency International (Oct. 16, 2018), https://www.transparency.org/news/pressrelease/alarm_over_increasing_signs_of_state_capture_and_pressure_on_civil_society (on a scheme to control the Georgian tobacco market to benefit political elites); *Eastern Europe & Central Asia*, *supra* note 44 (noting growing distrust of public officials within Georgia).

47 *See, e.g.*, Börzel & Pamuk, *supra* note 36, at 92 (former Defence Minister who formed rival political party); *Council of Europe praises Georgia's anti-corruption efforts, demands more*, www.euractiv.com (Jan. 17, 2017), https://www.euractiv.com/section/enlargement/news/council-of-europe-praises-

SQUINT HARDER: SPECIOUS COMPARISONS

This category of legal whataboutism is relatively straightforward: propose a legal change that in reality has only superficial resemblance (at best) to a norm or institution in a "civilised" jurisdiction, then repeat specious assertions of that resemblance to allay scepticism. Writing in 2017, Cem Tecimer argued that Turkish officials had extensively invoked comparisons of this type, in a practice he referred to as "abusive comparativism":

> *"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,*

georgias-anti-corruption-efforts-demands-more/ (noting concerns regarding selective prosecutions and continued governmental control of prosecutors).

downright inaccurate and/or self-contradictory with the actual policies pursued by the governing elites."[48]

Tecimer concludes his account of abusive comparativism in Turkey by asking whether similarly flimsy comparisons have been invoked elsewhere.[49] The two examples below suggest that the question should be answered in the affirmative.

Example 3: Legislating Against "Fake News" in Singapore

Public statements by Singaporean officials during the legislative process of the Protection from Online Falsehoods and Manipulation Act ("POFMA") are a recent example of the tactical use of specious comparisons to deflect criticism.

On 3 April 2017, Singapore's Minister of Law called for a review of existing legislation to address the problem of "fake news."[50] In

48 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/.

49 *Id.*

50 *Government 'seriously considering' how to deal with fake news: Shanmugam*, CNA, https://www.channelnewsasia.com/news/singapore/government--seriously-considering--how-to-deal-with-fake-news-sh-8712436.

January 2018, at the government's recommendation,[51] the Singaporean Parliament established a Select Committee on Deliberate Online Falsehoods to consider the issue. After a series of hearings – dismissed by Human Rights Watch as a "media event" rather than a genuine consultation[52] – the Select Committee recommended (among other measures) the enactment of new legislation[53] – the bill that eventually became POFMA. POFMA was tabled before Parliament on 1 April 2019, passed on 8 May, and entered into force on 2 October that year. Before addressing *how* Singaporean ministers justified POFMA to the Singaporean public and outside observers, it falls to consider how the legislation works.

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51 *Deliberate Online Falsehoods: Challenges and Implications*, Misc. 10 of 2018 ¶ 83 (Singapore Ministry of Communications and Information; Singapore Ministry of Law), Jan. 5, 2018; *Government proposes committee to study how to deal with deliberate online falsehoods*, TODAYonline, https://www.todayonline.com/singapore/government-proposes-committee-study-how-deal-deliberate-online-falsehoods.

52 *Human Rights Watch Declines Singapore's Invite to "fake News" Hearing*, REUTERS, Mar. 30, 2018, https://www.reuters.com/article/us-singapore-politics-fake-news-idUSKBN1H60XQ.

53 *See, e.g.*, *Select Committee makes 22 recommendations to deal with fake news threat to Singapore*, CNA, https://www.channelnewsasia.com/news/singapore/select-committee-fake-news-online-falsehoods-recommendations-10739834; *Report of the Select Committee on Deliberate Online Falsehoods - Executive Summary* (2018) (executive summary). The full report is not accessible through Singapore's National Archives online.

The POFMA scheme

Under POFMA, a minister may direct that any of the following directions (among others) be issued, in relation to a "false statement of fact" that has been, or is being, communicated in Singapore:

- A "Part 3 Direction" to the person who made the statement:
  - A "Correction Direction," requiring the addressee to issue a correction notice of the form and content prescribed in the Correction Direction;[54]
  - A "Stop Communication Direction," requiring the addressee to stop making that statement in Singapore by a specified time.[55] Such a direction may also require the addressee to issue a correction notice;[56]
- A "Part 4 Direction" to internet intermediaries and providers of mass media services:
  - A "Targeted Correction Direction," requiring the addressee to communicate a correction notice of the form and content

54 Protection from Online Falsehoods and Manipulation Act 2019—Singapore Statutes Online § 11, https://sso.agc.gov.sg/Act/POFMA2019.

55 *Id.* sec. 12(1).

56 *Id.* sec. 12(3).

prescribed in the direction to all end-users who have accessed material containing the statement;[57]

- A "General Correction Direction," requiring the addressee to communicate a correction notice to all end-users (or to any specified description of such end-users);[58] or
- A "Disabling Direction," requiring the addressee to disable access to the statement within Singapore.[59]

Critically, a minister may issue a direction under Parts 3 or 4 of POFMA in relation to any false statement of fact communicated in Singapore (regardless of subject matter), provided that he "is of the opinion that it is in the public interest to issue the Direction."[60] Section 4 defines "in the public interest" in expansive terms (emphases added):

> *For the purposes of this Act and* ***without limiting the generality of the expression****, it is in the public interest to do anything if the doing of that thing is necessary* ***or expedient —***

57 *Id.* sec. 21.
58 *Id.* sec. 23.
59 *Id.* sec. 22.
60 *Id.* secs. 10(1)(b), 20(1)(b).

(a) in the interest of the security of Singapore or any part of Singapore;

(b) to protect public health or public finances, or to secure public safety or public tranquillity;

(c) in the interest of friendly relations of Singapore with other countries;

(d) to prevent any influence of the outcome of an election to the office of President, a general election of Members of Parliament, a by-election of a Member of Parliament, or a referendum;

(e) to prevent incitement of feelings of enmity, hatred or ill-will between different groups of persons; or

(f) ***to prevent a diminution of public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board****.*[61]

Contravention of a Part 3 Direction or a Part 4 Direction is a criminal offence, punishable (in the case of individuals) with up to 12

61 *Id.* sec. 4.

months' imprisonment and/or a fine of up to SG$20,000.[62] An appeal against a Part 3 or Part 4 Direction may be made to the minister who issued the direction;[63] if that appeal is unsuccessful, the appellant can then appeal to the High Court.[64]

Singaporean Comparisons to Other Jurisdictions

Singaporean officials have taken pains to paint their proposed measures as consonant with practices elsewhere. As early as January 2018, the Green Paper referred to (among other measures) the German Network Enforcement Act and to a French legislative initiative to address fake news.[65] This approach extended to the text of the bill as presented to Parliament. In a letter to the Washington Post, Singapore's Ambassador to the United States publicly defended the (then-) bill by pointing out that "Germany, France, Britain and Australia have adopted or are considering legislation to combat the spread of false information

62 *Id.* secs. 15(1), 27(1).
63 *Id.* secs. 17(2), 29(2).
64 *Id.* secs. 17(1), 29(1).
65 *Deliberate Online Falsehoods*, *supra* note 52, paras. 61–71.

online."[66] Prime Minister Lee Hsien-loong was more explicit in drawing parallels with French, German, and Australian legislation:

> *"Singapore is not the only one which has taken legislation on this issue … The French have done so, the Germans have done so. The Australians have just done so, something similar and very draconian. The British are also thinking of doing this as well."*[67]

It therefore falls to consider the French, German, and Australian legislation in turn.

66 Ashok Kumar Mirpuri, *Opinion | Singapore has a right to fight online falsehoods with its laws*, Washington Post, https://www.washingtonpost.com/opinions/singapore-has-a-right-to-fight-online-falsehoods-with-its-laws/2019/04/14/745d996c-5c86-11e9-98d4-844088d135f2_story.html.

67 Eileen Ng, *Singapore PM defends proposed law combating fake online news*, Associated Press (Apr. 9, 2019), https://apnews.com/29b66dfffec345f2b78ed8d357797977.

France: Law 2018-1202 ("the French Act")[68]

Unlike POFMA, significant portions of the French Act are temporally limited in application to a three-month period before general elections.[69] In essence, the French Act does the following:

- It imposes an obligation on online platforms to disclose who has paid for content on these platforms and to publish statistics relating to the operation of their content recommendation algorithms.[70] A breach of this obligation is punishable by up to a year's imprisonment and a fine of EUR 75,000;[71]
- It empowers a judge, on application by the public prosecutor, a candidate, or any person who otherwise has an interest, to order "all proportionate and necessary measures" to stop the dissemination of "inaccurate or misleading" allegations "likely to alter the sincerity of the upcoming polls" "in a deliberate,

68 *Report of the Select Committee on Deliberate Online Falsehoods*, *supra* note 54; *see also A guide to anti-misinformation actions around the world*, Poynter, https://www.poynter.org/ifcn/anti-misinformation-actions/.

69 LOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information, 2018-1202 §§ 1, 6 (U.S. 22 décembre 2018); *A guide to anti-misinformation actions around the world*, *supra* note 69.

70 LOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information, 2018-1202 § 1.

71 *Id.*

artificial or automated … manner."[72] Such applications may only be made in a three-month period before general elections; and

- It gives the French broadcasting regulator new powers during the three-month period before general elections, including the power unilaterally to suspend the operations of broadcast media that is (a) under the control of a foreign state and (b) deliberately disseminating false information likely to alter the fairness of the ballot.[73]

Even a brief description of the French Act shows that it differs from POFMA in at least three significant respects:

1. Two out of the three major measures in the French legislation are temporally confined to a three-month period before a general election;

72 *Id.*; *A guide to anti-misinformation actions around the world*, *supra* note 69.

73 LOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information, 2018-1202 § 6; *A guide to anti-misinformation actions around the world*, *supra* note 69.

2. The same two measures are framed with reference *only* to false or misleading statements likely to affect the conduct of the election; and
3. The power to order the removal of (or cessation of distribution of) content is vested in a judge at first instance, rather than in an administrative body.

Germany: The Network Enforcement Act ("the German Act")

The German Act, which entered into force on 1 January 2018, is explicitly aimed at online platforms ("social networks"), rather than broadcast or online media. Under section 1(1), the German Act shall not apply to "[p]latforms offering journalistic or editorial content, the responsibility for which lies with the service provider itself."[74]

Under the German Act, social networks that have two million or more registered users in Germany are required to:

- Maintain an "effective and transparent procedure for handling complaints about unlawful content,"[75] under which:

74 » Network Enforcement Act (Netzdurchsetzunggesetz, NetzDG) German Law Archive § 1(1), https://germanlawarchive.iuscomp.org/?p=1245.

75 *Id.* sec. 3(1).

- The network must remove "manifestly unlawful" content within 24 hours of receiving a complaint;[76] and
- The network must remove "all unlawful content" within 7 days of receiving a complaint (unless the complaint is contested or referred to a regulatory body).[77]

Failure to maintain a complaints procedure may result in a fine of up to EUR 5 million;[78]

- Produce six-monthly reports on the handling of complaints.[79] Failure to do so may result in a fine of up to EUR 5 million;[80] and
- Designate an individual to receive service within Germany.[81] Failure to designate such an individual, or failure to respond to requests for information by a designated individual, is punishable with a fine of up to EUR 500,000.[82]

The German Act differs from POFMA in at least three significant respects:

76 *Id.* sec. 3(2)(2).
77 *Id.* sec. 3(2)(3).
78 *Id.* secs. 4(1)-(2).
79 *Id.* sec. 2.
80 *Id.* secs. 4(1)-(2).
81 *Id.* sec. 5.
82 *Id.* secs. 4(1)-(2).

1. It does not create any offences punishable by imprisonment;
2. It explicitly excludes broadcasters and online news providers; and
3. It requires the regulated social networks *themselves* to implement procedures for the removal of content (rather than vesting the power of removal in a governmental body).

Australia: The Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 ("the Australian Act")

The Singaporean Prime Minister's reference to Australian legislation appears to have been to the Australian Act, which received royal assent on 5 April 2019.

The Australian Act is limited in subject matter to "abhorrent violent material," which it defines in Schedule 1(1) as:

> *"(a)*
>
> *(ii) visual material; or*
>
> *(iii) audio-visual material;*

that records or streams abhorrent violent conduct engaged in by one or more persons; and

(b) is material that reasonable persons would regard as being, in all the circumstances, offensive; and

(c) is produced by a person who is, or by 2 or more persons each of whom is:

(i) a person who engaged in the abhorrent violent conduct; or

(ii) a person who conspired to engage in the abhorrent violent conduct; or

(iii) a person who aided, abetted, counselled or procured, or was in any way knowingly concerned in, the abhorrent violent conduct; or

(iv) a person who attempted to engage in the abhorrent violent conduct."[83]

"Abhorrent violent conduct" is in turn defined as terrorism, murder, attempted murder, torture, rape, or kidnapping.[84]

Under the Australian Act:

83 Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Australia 2019).

84 *Id.*

- Internet service providers, content service providers, and hosting service providers are required to notify the Australian Federal Police of abhorrent violent material accessible through their services within a reasonable time of becoming aware of such material. Failure to do so is an offence punishable with a fine worth 800 penalty units;
- Content service providers and hosting service providers must expeditiously remove (or cease to host) abhorrent violent material that is "reasonably capable of being accessed within Australia." Failure to do so is an offence punishable with:
    - In the case of an individual, up to three years' imprisonment and a fine of up to 10,000 penalty units;
    - In the case of a corporation, a fine of up to 10% of the company's annual turnover or 50,000 penalty units, whichever is the greater.

As noted above, the Australian Act only covers "abhorrent violent material," namely material that shows a designated, limited set of serious criminal offences. It is therefore significantly narrower in scope

than POFMA, which encompasses *any* false statement of fact that is considered to affect the "public interest" (broadly construed).

Example 4: High-Speed Rail Co-Location in Hong Kong

The way in which the Hong Kong Government ("HKG") justified its particular implementation of customs and immigration checkpoints in its new express rail terminal is another example of specious comparisons to other jurisdictions.

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 bitter opposition throughout 2009 and 2010 for several reasons, one of them being border checkpoints.

Despite being under Chinese sovereignty, Hong Kong was empowered to retain its own laws, including its own immigration law and border controls;[85] hence the need for border checkpoints. The problem lay in *where* the checkpoints would be located.

85 [BL Arts 8 and 154; JD Annex I]

The first option would have been to maintain two separate sets of checkpoints, one on each side of the Hong Kong-Mainland border. Previous railway links between Hong Kong and the Mainland followed this arrangement.[86] However, maintaining two separate sets of checkpoints at each end of the rail line would drastically reduce the time saved, undermining the new line's raison d'etre.

This seemed to leave two possibilities: (a) two sets of checkpoints, both physically located in Hong Kong; or (b) two sets of checkpoints, both physically located in Mainland China. However, there was a problem with the former: Article 18 of the Basic Law – Hong Kong's constitutional instrument – 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.[87] Perhaps in recognition of the uncomfortable questions that checkpoint location would raise, the HKG sought funding from the legislature without clearly identifying *what*

86 *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/frmNotice.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).

87 [BL Art 18]

checkpoint arrangement it would adopt. Nonetheless, the Legislative Council approved funding in early 2010.

The checkpoint question lay dormant until mid-2017, when the HKG announced that it would adopt a "co-location" arrangement (the "Arrangement") for border checkpoints.[88] Under the Arrangement, both sets of checkpoints would be physically located within the rail terminus in Hong Kong (the "Hong Kong Terminus"). Parts of the Hong Kong Terminus would be leased out to Mainland China. Much of Mainland law, including criminal law, would apply to these parts of the Hong Kong Terminus – as well 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 would have been either to (a) adopt a different checkpoint arrangement; or (b) seek an amendment of Article 18 from the National People's Congress Standing Committee ("NPCSC") in Beijing. However, widespread distrust of the NPCSC,

88 *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).

both within and outside Hong Kong, made the latter option politically unviable.

Rather than pursue an alternative to the Arrangement, the HKG jumped to its defence. 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,[89] in a bid to portray the Arrangement as legally unobjectionable.[90] It therefore falls to examine these respective arrangements in detail.

89 *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 (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 4.

90 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/.

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 (the "Co-operation Agreement");[91] (2) a Decision of the Standing Committee of the National People's Congress approving the Co-operation Agreement (the "NPCSC Decision"); and (3) the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance, Cap. 632 (the "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" (the "MPA").[92] 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."[93] Under Articles 3, 4, and 7, the HKG retains jurisdiction over the following matters within the MPA:

91 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.

92 *Id.* sec. 2.

93 *Id.*

- 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);
- 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);
- The business affairs of the Hong Kong rail operator (including insurance, employment, and tax affairs): Arts 7(3) and 7(6);
- 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);
- Environmental and safety regulation: Art 7(4); and
- "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

> [i.e. the Hong Kong Terminus], 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).

More succinctly, the *default* position under the Co-operation Agreement is that Mainland law applies to the MPA.

Pre-Clearance in Canada

The US and Canada first made a pre-clearance agreement in 1974.[94] Under this original agreement, only the customs, immigration, agriculture, and public health laws of the receiving country could be exercised in pre-clearance areas, and only to the extent consistent with the law in the sending country.[95] As of August 2019,[96] pre-clearance

94 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.

95 *Id.* at 258 (Art. VIII).

96 *Preclearance in Canada and the United States*, Public Safety Canada (Aug. 15, 2019), https://www.publicsafety.gc.ca/cnt/brdr-strtgs/prclrnc/index-en.aspx; *United States and Canada Implement Preclearance Agreement*, Department of Homeland Security (Aug. 15, 2019), https://www.dhs.gov/news/2019/08/15/united-states-and-canada-implement-preclearance-agreement.

between the US and Canada is governed by the Agreement on Land, Rail, Marine and Air Transport Preclearance between the Government of Canada and the Government of the United States 2015 (the "2015 Treaty");[97] the (Canadian) Preclearance Act 2016 (the "Canadian Act");[98] and the (US) Promoting Travel, Commerce and National Security Act 2016 (the "US Act").

Article II of the 2015 Treaty contains provisions on the law applicable within pre-clearance areas. In particular, Article II(2) provides:

- "The Inspecting Party shall ensure that the preclearance officers comply with the law of the Host Party while in the territory of that Host Party";[99]
- "The law of the Host Party applies in the preclearance area and the preclearance perimeter".[100] "Preclearance perimeter" refers to

97 Agreement on Land, Rail, Marine and Air Transport Preclearance between the Government of Canada and the Government of the United States, Mar. 2015.

98 Preclearance Act 2016 (Canada).

99 Agreement on Land, Rail, Marine and Air Transport Preclearance between the Government of Canada and the Government of the United States, sec. II(2), *supra* note 98.

100 *Id.*

a demarcated, reasonable area around a vehicle being subjected to preclearance;[101]

- "Preclearance officers shall only exercise powers and authorities permitted and provided by the Host Party pursuant to this Agreement";[102]
- "preclearance shall be conducted in a manner consistent with the law and constitutions of both Parties and with this Agreement";[103] and
- "the Inspecting Party shall not enforce the Inspecting Party's criminal law in the territory of the Host Party through activities such as arrest or prosecution."[104]

Unlike the Co-operation Agreement, the 2015 Treaty (a) provides that the law of the host jurisdiction continues to apply within pre-clearance areas; and (b) expressly bars the inspecting jurisdiction from enforcing its criminal law within pre-clearance areas.

101 *See id.* sec. I(20); *id.* sec. I(3).

102 Agreement on Land, Rail, Marine and Air Transport Preclearance between the Government of Canada and the Government of the United States, sec. II(2), *supra* note 98.

103 *Id.*

104 *Id.*

Parts I and II of the Canadian Act go into greater detail on the arrangements for US pre-clearance in Canada and Canadian pre-clearance in the US respectively.[105] Under Part I, American pre-clearance officers are only permitted to exercise powers conferred by US law in relation to "importation of goods, immigration, agriculture and public health and safety",[106] and only for the purpose of determining whether travellers or goods are admissible into the US.[107] They are "not permitted to exercise any powers of questioning or interrogation, examination, search, seizure, forfeiture, detention or arrest that are conferred under the laws of the United States;"[108] instead, their powers of questioning, inspection, seizure, and detention are conferred by the Canadian Act.[109] Part I also declares that Canadian law continues to apply in pre-clearance areas and pre-clearance perimeters,[110] and requires American pre-clearance officers to comply with Canadian law in exercising their functions.[111]

105 The US Act only makes provision for offences committed by US pre-clearance officers stationed in Canada: *see* Promoting Travel, Commerce and National Security Act 2016 (U.S.).
106 *Id.* sec. 10(1).
107 *See id.*
108 *Id.* sec. 10(2).
109 *See id.* secs. 10–16; *id.* secs. 19–26; *id.* sec. 28; *id.* secs. 31–32; *id.* sec. 34.
110 Preclearance Act 2016 § 9 (Canada).
111 Preclearance Act 2016 § 11(1) (Canada).

Similarly, under Part II, Canadian pre-clearance officers can only exercise powers conferred on them by Canadian legislation relating to the entry of persons or importation of goods into Canada.[112] Such officers are *not* permitted to exercise "any powers of questioning or interrogation, examination, search, seizure, forfeiture, detention or arrest, **except to the extent that such powers are conferred on the officer by the laws of the United States**"[113] (emphasis added).

Eurostar Pre-Clearance

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

- 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
- 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.

112 *Id.* sec. 47(2); *id.* sec. 46.
113 Preclearance Act 2016 § 47(1).

Part II of the Sangatte Protocol lays out the basic principles governing Eurostar pre-clearance. Under Article 5(1), the UK and French governments agree to establish "juxtaposed national control 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."[114] The term "frontier controls" is defined in Article 1(2)(a) as "police, immigration, customs, health, vetinary 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."[115] 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."[116] 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

114 [Sangatte Protocol Art 5(1)]
115 [Sangatte Protocol Art 1(2)(A)]
116 [Sangatte Protocol Art 1(2)(G)]

the adjoining State.[117] The Additional Protocol of 2000 extends the Sangatte Protocol scheme to other designated British and French railway stations,[118] 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.[119] 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 Belgian and French territory, and Belgian officers may do so in British and French territory.[120] As with the Sangatte Protocol, only laws and regulations relating to frontier controls of the inspecting State apply in juxtaposed control zones.[121] The 2013 Agreement extends the scheme to trains that travel from Belgium to the UK and make commercial stops in France.[122] Under Article 3, British officers stationed in the Belgian juxtaposed control zone may perform immigration controls on

117 [Sangatte Protocol Arts 5-11]
118 [Additional Protocol Art 2]
119 [Tripartite Agreement Art 2(3)]
120 [Tripartite Agreement Arts 1(1) and (4); Sangatte Protocol Art 1(2)(A)]
121 [Tripartite Agreement Art 4; Sangatte Protocol Art 2]
122 [2013 Agreement Arts 2, 4]

passengers travelling to the UK on trains making commercial stops in France.[123]

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

Having set out how the Canadian and European schemes for pre-clearance operate, 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.

First, 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

123 [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.[124]

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 (relating to customs, immigration, and quarantine) shall apply within pre-clearance areas. 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 made the HKG's disinformation campaign possible. As part of its strategy to promote the Co-Location Arrangement, the HKG

124 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.

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.

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

- Acknowledged that the Co-Location Arrangement was "unique internationally" in that the Canadian and Eurostar schemes involved entry clearance being done prior to embarkation;[125]
- 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";[126] and

125 [Cite XRL litigation]
126 [Cite XRL litigation]

- 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.[127]

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

TENTATIVE CONCLUSIONS

The examples set out above, although not exhaustive, suggest some tentative conclusions about the three axes of legal whataboutism.

First, as Siems' example of Fascist Italy demonstrates, the conscious borrowing of "worst practices" predates successive waves of "law and development" and "rule of law reform." However, this practice is also the least useful as a means of disguising the adoption of repressive norms or institutions.

127 [Cite XRL litigation]

Second, the Hong Kong and Singapore examples show that there need not be *any* meaningful resemblance between the proposed norm or institution and its purported parallel. In at least some instances, bald-faced lying about what other jurisdictions do is a viable tactic.

Third, selective, acontextual "transplantation" of the kind that Dixon, Landau, and Scheppele describe does seem to occur in countries such as Hungary. However, the Hungarian example suggests that this strategy is frequently accompanied by a combination of other types of legal whataboutism and home-grown "reforms."

However, the examples also illustrate a broader point. The extent to which any given provision resembles that in another jurisdiction in form, substance, and context is a matter of degree. Thus any given assertion that Bill X resembles Act X' may invoke any combination of the three subspecies of whataboutism set out above. Further, instances of whataboutism are likely to be accompanied by other tactics, such as abusing executive discretion.