

Legal Hybridity in Hong Kong and Macau

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Résumé de l'article

Cet article a pour but de comparer les cas des deux régions administratives spéciales (RAS) de Hong Kong et de Macao avec la grille théorique développée par Vernon V. Palmer afin de décrire les juridictions mixtes « classiques » droit civil-common law. Les résultats incluent une reconnaissance de l'hybridation progressive des systèmes juridiques de Hong Kong et de Macao, originaires de la common law anglaise et de la tradition civiliste portugaise respectivement, par l'infiltration des modèles juridiques et des idéologies de la Chine continentale.

La recherche amène également une révision critique et un affinement de la méthodologie et des outils développés par Palmer afin de les rendre applicable à un plus large éventail d'hybridation allant au-delà des mélanges « classiques » et à une meilleure appréciation de comment les phases de transition politiques et institutionnelles jouent un rôle critique dans la « mixité » ou l'hybridité.

LEGAL HYBRIDITY IN HONG KONG AND MACAU

*Ignazio Castellucci**

The article aims to compare the case of the two Chinese Special Administrative Regions (SARs) of Hong Kong and Macau against the theoretical grid developed by Vernon V. Palmer to describe the “classical” civil law-common law mixed jurisdictions. The results of the research include an acknowledgement of the progressive hybridization of the legal systems of Hong Kong and Macau, hailing from the English common law and the Portuguese civil law tradition, respectively, by infiltration of legal models and ideologies from Mainland China.

The research also leads to a critical revision and refinement of the methodology and tools developed by Palmer in order to make them applicable to a wider range of processes of legal hybridization beyond “classical” mixes, and to a better appreciation of how transitional political and institutional phases play a critical role in legal “mixity” or hybridity.

Cet article a pour but de comparer les cas des deux régions administratives spéciales (RAS) de Hong Kong et de Macao avec la grille théorique développée par Vernon V. Palmer afin de décrire les juridictions mixtes « classiques » droit civil-common law. Les résultats incluent une reconnaissance de l'hybridation progressive des systèmes juridiques de Hong Kong et de Macao, originaires de la common law anglaise et de la tradition civiliste portugaise respectivement, par l'infiltration des modèles juridiques et des idéologies de la Chine continentale.

La recherche amène également une révision critique et un affinement de la méthodologie et des outils développés par Palmer afin de les rendre applicable à un plus large éventail d'hybridation allant au-delà des mélanges « classiques » et à une meilleure appréciation de comment les phases de transition politiques et institutionnelles jouent un rôle critique dans la « mixité » ou l'hybridité.

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"I do not think we fully understand them."

- Vernon V. Palmer

Introduction

A serious collective effort has been produced in recent years by the comparative legal scholars' community to produce advances in our understanding of mixed jurisdictions. Despite the candid admission of one of the champions of the field (quoted in the epigraph to this article),¹ our knowledge in this subject has certainly improved in the last decade or so. The geographic area of research on "mixity" has been enlarged far beyond the relatively small number of "classical" mixed legal systems, to involve other jurisdictions featuring obvious interactions and/or contaminations of different legal cultures.²

It has been recognised that "mixed"—beyond the "classic" use to designate jurisdictions featuring both civil law and common law elements³—can fruitfully be associated with another term featuring a similar but wider scientific meaning, that of "hybrid":⁴ "[t]he work of mixed jurists, of legal historians, and of some comparativists has led us to the recognition of the 'universal fact' of legal hybridity."⁵ Focus has now shifted from classifications and nomenclature to methodological issues, in order to better

¹ Vernon Valentine Palmer, "Quebec and Her Sisters in the Third Legal Family" (2009) 54:2 McGill LJ 321 at 339 [Palmer, "Third Legal Family"].

² Taxonomic issues represented one of the main themes of the Second World Conference of the World Society of Mixed Jurisdiction Jurists held in Edinburgh in 2007. Papers presented at the conference are available online: (2008) 12:1 EJCL <<http://www.ejcl.org>>. This issue includes the work of two of the most recognized authorities in this field: Vernon Valentine Palmer, "Two Rival Theories of Mixed Legal Systems", online: (2008) 12:1 EJCL 16 <www.ejcl.org/121/art121-16.pdf> [Palmer, "Two Theories"]; Esin Örüçü, "What is a Mixed Legal System: Exclusion or Expansion?", online: (2008) 12:1 EJCL 15 <www.ejcl.org/121/art121-15.pdf> [Örüçü, "Exclusion or Expansion?"]. A select number of those conference papers have also been published in volume 3 of the *Journal of Comparative Law*, and in Esin Örüçü, ed, *Mixed Legal Systems at New Frontiers* (London: Wildy, Simmonds & Hill, 2010). See also Ignazio Castellucci, "How Mixed Must a Mixed System Be?", online: (2008) 12:1 EJCL 4 <www.ejcl.org/121/art121-4.pdf> [Castellucci, "How Mixed?"].

³ Vernon V Palmer, ed, *Mixed Jurisdictions Worldwide: The Third Family* (Cambridge, UK: Cambridge University Press, 2001) [Palmer, *The Third Family*].

⁴ Örüçü, "Exclusion or Expansion?", *supra* note 2. The term "hybrid", besides, had already been used by Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, 3d ed, translated by Tony Weir (Oxford, UK: Clarendon Press, 1998) to indicate mixes including the "classic" mixed jurisdictions of Palmer's "third family".

⁵ Seán Patrick Donlan, "Comparative Law and Hybrid Legal Traditions—An Introduction" in Eleanor Cashin Ritaine, Seán Patrick Donlan & Martin Sychold, eds, *Comparative Law and Hybrid Legal Traditions* (Zurich: Schulthess, 2010) 9 at 16 [Donlan, "An Introduction"].

understand not only the features of this or that jurisdiction, but also, or especially, hybridity in general. “Mixing” forces at work are being scrutinised in a growing number of jurisdictions, as well as patterns and/or strategies of mingling amongst the different components of a given “hybrid” product.⁶

One of the fields arousing comparative scholars’ curiosity in recent years is certainly Chinese law—its legal tradition, legislation, legal ideology, and developments. Chinese law has become the subject of substantial legal research under innumerable points of view; an enormous mass of scholarship has been produced. We certainly know a lot more about China and its legal environment than we used to know, say, twenty years ago.⁷ However, the legal mixing or hybridisation process taking place in China—mentioned by comparative and Chinese law scholars almost matter-of-factly but in very general terms only—has not yet been analysed by many, with respect to the actual hybridisation strategies and “ways”.

This paper has, thus, a dual purpose. The first one: combining the two mentioned discourses, I will consider the case of China and its two Special Administrative Regions (SARs), Hong Kong and Macau. Of course it would be very interesting to analyze extensively the many legal and constitutional implications of the institutional setting of the two Chinese SARs. It would, however, be far beyond the reach of this essay which is focused on the hybridization dynamics there, while also expanding and innovating our knowledge about Chinese law and its satellites. The second purpose consists of an attempt to identify, in more general terms, elements of relevance for the research on legal hybridity and the process generating it, and to expand and refine the methodological toolbox for the purpose.⁸

⁶ The title and main themes of the Third International Congress of the WSMJJ, held at the Hebrew University of Jerusalem in June 2011, have been “Methodology and Innovation in Mixed Legal Systems.”

⁷ See e.g. Wang Chenguang & Zhang Xianchu, eds, *Introduction to Chinese Law* (Hong Kong: Sweet & Maxwell Asia, 1997); Albert Hung-yee Chen, *An Introduction to the Legal System of the People's Republic of China*, 4th ed (Hong Kong: LexisNexis, 2011) [Chen, *Introduction*]. Specifically on the issue of the rule of law in China, a very thorough and accurate analysis can be found in Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge, UK: Cambridge University Press, 2002); Ignazio Castellucci, “Rule of Law with Chinese Characteristics” (2007) 13 *Ann Surv Int'l & Comp L* 35 [Castellucci, “Rule of Law”]. See also Jianfu Chen, Yuwen Li & Jan Michiel Otto, eds, *Implementation of Law in the People's Republic of China* (The Hague: Kluwer Law International, 2002).

⁸ In this paper, I will update and take further some earlier reflections made in Ignazio Castellucci, “Chinese Law: a new Hybrid” in Ritaine, Donlan & Sychold, *supra* note 5, 75.

These introductory notes are aimed at identifying the main objectives of the research. In the next section the theoretical frame and the methodology followed will be stated. The subsequent analysis will develop starting with the change in the institutional setting of the two regions of Hong Kong and Macau. This change produced an enormous amount of debate and research in the legal, constitutional, economic, political, and social fields: the profile of institutional change highlighted in this essay is related to how institutional changes of that level are, almost by definition, introducing some degree of superimposition of values and legal hybridisation.

Phenomena of legal infiltration from Mainland China through legal and institutional mechanisms will then be described with relation to Hong Kong. A short mention, but still important in the view of this author, of the mechanism for dispute resolution in economic cooperation between the Mainland and each SAR, within the frame of the CEPA agreements, will permit an appreciation of how an important economic territory has been de-legalised as a consequence of the new political setting. Finally, other “softer” ways of legal hybridisation will be identified, mostly in relation to Macau.

The data exposed will then be assessed according to the chosen methodological gauge. The tool itself will be discussed, eventually, against the data collected here and previous consolidated “mixity” knowledge—in a circular process, to some extent, of adaptation between tool features and matter description, as is often the case in applied sciences and technology—leading to some final and more general submissions on legal “mixity”, hybridity, and on the methodology to research them.

I. Theoretical Frame and Methodology

A. *Vernon Palmer's Theoretical Findings*

Having to start from some firm methodological ground, the “classical theory” of mixed legal systems elaborated by Vernon Palmer probably represents—if originally related to the more limited environment of “classical” mixed jurisdictions—the only effort so far to provide a concrete classificatory grid to identify the common features typical of “mixed” common law-civil law legal systems around the world.⁹

These common elements include, in short: (a) The coexistence of both civil law and common law traditions, each with their typical features,

⁹ Vernon Valentine Palmer, “Introduction and Comparative Overview” in Palmer, *The Third Family*, *supra* note 3, 1 [Palmer, “Introduction”].

identifiable in the system in an obviously relevant amount. (b) The historic superimposition of a common law framework to a pre-existing civil law environment in critical areas, especially in relation to the role, structure and functioning of the judiciary and to the value of case law, but also more generally in relation with the areas of public law, criminal law, economic law, and institutional architecture. The older civil law rules stand, more or less, for the regulation of private matters. (c) An element of a subjective nature,¹⁰ described as the perception and/or feeling of lawyers and scholars of the relevant jurisdiction of their belonging to a “mixed” system. This subjective test partially overlaps with what Patrick Glenn calls a legal “tradition”:¹¹ a combination of historical facts and subjective readings, feelings and visions of the relevant people, transforming brute historical events into a cultural heritage and a factor of identity,¹² which in turn contributes, objectively, to “form”¹³ a legal system and shape its character and “style”.¹⁴

B. Application of Palmer's Grid to the Case of the Chinese SARs

Palmer's theory (and/or its application to a wider, different environment from its original one) may satisfy some and, perhaps, dissatisfy others. Palmer himself seems very active in testing and expanding the boundaries of his device.¹⁵ Still, it is probably the only firmly established analytical instrument so far—usable until proven wrong or superseded by a better tool. In analyzing and describing the Chinese SARs hybridization process, I will not refer to the most detailed elements in Palmer's grid; they would probably be too “tradition-specific” and related to “classic” mixes only. I will only use a generalized version of its three basic tests, which a priori seem reasonably applicable to mixes different from the “classic” ones, too: (a) an “obvious amount” test; (b) a “critical features” test; and, (c) a “subjective element” one. Validation and acceptance of the resulting refined tool will imply that there is a degree of comparability be-

¹⁰ *Ibid* at 7-11.

¹¹ H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 4th ed (Oxford, UK: Oxford University Press, 2010) ch 1, 2.

¹² *Ibid* at 34-35.

¹³ See Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)” (1991) 39:1 Am J Comp L 1 [Sacco, “Legal Formants I”]; Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)” (1991) 39:2 Am J Comp L 343 [Sacco, “Legal Formants II”].

¹⁴ In the sense which is central to the classification of legal systems in Zweigert & Kötz, *supra* note 4.

¹⁵ See e.g. Palmer, “Third Legal Family” *supra* note 1; Palmer, “Two Theories” *supra* note 2.

tween “classic” mixes and these new hybrids, and at the same time, that a larger number of objects could be analyzed against the more general grid produced here.

The patterns of superimposition leading to the “mixtures” Palmer described are, in fact, visible in Hong Kong and Macau: some aspects of Chinese law, institutional architecture, legal culture, and technical language are currently infiltrating both SARs’ legal traditions. This process is occurring mostly in public/constitutional law and with respect to institutions, the separation of powers, and the role of the judiciary—areas Palmer considers “critical” for the “mixing” process, when expansive political legal and institutional forces take over pre-existing ones.¹⁶ Even the very concept of the rule of law is undergoing a reshaping process in the two formerly Western, colonial possessions, acquiring some Chinese characteristics¹⁷—or at least, so far, a more Chinese flavour.

However, the Chinese hybridization process is occurring in a way which is more complex and sophisticated than the simple superimposition described in Palmer’s theory. We might perhaps call it a “smart” process, combining the “hard” superimposition of legal and institutional reforms with a “soft”, more subtle approach. One reason for the differences may lie in the People’s Republic of China’s (PRC) interest in permitting both regions to operate their current affairs, as far as possible, in the same manner as before the handover. This would also be connected, to some extent, to China’s international obligations related to the two territories.

The main reasons for the complexity of this process might lie, however, in uniquely Chinese traits and characteristics: “mixture” studies have generally revealed the process and details of Western mixtures of law. When observing the superimposition of a Chinese institutional and legal framework on two Westernized legal systems, hailing from both main Western traditions, it is reasonable indeed to expect the process to be different, and to see a different set of relevant elements take part in the process.

II. China and Its Two SARs: Institutional Superimposition

Hong Kong and Macau are former colonies of the United Kingdom and Portugal, handed over to the PRC in 1997 and 1999, respectively, in accordance with the Sino-British (1984) and Sino-Portuguese (1987) Joint Declarations. After their reversion to China, these two international cov-

¹⁶ Palmer, “Introduction”, *supra* note 9 at 9-10.

¹⁷ On the developing Chinese rule of law and its features, see Castellucci, “Rule of Law”, *supra* note 7.

enants granted these territories “a high degree of autonomy”¹⁸ and the survival of their social, economic, and legal systems, which were to be left “basically unchanged” for at least 50 years.¹⁹

The scheme has been implemented by making the two territories Special Administrative Regions (特別行政區, *tèbié xíngzhèngqū*) of the PRC, with their specific institutions and legal systems different from those of Mainland China. This peculiar status hails from the implementation of the political/institutional model known as “One Country, Two Systems” (一個國家兩種制度, *yī gè guójiā liǎng zhǒng zhìdù*; or *yīguó liǎngzhì*, 一國兩制, in its shorter form) (OCTS). This model was devised by Deng Xiao Ping in the early 1980s and proposed as a scheme for the reunification under Chinese sovereignty of Hong Kong, Macau and (especially) Taiwan.²⁰

The hybrid nature of Mainland China’s legal system is nowadays quite obvious to most due to the PRC’s legal reforms of the past decades, from the country’s constitution down to local regulations, and to the introduction of the “socialist market economy”.²¹ The hybridization of the

¹⁸ *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 3d Sess, 7th National People’s Congress (“NPC”), 4 April 1990, art 2, reprinted in 29 ILM 1511, online: <<http://www.basiclaw.gov.hk>> [HK Basic Law]; *Lei Básica da Região Administrativa Especial de Macau da República Popular da China* [Basic Law of the Macau Special Administrative Region of the People’s Republic of China], 1st Sess, 8th NPC, 31 March 1993, art 2 (unofficial English translation available online: <http://bo.io.gov.mo/bo/i/1999/leibasica/index_uk.asp>) [Macau Basic Law].

¹⁹ *Joint Declaration of the Government of the United Kingdom and the Government of China on the Question of Hong Kong*, 19 December 1984, 1399 UNTS 33, arts 3(3), 3(5), 3(12) [*Sino-British Joint Declaration*]. These articles list the “basic policies” that the Chinese government undertakes to implement in the Region. China undertook similar obligations regarding Macau: *Joint Declaration of the Government of Portugal and the Government of China on the Question of Macau*, 13 April 1987, 1498 UNTS 195, arts 2(2), 2(4), 2(12) (unofficial English translation at 229) [*Sino-Portuguese Joint Declaration*]. Article 5 of both the HK Basic Law (*supra* note 18) and the Macau Basic Law (*supra* note 18) provide that “[t]he socialist system and policies shall not be practised in the [Hong Kong/Macau] Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.” This amounts more to an obligation not to introduce the Chinese socialist system than one to leave the previous systems unchanged.

²⁰ See Albert HY Chen, “The Theory, Constitution and Practice of Autonomy: The Case of Hong Kong” in Jorge Costa Oliveira & Paulo Cardinal, eds, *One Country, Two Systems, Three Legal Orders — Perspectives of Evolution: Essays on Macau’s Autonomy after the Resumption of Sovereignty by China* (Berlin: Springer, 2009) 751 at 756 [Chen, “The Case of Hong Kong”]. An overall description of the OCTS policy is available on the government’s official web portal (China, State Council Information Office, “One Country, Two Systems”, online: China Internet Information Center <<http://www.china.org.cn/english/features/china/203730.htm>>).

²¹ See Ignazio Castellucci, “Reflections on the Legal Features of the Socialist Market Economy in China” (2011) 6:3 *Frontiers of Law in China* 343.

two SARs, however, is a more subtle process, combining institutional change and superimposition of the Mainland policies on the two territories with the PRC's commitment to maintain their socio-economic and legal systems "basically unchanged" for 50 years. Notwithstanding the agreements reached in both joint declarations, a major cause of hybridization in the two territories is their very restitution to China. Major changes in the territories' institutional setting followed the resumed sovereignty of China. Basic laws have been enacted in each SAR, having a quasi-constitutional nature and supra-legal hierarchical level; a substantial degree of political influence by the authorities in Beijing became apparent in both SARs. All these elements do affect the legal environment.

The two SARs provide indeed a very useful laboratory for Beijing to test the OCTS model and to conduct socio-political, institutional, and legal experiments. The SARs are, of course, sources of ideas and economic, legal models, and legal vocabulary that are usefully imported into China's socialist society for its market-economy-related reforms,²² like the introduction of legislation on trusts or that on securities, modeled on the Hong Kong ones, or other developments of all sorts.²³

The fundamental legal connection of the two SARs with the PRC is given by article 31 of the Chinese constitution, which stipulates that Special Administrative Regions can be created within China to which common Mainland law (including most of the PRC's constitutional provisions apart from article 31) and institutions shall not apply. Instead, specific systems are applicable therein, within the frame of specific laws issued by the National People's Congress. Each SAR, thus, has a basic law, a legal document of a quasi-constitutional nature, hierarchically placed above local legislation and other local normative sources. Basic laws have been drafted by mixed committees of experts from the Mainland and each SAR, and then approved in Beijing by the National People's Congress and promulgated by the president of the PRC. An "Annex III" to each basic

²² See Castellucci, "Rule of Law", *supra* note 7 at 75-82 ; Ignazio Castellucci, "Precedent and the Law: Report for the Macao Special Administrative Region, People's Republic of China" in Ewoud Hondius, ed, *Precedent and the Law* (Brussels: Bruylant, 2007) 349 [Castellucci, "Precedent"]; Yash Ghai, "The Intersection of Chinese Law and the Common Law in the Special Administrative Region of Hong Kong: Question of Technique or Politics?" in Oliveira & Cardinal, *supra* note 20, 13, which is also published in (2007) 37:2 Hong Kong LJ 363 at 365 [Ghai, "Intersection" cited to Hong Kong LJ]. On legal vocabulary specifically, see Alice Lee, "Language and the Law in Hong Kong: From English to Chinese" (1996) 3:2 Current Issues in Language and Society 156.

²³ E.g., horse racing was introduced experimentally in 2008 in Wuhan, with a view to introduce commercial betting on horse races in the Mainland, a proposal modelled on Macau and Hong Kong's racing business (Xinhua, "Horse racing back on Wuhan courses" *China Daily* (1 December 2008), online: China Daily <<http://www.chinadaily.com.cn>>).

law lists the few very fundamental laws of the PRC that shall also be applicable in the SARs.²⁴

Hong Kong and Macau are authorized by the National People's Congress "to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial powers, including that of final adjudication."²⁵ This autonomy certainly does not amount to independence. As a matter of fact, the extent and limits of such autonomy are a crucial issue, if not *the* crucial issue, in the current political, constitutional, and legal debate about China and its SARs. Article 31 of the constitution of the PRC is applicable in the SARs, for which specific basic laws have been enacted in Beijing accordingly: the two SARs are now "inalienable parts" of the territory of the PRC; the PRC has sovereignty over them and discharges sovereign functions for them such as foreign and defense affairs.²⁶ The special autonomy granted to the territories is entrusted to their respective executive bodies and is placed in a pre-eminent position by their basic laws and by political reality, as suggested by the fact the regions are special "administrative" regions.²⁷ In these jurisdictions legislative bodies

²⁴ Related to capital city of China, calendar, national anthem, flag of the People's Republic of China; National Day of the PRC; territorial sea and contiguous zone, exclusive economic zone and continental shelf; nationality; diplomatic privileges and immunities; national emblem; the Chinese military garrison in the SARs; judicial immunity for assets of foreign central banks.

²⁵ *HK Basic Law*, *supra* note 18, art 2; *Macau Basic Law*, *supra* note 18, art 2. The contents of the two basic laws are, *mutatis mutandis*, nearly identical.

²⁶ *Sino-British Joint Declaration*, *supra* note 19, art 3(2); *Sino-Portuguese Joint Declaration*, *supra* note 19, art 2(2); *HK Basic Law*, *supra* note 18, arts 1, 13-14; *Macau Basic Law*, *supra* note 18, arts 1, 13-14.

²⁷ See e.g. *HK Basic Law*, *supra* note 18, arts 43, 45, and *Macau Basic Law*, *supra* note 18, arts 45, 47, which specify that both regions' chief executive, who acts as the head of the Special Administrative Region, shall be selected through local elections but be appointed by and accountable to the Central People's Government in Beijing. Each region's basic law grants the chief executive the power to refuse to sign and promulgate bills passed by the Legislative Council and to dissolve the Legislative Council when it reapproves a bill that had been initially returned by the chief executive (*HK Basic Law*, *supra* note 18, arts 49-50; *Macau Basic Law*, *supra* note 18, arts 51-52). The chief executives also has the power to appoint members of the judiciary and, in Macau, may appoint some members of the Legislative Council. The chief executive has the power to nominate the appointment of top SAR officials (e.g., the auditor-general and the commissioners of police and customs) to the Central People's Government and recommend their removal (*HK Basic Law*, *supra* note 18, art 48; *Macau Basic Law*, *supra* note 18, art 50). Remarkably, the chief executive appoints the head of the region's highest court, but the chief executive of Macau may only nominate the procurator-general, who must be appointed by the Central People's Government. In Hong Kong, by contrast, the Department of Justice "controls" the prosecutions service and the secretary of justice is appointed by the Central People's Government under art 48 (*HK Basic Law*, *supra* note 18, arts 63, 88, 90; *Macau Basic Law*, *supra* note 18, arts 88, 90). This reveals a typical-

remain in the shadows as general policy-making organs, and the judiciaries tend to show a somehow subordinate attitude vis-à-vis the executive—more pronouncedly in Macau, less so in Hong Kong.²⁸

The two territories' political elites are very closely connected to those of the Mainland, the latter being capable of affecting the former's visions and policies. There is a strong political relation between the government in Beijing—which features a special department for Hong Kong and Macau Affairs with ministerial rank as well as officers of the central government residing in the two SARs—and the two SARs' chief executives.²⁹

The socialist idea of a single power with different functions—instead of a Western-style separation of powers with effective checks and balances—with a key role for political and institutional supervision, typical of Mainland China's socialist ideology,³⁰ is increasingly seeping into the political-institutional framework and culture of the SARs.

III. Legal Infiltrations: Interpreting the Basic Laws

A. *The Interpretive Mechanism*

An important feature of the SARs' new legal environment is the fact that the highest courts in the SARs lack the power to definitively interpret their respective basic laws³¹, a feature that seems to contradict to

ly socialist attitude, of giving pre-eminence to the procuratorial system within the judiciary: see Castellucci, "Rule of Law", *supra* note 7 at 51-54.

²⁸ A long description of the chief executive's central importance and prerogatives is made in Ieong Wan Chong, et al, "*One Country, Two Systems*" and the Macao SAR (Macao: Centre for Macau Studies—University of Macau, 2004), ch VIII, especially sections "The Unique Characteristics of the Chief Executive" and "The Executive-Led Model of Separation of Powers", at 304 and 319, respectively. Chen, "The Case of Hong Kong", *supra* note 20 at 763, also describes the Hong Kong system as being "executive-led", according to Mainland scholars and drafters of the *Basic Law*.

²⁹ The implementation in the SARs of law passed in Beijing is expressly entrusted to the chief executive (*HK Basic Law*, *supra* note 18, art 48(2); *Macao Basic Law*, *supra* note 18, art 50(2)).

³⁰ Xin Chunying, *Chinese Courts: History and Transition* (Beijing: Law Press, 2004) at 99-101 [Xin Chunying, *Chinese Courts*]; Castellucci, "Rule of Law", *supra* note 7 at 43.

³¹ Article 143 of the *Macao Basic Law* (*supra* note 18) states:

The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress. The Standing Committee of the National People's Congress shall authorize the courts of the Macao Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region. The courts of the Macao Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the

some extent article 2 of both basic laws, which stipulate that SARs enjoy judicial power including “local final adjudication”.

In fact, the interpretation of rules of either basic law can only be done in the relevant territory by the local court system as long as it does not involve any issue falling under the authority of the PRC’s central government or relating to the relations between the SARs and the Mainland. According to articles 143 of the Macau *Basic Law* and 158 of the Hong Kong *Basic Law*,

The Standing Committee of the National People’s Congress shall authorize the courts of the [Hong Kong / Macau] Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this law which are within the limits of the autonomy of the region.³²

Otherwise, an interpretation of the relevant provisions of the basic laws shall be sought in Beijing, to be issued by the Standing Committee of the National People’s Congress (NPCSC)³³, the top legislative/political organ of the PRC. Thus, before issuing a final decision, the courts of both territories *must* ask Beijing for a *binding* interpretation to be applied to the case at hand.³⁴

It is not a court’s job, whether in the SARs or the PRC, to find interpretations of the basic law beyond routine *prima facie* applications of its black-letter rules. Quite differently from the Western approach, in the socialist legal tradition of China adjudication is a different function from in-

courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments in the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People’s Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected. The Standing Committee of the National People’s Congress shall consult its Committee for the Basic Law of the Macao Special Administrative Region before giving an interpretation of this Law.

The corresponding article in the *HK Basic Law* (*supra* note 18, art 158) is very similar.

³² *Macau Basic Law*, *supra* note 18, art 143; *HK Basic Law*, *supra* note 18, art 158.

³³ The NPCSC is also vested with the authority to interpret the national laws of Mainland China: *Legislation Law of the People’s Republic of China*, 3d Sess, 9th NPC, 15 March 2000, art 42 (unofficial English translation available online: <<http://www.lawinfochina.com>>).

³⁴ *Macau Basic Law*, *supra* note 18, art 143; *HK Basic Law*, *supra* note 18, art 158.

terpretation, the former being thought of rather as mere application of the law. If interpretation is arguably the most characteristically technical element in the Western tradition and theory of law, in the Chinese tradition and theory it is something substantially different: it is considered to be law-making in nature, and thus, belongs to the lawmaker. It is not (only) subject, consequently, to technical standards and rules but (mostly) to its instrumental role in policy implementation.³⁵

This principle is now also applicable to the SARs' basic laws, when local SARs' systems have to interact with general national interests and with the national legal frame.

The two SARs legal systems, however, displayed different levels of resistance towards it for a variety of reasons, which will be discussed below. One of these is that Hong Kong's common law heritage implies the doctrine of *stare decisis*, which makes new interpretations—as well as the enforcement of political directives through interventions in the work of the judiciary—more difficult than in Macau. The operation of the *Basic Law*'s principle for the interpretation of the *Basic Law* had to face some resistance in the Hong Kong legal environment and indeed provoked some political, constitutional, and legal shockwaves not seen in Macau.

After the handover of the former British colony to China, sensitive and controversial issues involving the interpretation of local law and the *Basic Law* of Hong Kong have been dealt with by the NPCSC. Four binding interpretations have been issued thus far since 1997. Each interpretation has been considered by many Hong Kong lawyers and jurists as contrary to a “correct” technical interpretation of the *Basic Law* made in accordance with consolidated common law standards and precedents. Each attracted international attention; the first two, also, a degree of local political confrontation.

B. Ng Ka Ling

The first of those four cases related to the right of abode in Hong Kong for Chinese nationals. Only a couple of years after the handover, the Hong Kong Government asked the NPCSC for an interpretation of the *Basic Law* to balance its provisions on the right of abode with some restrictive rules of the territory's immigration law.

³⁵ See Ghai, “Intersection”, *supra* note 22 at 401-02; Castellucci, “Rule of Law”, *supra* note 7 at 44-46; Chien-huei Wu, “One Country, Two Systems, and Three Memberships: Legal and Economic Integration between China and Its Two SARs” (2007) 7:3 *Global Jurist Advances* 1 at 2-6 [Wu, “Integration”] (elaborating on the differences in Chinese law between “interpretation of law” (of a legislative nature) and “judicial interpretation”).

The government did so *after a final judicial decision* had been issued by the Court of Final Appeal (CFA). The CFA had extended the right of abode to the children of a person resident in the territory and had declared the restrictive Hong Kong legislation unconstitutional, as being contrary to the *Basic Law* and to the *International Covenant on Civil and Political Rights* (1966 International Covenant).³⁶

The mentioned court decision was entirely within common law standards and consistent with the 1966 International Covenant. The CFA clarified that it was within its powers to assess whether there was a need, or not, to activate the mechanisms of article 158 requesting an interpretation of the *Basic Law* to the NPCSC in Beijing, finding it was not the case in that particular instance.

A political issue exploded as the ruling was deemed to be “wrong” both by the Hong Kong government and by Mainland political-legal circles. A request to the NPCSC of interpretation of the *Basic Law* articles 22 and 24 on the right of abode, made by the Hong Kong government instead of the CFA, became the subject of political and constitutional debate over the independence of Hong Kong courts.

Less than a month after the ruling, the CFA had to issue a quite unusual clarification in the form of a *functus officio* order at the request of the SAR Government.³⁷ Such a “clarification” was certainly not within the range of ordinary legal products of the court: the order has been issued based on the court’s “inherent jurisdiction”³⁸ and the need to “clarify” (including placating Mainland authorities) that

[t]he Court’s judicial power is derived from the Basic Law. Article 158(1) vests the power of interpretation of the Basic Law in the Standing Committee under art 158(2) and 158(3)

The Court’s judgment on 29 January 1999 did not question the authority of the Standing Committee to make an interpretation under art 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court’s judgment question, and the Court accepts that it cannot question, the authority of the National People’s Congress or

³⁶ *Ng Ka Ling v Director of Immigration*, 2 HKCFAR 4 at 36, 40, 46, [1999] 1 HKLRD 315, [Ng Ka Ling]. See also *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, 6 ILM 368. The covenant is applicable in Hong Kong by virtue of the *Hong Kong Bill of Rights Ordinance*, (1991) c 383, and the *HK Basic Law*, *supra* note 18, art 39.

³⁷ *Ng Ka Ling v Director of Immigration (No 2)*, [1999] 1 HKLRD 577 (available on WL Can) [Ng Ka Ling CFA clarification cited to HKLRD]

³⁸ *Ibid* at 578 (short argument of Li CJ, to which the other members of the panel adhered unanimously).

the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.³⁹

Basically, the clarification was the product of political pressure from Beijing and amounted to an acknowledgement of the fact that the NPCSC has full power to intervene and interpret the *Basic Law* at its own will, not just when solicited to do so by the CFA according to article 158 of the *Basic Law* of Hong Kong. Shortly thereafter, the Hong Kong government publicly announced it would seek the intervention of the NPCSC, stating its reasons:

8. We have considered inviting the CFA to reconsider its decision when the relevant material issues are raised in a future case that comes before it. The advantage of this approach is that any change in the interpretation of the Basic Law would be achieved by judicial action in Hong Kong.

9. However, there is no guarantee that an appropriate case will emerge shortly. Even such [*sic*] a case does emerge, it would take a long time to reach the CFA and this would offer no quick solution to the problem. *Moreover, we could not be sure that the CFA would reach a different conclusion on the relevant issues. If it did, the CFA might be criticized as having yielded to political pressure instead of making a rational judicial decision. This would damage its credibility.*

10. Legal analysis indicates that the chance of the CFA reversing its judgment is slim. Under common law principles, there must be stability in case precedents. Unless there are changes in the circumstances or in legal viewpoints over a long period of time, the CFA will not easily reverse any of its previous decisions. The House of Lords in Britain has unanimously ruled that even if it considered that a previous judgment had been wrongly decided, this did not constitute sufficient grounds for reversion. *If the CFA in Hong Kong adopts this principle, it could not possibly change its judgment made on 29 January within just a few months.*

11. We must stress that by reversion we mean the CFA reverses its previous decision in a similar case in the future. *We are not asking the CFA to reverse its original judgment when there is no case before it. Such an approach is without legal basis, nor is it acceptable. ...*

18. However, NPCSC's interpretation of the Basic Law may be regarded by common law jurisdictions and some people in Hong Kong as undermining the rule of law and CFA's power of final adjudication, as well as interference with the judicial independence and jeopardizing Hong Kong's autonomy. These perceptions may attract negative criticisms on NPCSC's interpretation and the HKSAR Government. ...

³⁹ *Ibid.*

19. *After careful consideration of the pros and cons of the above options, the SAR Government takes a view that the problems should be resolved by an interpretation of the BL. This approach offers the most resolute, prompt and conclusive solution to the present problems. It is also conducive to maintaining the prosperity and stability of Hong Kong, and is in our long term and overall interests. ...*

20. *The Basic Law is a national law. Under the Mainland system, the ultimate power to interpret statutes is vested in the NPCSC. Since the NPC enacts statutes, its Standing Committee knows best what the true legislative intent was and is the most authoritative body to interpret the law. ...*

22. *Given this constitutional background, would an interpretation of right of abode issues under the BL in fact undermine the rule of law? The CFA stated clearly on 26 February⁴⁰ that it could not question the authority of the NPCSC to make an interpretation under the Basic Law, which would have to be followed by the SAR courts. In other words, an NPCSC interpretation of the Basic Law is part of our new constitutional order. This is entirely consistent with the rule of law.⁴¹*

The government of Hong Kong explained its action to involve the NPCSC, making clear that in the new constitutional order this was the appropriate way to solve the substantial problem and showing, at the same time, respect for the common law tradition of the territory, and concern for the CFA's credibility in the future. With this statement, following the *Ng Ka Ling CFA clarification*,⁴² the constitutional crisis was settled.

The NPCSC interpretation was issued soon thereafter and it was, of course, consistent with the more restrictive policies of both the Beijing and Hong Kong governments. It was grounded, technically speaking, on an interpretation of the *Basic Law* provisions on the right of abode based on legislative intent and context, which is typically a Chinese way of statutory interpretation alien to the common law tradition.⁴³ Subsequent cas-

⁴⁰ The reference is to the *Ng Ka Ling CFA clarification*, *supra* note 37.

⁴¹ Hong Kong Special Administrative Region, Office of the Chief Executive, *Right of Abode: The Solution* (18 May 1999), online: Legislative Council of Hong Kong <<http://www.legco.gov.hk/yr98-99/english/hc/papers/roa-e.pdf>> [HKSAR, *Right of Abode*] [emphasis added].

⁴² *Supra* note 37.

⁴³ Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 10th Sess, Standing Committee of the 9th NPC, 26 June 1999 (English translation available online: <http://www.basiclaw.gov.hk/en/materials/1999_6_26.html>) [NPCSC Interpretation]. The interpretation also stated:

The legislative intent as stated by this Interpretation, together with the legislative intent of all other categories of Article 24(2) of the Basic Law ... have been reflected in the "Opinions on the Implementation of Article 24(2) of the

es relating to the right of abode have all been adjudicated in the courts of the Hong Kong SAR according to the NPCSC interpretation.⁴⁴

The intervention of the NPCSC in this case, unsolicited by the CFA as provided by article 158 of the Hong Kong *Basic Law*, shows some consistency with general principles of the Chinese legal system on attribution of jurisdiction to the different levels of courts, from the grassroots level up to the Supreme People's Courts, according to the general impact of the case: e.g. a higher court may well decide, *motu proprio*, to attract into its jurisdiction and entertain a case already introduced before a lower one.⁴⁵

Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress on 10 August 1996.

⁴⁴ See e.g. *Lau Kong Yung v Director of Immigration*, [1999] 3 HKLRD 778 (available on WL Can) (CFA).

⁴⁵ As it is easy to see in the following provisions on attribution of jurisdiction by level of court in the *Civil Procedure Law of the People's Republic of China* (4th Sess, 7th NPC, 9 April 1991) (English translation in Wei Luo, *The Civil Procedure Law and Court Rules of the People's Republic of China* (Buffalo: William S Hein & Co, 2006); alternate translation available online: <<http://www.lawinfochina.com>>):

Article 18: A basic people's court shall have jurisdiction as the court of first instance over civil cases, unless otherwise stipulated in this law.

Article 19: An intermediate people's court shall have jurisdiction as courts [*sic*] of first instance over the following civil cases:

- (1) Major cases involving foreign elements,
- (2) Cases that have major impacts in the area of its jurisdiction, and
- (3) Cases under the jurisdiction of the intermediate people's courts as determined by the Supreme People's Court.

Article 20: A higher people's courts [*sic*] shall have jurisdiction as the court of first instance over civil cases that have major impacts on the areas of its jurisdiction.

Article 21: The Supreme People's Court shall have jurisdiction as the court of first instance over the following civil cases:

- (1) Cases that have major impacts on the whole country, and
- (2) Cases that the Supreme People's Court deems should be adjudicated by itself.

Article 39: People's courts at higher levels shall have the authority to try civil cases over which people's courts at lower levels have jurisdiction as courts of first instance; they may also transfer civil cases over which they themselves have jurisdiction as courts of first instance to people's courts at lower levels for adjudication.

If a people's court at a lower level deems it necessary for a civil case of first instance under its jurisdiction to be tried by a people's court at a higher level, it may request such a people's court to try the case.

The underlying idea clearly seems to be that the identification of the appropriate jurisdiction as well as the subsequent application of the law to a case are not neutral, technical operations solely regulated by the law, as it would be under the Western concept of the rule of law. An element of policymaking or policy-enforcing is instead involved in the Chinese principles of the judicial process, warranting a degree of operational discretion which has to be exercised at the appropriate level of authority by a court expressed, supervised—and in fact interfered with—by the appropriate level of the political and governmental pyramids.⁴⁶

C. Subsequent Interpretations of the Basic Law by the NPCSC

In the next case of interpretation of the Hong Kong *Basic Law* in 2004, the NPCSC, solicited by the central Chinese government, intervened in the constitutional reform process. Article 45 of the *Basic Law* stipulates that

The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government.

The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.

The specific method for selecting the Chief Executive is prescribed in Annex I: "Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region".⁴⁷

A similar rule is in article 68 with respect to the elections of the Legislative Council. Annex I to the *Basic Law* provides for the method of election of the chief executive based on limited functional, politically controlled constituencies, suggesting however that the system could be open for re-

⁴⁶ All authors researching Chinese law do emphasize the very strict operational relations and the structural political interferences of the Chinese political and governmental apparatuses with the work of Chinese courts: see e.g. Castellucci, "Rule of Law", *supra* note 7 at 51-58; Chen, *Introduction*, *supra* note 7; Nanping Liu, *Opinions of the Supreme People's Court: Judicial Interpretation in China* (Hong Kong: Sweet & Maxwell Asia, 1997); Peerenboom, *supra* note 7; Xin Chunying, *Chinese Courts*, *supra* note 30.

⁴⁷ *HK Basic Law*, *supra* note 18, art 45.

forms after the elections of 2007. Annex II provides similarly for the Legislative Council elections.⁴⁸

Large quarters of the Hong Kong public expected—against the inclination of the SAR’s government and of central authorities—universal suffrage to become the method for the elections of the chief executive and for the Legislative Council following those of 2007. At a minimum, they expected to have the reform process for democratization started for both the legislative and executive organs of the SAR.

The interpretation of the NPCSC intervened in a very hot debate, clarifying that the process shall be controlled tightly by the central authorities in Beijing and that its “gradual” nature shall prevail over the tension towards universal suffrage. As such, it introduced a controlling role for Beijing in the SAR’s democratization process, expressly reinforcing the nature of the SAR as an “executive-led” administrative region, and effectively delaying universal suffrage *sine die*.⁴⁹

The controlling role discharged by Beijing over the democratization in the SARs’ elections is confirmed by a subsequent decision of the NPCSC, in 2007, setting a timetable for the process expressed in quite flexible terms.⁵⁰

Another case of interpretation with heavy political implications took place in 2005, when the then-incumbent chief executive resigned two

⁴⁸ *Ibid*, art 68, Annexes I, II. Annexes I and II of the Macau Basic Law (*supra* note 18) provide similarly, with reference to elections taking place after 2009.

⁴⁹ Ghai, “Intersection”, *supra* note 22 at 396-98. The election processes for the chief executive and the Legislative Council have been reformed in 2010 to introduce some amendments for the elections to be held in 2012, still within the general model of functional constituencies.

⁵⁰ Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage, 31st Sess, Standing Committee of the 10th NPC, 29 December 2007 (English translation available online: Government of Hong Kong <<http://www.cmab-cd2012.gov.hk/doc/decision.pdf>>). This decision excluded universal suffrage for the 2012 elections of the chief executive and the Legislative Council. The Hong Kong government subsequently published a report on the issue: Hong Kong Special Administrative Region, Constitutional and Mainland Affairs Bureau, *Consultation Document on the Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012* (November 2009), online: Government of Hong Kong <<http://www.cmab-cd2012.gov.hk/>>. The NPCSC Decision also stated that universal suffrage “may” become the model for the elections of 2017—a possibility expressed in terms that made one political commentator state that “[t]he only certainty is that Hong Kong will get exactly what Beijing wants it to have”: Augustine Tan, “Hong Kong on the march — again”, *Asia Times* (11 January 2008) online: Asia Times <<http://www.atimes.com>>.

years before the end of his mandate (officially due to health problems; however most political commentators and scholars agree that it has been due to his falling into disgrace with central authorities). An interpretation was requested to the NPCSC by the Chinese government to clarify whether the newly elected chief executive would serve an entire five-year new term according to article 46 of the *Basic Law* or just the remainder of his predecessor's term, until 2007. The latter solution prevailed, although contrary to the views of most Hong Kong observers and legal professionals. A remarkable document related to this issue, expressing the views of the SARs and central authorities, is the *Reply of the Department of Justice of 1 April 2005 to the Bar association*, the latter having expressed support, instead, for a five-year term of the elected officer according to common law standards of statutory construction.⁵¹ The Department of Justice observed:

The Bar Association expressed concern about the Secretary for Justice's reliance on Mainland legal scholars when coming to her view on the Chief Executive's term of office. ...

The Department of Justice wishes to emphasize that the provisions in the Basic Law relating to the appointment of the Chief Executive are provisions concerning affairs which are the responsibility of the Central People's Government, and which concern the relationship between the Central Authorities and the Region. ...

This being so, the Department of Justice considers it appropriate to seek the views of Mainland legal experts, particularly the views of members of the Legislative Affairs Commission of the NPCSC, as to the way in which the NPCSC would interpret those provisions. ...

The Bar states that there are advantages in the common law approach of construing legislative intent by reference to the language of text in its context and its purpose, as opposed to relying on recollections of Mainland scholars of "assumptions behind the intent of the Basic Law Drafting Committee and the NPC in adopting the Basic Law."

The Department of Justice agrees that there are advantages in the common law approach towards statutory interpretation. However, it notes that, when construing the Basic Law, the courts are not restricted to "the language of text in its context and its purpose." The Court of Final Appeal ruled in the case of *Director of Immigration v*

⁵¹ Hong Kong Special Administrative Region, Department of Justice, *The Chief Executive's Term of Office: Response of the Department of Justice to the Hong Kong Bar Association's Statement of 17 March 2005* (1 April 2005), online: Government of Hong Kong <<http://www.doj.gov.hk/eng/archive/pdf/barassoe.pdf>> [HKSAR, *Response to Bar*]; Hong Kong Bar Association, *Secretary for Justice's Statement on the Term of the New Chief Executive of the HKSAR: Statement of the Hong Kong Bar Association* (17 March 2005), online: Hong Kong Bar Association <http://www.hkba.org/whatsnew/submission-position-papers/2005/20050317_e.pdf>.

Chong Fung-yuen that: “Extrinsic materials which throw light on the context or purpose of the Basic Law or its particular provisions may generally be used as an aid to the interpretation of the Basic Law.”⁵²

The NPCSC decision was based on a “Chinese” interpretation of the “five-year term” provided in article 46 of the *Basic Law*. According to the NPCSC, article 46 provides for a fixed duration of the “term of office”, not necessarily of each individual elected officer; a fixed term of the overall duration of five years may thus include consecutive, elected officers in case of early resignation of the originally elected one.⁵³ Support for this approach also came from the literal provision in Annex I, which states that elections for the chief executive be held in 2007.⁵⁴

The short-term chief executive elected in 2005 was then re-elected in 2007: political commentators suggest the first, short term was applied for Beijing to test his performance, before allowing his re-election for a full five-year term.⁵⁵

Both cases were related to very sensitive political issues. In both cases, Beijing and the government of the SAR intervened to prevent the “legalization” of issues—i.e. avoiding that doubts would end up before the courts, where another constitutional crisis like the one related to the *Ng Ka Ling* case, or at least some degree of political confrontation would have been more or less certain.

D. The Congo Case

The most recent interpretation of the Hong Kong *Basic Law* by the NPCSC materialized in 2008-2011; it has been the first ever activated by the Hong Kong CFA according to article 158 of the *Basic Law*, within the frame and towards the end of judicial proceedings having escalated the entire judicial pyramid in the SAR, receiving extensive coverage in Hong Kong media as “the Congo case”.⁵⁶

⁵² HKSAR, *Response to Bar*, *supra* note 51.

⁵³ *Ibid.*

⁵⁴ Ghai, “Intersection”, *supra* note 22 at 399.

⁵⁵ *Ibid.*

⁵⁶ *FG Hemisphere Associates LLC v Democratic Republic of Congo* (2008), [2009] 1 HKLRD 410 (Court of First Instance) [*Congo (CFI)*], rev’d [2010] 2 HKLRD 66, [2010] HKEC 194 [*Congo (CA decision)*], leave to appeal to CFA granted [2010] 2 HKLRD 1148, [2010] HKEC 670 [*Congo (CA leave to appeal)*], provisionally aff’d and interpretation of the NPCSC requested by the Court of Final Appeal [2011] HKEC 747 (available on WL Can) [*Congo (CFA provisional decision)*], finally aff’d [2011] HKEC 1213 (available on WL Can) (CFA) [*Congo (CFA final decision)*] (following the interpretation of the

A US investment fund, holding two ICC arbitral awards against the Democratic Republic of Congo, obtained leave from the Hong Kong High Court to enforce them in the SAR for an amount of over 100 million US dollars.⁵⁷ The assets attached and frozen belonged to Chinese state-owned enterprises (SOEs) and were to be used for payments to the African government within the framework of the Chinese government economic cooperation with developing countries.

The government of Congo applied to the Court of First Instance (CFI) of the Hong Kong SAR to set aside the leave granted to enforce the awards in the SAR. The African government had raised a defence in relation with its sovereign activities, “acts of State” not being subject to the jurisdiction of Hong Kong courts according to article 19 of its *Basic Law*. The Chinese government also had an interest in seeing an absolute concept of sovereign immunity enforced and in keeping its activities (and related resources) for economic cooperation with developing countries not subject to the jurisdiction of Hong Kong courts—and thus immunized from attacks of creditors of the relevant country.

A letter of the Mainland government commissioner for foreign affairs in the Hong Kong SAR, arguing in favour of the Chinese absolute doctrine of sovereign immunity, was sent to the CFI and put on the record of the proceedings. The secretary of justice of Hong Kong also intervened in the case to support the view of the Chinese government. The argument was that dealing with the concept of “act of State” involved national foreign policy and that it was impossible that a legal concept having a substantial foreign policy dimension could have different contents in the SAR and the Mainland.

The opposing legal position of the US investment fund was connected to the narrower concept of “act of State” firmly established at common law, also in Hong Kong, which would not immunize the resources in the case at hand from jurisdiction.

In 2008, the CFI ordered that the leave to enforce the awards be set aside, recognizing the public and not merely commercial nature of the activities to which the frozen monies were related.⁵⁸ The CFI ruling was then reversed by a majority of the Court of Appeal based on the restrictive theory of state immunity, and the asset freeze injunction was restored.⁵⁹

Hong Kong *Basic Law* given by the NPCSC, which is reproduced in Annex 2 of *Congo (CFA final decision)*.

⁵⁷ *Congo (CFI)*, *supra* note 56 at 415.

⁵⁸ *Ibid.*

⁵⁹ *Congo (CA decision)*, *supra* note 56.

The court of appeal, however, granted leave to appeal to the CFA considering the need to deal with the issue of interpretation of the *Basic Law*.⁶⁰

As the case reached the CFA, the government of Hong Kong solicited the court to require an interpretation of the NPCSC according to article 158 of the *Basic Law* in order to have the actual scope of “act of State”, as provided in article 19 of the *Basic Law*, clarified.

And so the CFA did, with a majority decision of three members against two (which did not surprise many in the legal community) upholding the idea that there cannot be two different doctrines of “act of State” in two different areas of the same country, and supporting the view that the Chinese concept is also applicable in Hong Kong since the handover. The CFA majority wrote:

we have arrived at the following conclusions which, in accordance with Article 158(3), are necessarily tentative and provisional, namely, that:

(a) The HKSAR cannot, as a matter of legal and constitutional principle, adhere to a doctrine of state immunity which differs from that adopted by the PRC. The doctrine of state immunity practised in the HKSAR, as in the rest of China, is accordingly a doctrine of absolute immunity. ...

(c) Prior to rendering a final judgment in this matter, the Court is under a duty pursuant to Article 158(3) of the Basic Law to refer, and does hereby refer, the questions set out in Section G of this judgment to the Standing Committee of the National People's Congress, being questions relating to the interpretation of Articles 13 and 19 of the Basic Law ...⁶¹

The CFA thus issued a decision requesting the actual meaning of “act of State” as provided in article 19 of the *Basic Law* be clarified by the NPCSC. Additionally, the CFA provisionally revoked the injunction freezing Chinese payments to be made in favour of the Congolese government, supporting the Chinese concept of “act of state” as applicable in Hong Kong as well, and thus the Hong Kong courts' lack of jurisdiction.⁶²

The NPCSC then issued its interpretation, confirming that the Chinese concept of “act of State”, related to an absolute immunity of states

⁶⁰ *Congo, (CA leave to appeal)*, *supra* note 56 at para 13.

⁶¹ *Congo (CFA provisional decision)*, *supra* note 56 at para 183, Mason NPJ, Chan & Ribeiro PJJ.

⁶² *Ibid* at paras 407, 413, 415.

from jurisdiction of courts, shall also be applied in the courts of the SAR; the CFA then confirmed its provisional decision.⁶³

E. Identifying Principles and Rules Being Infiltrated

The above review of the interpretations given by the NPCSC reveals a significant amount of flexibility introduced in the legal rules applicable in Hong Kong and in the ways they are interpreted. These findings are consistent with an instrumental concept and function of the law which typically belongs to the Chinese idea of the rule of law.⁶⁴ This concept of the law allows the Chinese authorities operational latitude—up to an almost unrestricted power for the top echelon of the Mainland central government organs—when dealing with subjects and/or lower level entities, perhaps including an entire administrative region, rather than having the law defining and limiting Chinese government organs' scope of legitimate action.

A number of important principles of the common law tradition and of Western rule of law seem to have been subjected to the pressure, when not plainly to the superimposition, of a more Chinese, socialist vision and of some of its implementing devices:

1) Courts now “adjudicate” (article 2 of both basic laws). They are not inherently competent to “interpret” the basic laws: they can only do it in relation to cases of “local” relevance having so been *authorized* by the NPCSC (article 143 of Macau *Basic Law* and article 158 of Hong Kong *Basic Law*), and certainly should not try and declare laws invalid against it, as demonstrated by the *Ng Ka Ling* case.

2) The term “local” in article 2 of both basic laws, stipulating that both SARs enjoy “judicial power including local final adjudication”, seems to identify an “impact factor” of the decision to fall within the autonomy of the SARs' judiciaries, rather than a purely geographic indicator of where the case producing the decision is originated, consistent with Chinese procedural principles on attribution of jurisdiction as discussed above.⁶⁵ SARs' laws apply to “local” activities; “local” judicial decisions are given according to “local” standards, unless a larger, national interest is involved.

⁶³ Zhao Yinan, “Top Legislature Interprets HK Law” *China Daily* (27 August 2011), online: China Daily <<http://www.chinadaily.com.cn>> (also available on Global Factiva <<http://global.factiva.com>>). The text of the NPCSC interpretation is reproduced in *Congo (CFA final decision)*, *supra* note 55 at Annex 2.

⁶⁴ See e.g. Peerenboom, *supra* note 7; Castellucci, “Rule of Law”, *supra* note 7.

⁶⁵ See Part III, above.

3) The basic law interpretive device gives the NPCSC the power to decide what is “local” in individual instances—i.e. falling “within the limits of the autonomy of the Region” as per article 158 of the Hong Kong *Basic Law*.

4) It also provides the power to “interpret” the basic law—in the Chinese sense of exercise of a law-making power, thus introducing legal rules produced in the Mainland, binding on the SARs’ courts.

5) Moreover, interpretations may be issued by the NPCSC at will—or, not just when solicited by the SARs highest courts,⁶⁶ or by any SAR authority.⁶⁷ This is consistent with the already mentioned Chinese principles on attribution of jurisdiction to organs of different levels, and related power of higher authorities to intervene with lower ones to take charge of a given case.

Interpretations of the NPCSC may, in fact, also be issued after a case is decided “wrongly”,⁶⁸ with a case still pending,⁶⁹ or without any case pending in court.⁷⁰ This gives Beijing a tool to directly and unrestrictedly intervene in the legal systems of the SARs and to define the extent of the SARs’ courts’ jurisdiction, thus introducing a significant element of uncertainty in the SARs’ legal systems. More generally, the NPCSC has the power to define the spheres of authority of the two SARs governments, making the latter *ex ante* assessment uncertain.

6) Mainland legal doctrines and its method of statutory interpretation are part of the applicable SARs’ legal systems and apply to the interpretation of all PRC laws that are applicable in the SARs according to Annex III of the basic laws.⁷¹ The same applies to the NPCSC’s interpretations of the basic laws, which are issued whenever a larger-than-the-SAR interest is involved (this assessment being made by the NPCSC).⁷²

⁶⁶ As clarified by the CFA with the *Ng Ka Ling CFA clarification*, *supra* note 37. This was followed by a request to the NPCSC from the Hong Kong government (HKSAR, *Right of Abode*, *supra* note 41).

⁶⁷ As it has been the case with the 2004 and 2005 interpretations on elections and term of office of the chief executive, requested to the NPCSC by the Chinese government.

⁶⁸ As in the interpretation following *Ng Ka Ling*, *supra* note 36.

⁶⁹ As in the *Congo* case, *supra* note 56.

⁷⁰ As in the 2004 and 2005 interpretations.

⁷¹ See e.g. *Azan Aziz Marwah v Director of Immigration* (2008), [2009] 3 HKC 185 (available on QL) (CFI) (on the applicability of PRC statutory interpretation rules to the PRC’s Law on Nationality).

⁷² See NPCSC Interpretation, *supra* note 43 and the explicit mention of Mainland doctrines in HKSAR, *Response to Bar*, *supra* note 51.

7) The SARs' chief executives' pre-eminent positions in both regions; the political continuum and strict cooperation between each chief executive and central authorities; light checks and balances; and the NPCSC interpretive capability make the SARs' legal environment very executive led and policy sensitive—more similar to that of the Mainland—and subject to institutional and political pressure from Beijing.

8) All these factors also facilitate the introduction of Chinese critical legal rules into the SARs, due to the already discussed alerting or soliciting role discharged by the chief executives with the NPCSC in relation to important matters.

9) Consistent with Mainland practices for political appointees, the chief executive's fixed term of office corresponds to an institutional cycle with a fixed length, which, as clarified by the interpretation of 2005, may include several officers, consecutively elected. The mechanism is designed to improve stability and foreseeability in the political process and to enhance control over it, including sometimes to test elected officers' performance before granting them a full term.

10) The interpretation of law in the two SARs can be very flexible according to policy needs and is not subject to consistent technical-legal standards: contextual elements may be relevant sometimes (as in the 2005 interpretation of the term of office of the chief executive);⁷³ a very literal interpretation may applied in other cases (as in the 2004 interpretation on universal suffrage; or as in the Macau government's approach to law degrees "issued in Macau"—discussed below).

11) Procedural rules play a very ancillary role; decisions are taken following the methods more politically appropriate for the case at hand. They may include such extraordinary output as the "clarification" issued by the CFA in *Ng Ka Ling*, based on its "inherent jurisdiction" rather than according to established procedural law.⁷⁴ This was basically a *functus officio* non-decision, issued to pave the road for subsequent developments including the chief executive's position⁷⁵ and the NPCSC interpretation of 1999. It is a judicial product quite far from any Western concept of rule of law, rather akin in form to Chinese law features such as the retrials following governmental/procuratorial requests in cases of "wrong" decisions;⁷⁶ akin, in substance, to an announcement of future change of the rule previously applied.

⁷³ *Ibid.*

⁷⁴ *Ng Ka Ling CFA clarification*, *supra* note 37.

⁷⁵ HKSAR, *Right of Abode*, *supra* note 41.

⁷⁶ Castellucci, "Rule of Law", *supra* note 7 at 53-54.

12) In general, the “legalization” of issues is not considered the best way to deal with complex or sensitive situations.

13) Immigration policy clearly seems to prevail over close family relations, notwithstanding the protection afforded to the latter in the *Basic Law* and in international covenants, through ways (restrictive interpretation of article 24 of the *Basic Law* done also considering legislative intent, purpose and context, according to Mainland standards of statutory interpretation⁷⁷) and to an extent (certainly also due to policy reasons) that would not have been likely in many Western jurisdictions—as demonstrated by the *Ng Ka Ling* case and the subsequent interpretation of 1999.⁷⁸ By extending this idea a little bit, it could be said that policy interests prevail over individual rights and (may thus twist the interpretation of) legal norms much more often than in the Western tradition, consistent with general socialist political and legal principles.

14) Universal suffrage is viewed unfavourably. Its implementation is being delayed by straining the meaning of the transitional provisions in basic laws Annexes I and II, a different system of election based on functional constituencies being preferred, as proven by the political case related to the selection of the chief executive and of the Legislative Council of Hong Kong culminated with the NPCSC interpretation of 2004.

15) An absolute concept of sovereign immunity typical of the Chinese law has been introduced in both SARs with the interpretation of 2011. This provides better protection of Chinese policy interests while disregarding Western market economy assumptions and Western law principles that tend to restrict immunity and equalize sovereigns to individuals before the courts in a number of instances.⁷⁹

⁷⁷ NPCSC Interpretation, *supra* note 43.

⁷⁸ Even before the *Human Rights Act* ((UK) 1998, c 42), English law displayed some attention to parenthood and a “softer” attitude, especially when young children have been involved, in assessing the extension of the right of abode: see e.g. *R v Secretary of State for the Home Department ex parte Ajayi* (1994), CO/1605/92 at 6 (QL) (QBD); *R v Secretary of State for the Home Department ex parte Natufe* (1996), CO/953/96 at 7 (QL) (QBD). Elsewhere the common law also displays some friendlier approaches to extended protection of close family members grounded on constitutional, international (*and comparative!*) law arguments: *Rattigan v Chief Immigration Officer*, [1995] 1 BCLR 1, 1994 SACLX LEXIS 255 (Zimbabwe SC).

⁷⁹ A possible, new issue might have appeared recently, as the Hong Kong Court of First Instance entertained a case between a Hong Kong plaintiff and a Mainland defendant involving the arrest in Hong Kong of a search and rescue vessel belonging to the latter. The defendant turned out to be an entity organic to the Chinese Government. The court dismissed the defendant’s application to release the vessel, which was based on the doctrine of Crown immunity (Crown immunity refers to the immunity of the domestic government, while state immunity refers to foreign governments) on the ground that while

With these principles seeping in, it is reasonable to conclude that a superimposition of Chinese general framework values is taking place, however unchanged the SARs' legal systems may look at a first glance and despite more or less face-saving statements and lip service paid from all institutional actors both in the SARs and in the Mainland (in fact, a phenomenon more and more confined to Hong Kong local debate) on the preservation of the SARs' original legal traditions.⁸⁰

F. The Unequal Duality of Vision

A well-known scholar who has researched the Hong Kong legal and institutional environment over a long period of time expressed the view that the Hong Kong basic law—to a significant extent a common law piece of legislation due to its contents in relation to fundamental rights⁸¹—is a legal enactment meant more to keep the Hong Kong legal system securely separated from the Chinese one, than to produce integration.⁸²

Perhaps those statements reflect a common law point of view, and the related normative approach to legal text. However, it is also to be considered that both basic laws are Chinese pieces of legislation: their mentioning of fundamental rights does not make them, when “in action”, common law enactments more than the list of fundamental rights in the constitution of China makes it a common law constitution. It is also difficult to consider the two basic laws as enactments hailing from the two different legal traditions of the two SARs' former colonial powers: they are almost identical, enacted in Beijing by Mainland legislative authorities within the framework of the Chinese constitution, for the two Chinese SARs. The interpretive mechanisms applicable in the most sensitive cases, managed by the appropriate Chinese authorities according to their legal institutional and political system, also tend to confirm that fundamental truth.

It is also true, on the other hand, that the SARs courts will ordinarily interpret their basic laws “from below”, according to their traditional Western standards, as far as the case at hand has a “local” relevance. Hong Kong courts will, moreover, continue to work according to common

the defendant had the right to claim immunity, it had in fact waived this right by not pleading immunity in a timely manner (*The Hua Tian Long* (No 3), [2010] 3 HKC 557). The case is currently under appeal; the interesting issue in the coming appellate decision will be related to whether a waiver of Crown immunity, which is possible under common law, can co-exist with the PRC's absolute approach to state immunity following *Congo* (CFA final decision), *supra* note 56.

⁸⁰ See the *Ng Ka Ling CFA clarification*, *supra* note 37, and HKSAR, *Right of Abode*, *supra* note 41.

⁸¹ Ghai, “Intersection”, *supra* note 22 at 371.

⁸² *Ibid* at 367.

law standards most of the time, when no basic law provision needs to be interpreted in the case. So will Macau courts with their local version of the Portuguese civil law, *mutatis mutandis*, though perhaps with not as strong a resistance as displayed by the Hong Kong environment.

The relative autonomy of the two visions and legal environments (the Mainland's and that of each SAR) in ordinary cases cannot exclude the existence of specific areas of the law or particular instances when the two visions come in contact. This will happen more and more with the social and economic integration of the SARs with the Mainland: pressure "from the top" and "resistance from below" produce complex dynamics of interaction, negotiations, and adjustments. This situation has aptly been described through the theoretical frame of a legally pluralist environment, with China and the two regions playing the role of semi-autonomous social and legal fields.⁸³

The two basic laws are the legal interface between these semi-autonomous fields. They have a "dual" nature as Chinese pieces of legislation for two Chinese administrative territorial partitions, and as local quasi-constitutions that guarantee the SARs' previous legal environment. They are used by local authorities as the primary source of their common law (Hong Kong) or civil law (Macau) legal systems. The tension between these two visions and related technical standards of interpretation and application has previously been clearly pointed out.⁸⁴ Still, that "duality" is an "unequal duality". The underlying struggle produces an increasingly visible dominance of the "one country" element over the "two systems" one,⁸⁵ as demonstrated by the very different way the Hong Kong CFA dealt with the *Ng Ka Ling* case in 1999 and the *Congo* case in 2011.⁸⁶

The Chinese political-legal element, present and prevailing in the basic law and its top-level interpretive organ and mechanism, may transform the black-letter rules contained therein into a product that is inherently flexible and fuzzy in meaning.⁸⁷ Rules may become "softer": guideline elements, to be used in finding syntheses at the end of dialectic processes; directives on how to flexibly reconcile opposite tensions, admitting variable solutions in individual cases. They may come to share to some

⁸³ Cora Chan, "Reconceptualising the Relation Between the Mainland Chinese Legal System and the Hong Kong Legal System" (2011) 6:1 Asian Journal of Comparative Law 1.

⁸⁴ *Vallejos v Commissioner of Registration*, 2010 HCAL 124 at paras 8-10 (CFI), online: Legal Reference System <<http://legalref.judiciary.gov.hk>>.

⁸⁵ Denis Chang, "The Imperatives of One Country, Two Systems: One Country Before Two Systems?" (2007) 37 Hong Kong LJ 351.

⁸⁶ See above, section "Legal Infiltrations", *passim*.

⁸⁷ See generally Castellucci, "Rule of Law", *supra* note 7.

extent the nature of the “basic policies” (*jīběn fāngzhēn zhèngcè*, 基本方針政策)⁸⁸ the Chinese government undertook to follow in the joint declarations and their annexes, most of which are largely reproduced in the text of both basic laws.⁸⁹

In the opinion of this author, the purpose of the basic laws is not just that of isolating the SARs’ legal systems, as discernible in their black-letter text from a common law normative perspective. Their purpose is also—or perhaps pre-eminently, from the functional Chinese rather than the normative point of view—one of providing Mainland authorities with steering capability over these systems. The Mainland authorities gain that capacity by framing them within a cage of quasi-constitutional, but still flexible, provisions they may interpret according to what they think appropriate. The basic laws “in action” may thus produce some convergence of the SARs over time towards a more Chinese societal model, rather than securing the immutability of the regions’ previous state of affairs.

Western powers will not cry shame on these developments. As China became a global political and economic superpower, British and Portuguese concerns about the Chinese socialist system being enforced in the former colonial territories—the original reason leading to the Chinese undertakings in the joint declarations—have lost much of the plausibility they had in the 1980s. In addition, the two former powers’ actual capability to intervene effectively, even if they wished to do so, is questionable.

IV. Delegalization: The Closer Economic Partnership Arrangement

Another example of “hard superimposition” of Chinese concepts, operational models, and mechanisms on both SARs’ legal systems is given by

⁸⁸ Chang, *supra* note 85 at 354-57 (elaborating on “*jīběn fāngzhēn zhèngcè*” (基本方針政策) in both basic laws’ preambles—translated in the English version of the Hong Kong *Basic Law* as “basic policies” and in the Portuguese version of Macau as “*políticas fundamentais*”). In Chinese that wording in fact adds a further element related to the idea of “policy” or “political directive” (*fāngzhēn*, 方針) to the original words in the joint declarations—*jīběn zhèngcè*, 基本政策, also translated as “basic policies”, “*políticas fundamentais*”.

⁸⁹ *Sino-British Joint Declaration*, *supra* note 19; *Sino-Portuguese Joint Declaration*, *supra* note 19. It is certainly unusual how in those two international law instruments the Chinese government undertook to list “basic policies,” with each instrument also presenting an annex I in which the policies listed in the joint declarations are elaborated upon by the Chinese government. The initial articles of both basic laws (“General Principles”) reproduce more or less the “basic policies” agreed to in the joint declaration; the elaborations contained in each annex I are the basis for many of the basic laws’ other articles (HK *Basic Law*, *supra* note 18; Macau *Basic Law*, *supra* note 18).

the provisions for dispute resolution between each SAR and the Mainland within the Closer Economic Partnership Arrangement (CEPA) framework. The CEPAs are two institutional arrangements concluded in 2003 between the Mainland and each SAR that create a tariff-free trade zone and specific provisions to regulate it. The entire scheme is aimed at avoiding problems related to having three separate WTO memberships—of the two SARs, and of Mainland China after its accession in 2001—which could otherwise make the international WTO legal mechanisms applicable to the relations between China, Hong Kong, and Macau, which certainly are not international.⁹⁰

The disputes between the Mainland and the SARs on tariffs and trade, according to the CEPA, shall be resolved through amicable negotiations, with a bilateral steering committee producing consensual decisions.⁹¹

If the existence of alternatives to judicial mechanisms to solve economic and trade disputes is quite common worldwide, it is also true that provisions for negotiations or mediation mechanisms never prevent, should these alternatives fail, the ultimate recourse to adjudicatory mechanisms, including judicial, quasi-judicial, and arbitral forms. The remarkable element in the case of the CEPA is exactly this: no other way or remedy is available. Neither the kind of adjudication implemented within the WTO, nor any other kind, is permitted. This element is perhaps inevitable, given the unequal relation between the parties. Differences are not adjudicated in this very important Chinese economic environment: they are delegatized instead and, ultimately, resolved politically.

This amounts to an application of a very traditional Asian and Chinese approach in dispute resolution, also present in the classic socialist model of resolution of differences between economic units. The scheme is certainly distant from the idea of third-party adjudication inherent in the Western concept of rule of law, which is based on the existence of certain foreseeable rules enforced through a technical-legal mechanism featuring a third party as the deciding body or official.

⁹⁰ Wu, "Integration", *supra* note 35 at 29-32.

⁹¹ China, Ministry of Commerce, *Mainland and Hong Kong Closer Economic Partnership Arrangement* (29 June 2003), art 19, reprinted in (2003) 2 Chinese Journal of International Law 640, available online: <http://www.tid.gov.hk/english/cepa/files/main_e.pdf>; China, Ministry of Commerce, *Mainland and Macao Closer Economic Partnership Arrangement* (17 October 2003), art 19 (unofficial English translation available online: <http://www.economia.gov.mo/public/docs/CEPA_CEPA_I/index/en/efulltext.pdf>); Wu, "Integration", *supra* note 35 at 29-32.

V. Hybridization: The “Soft” Way

A. *Macau and Its Lower Resistance to Legal Infiltration from Mainland China*

The introduction of policies and legal doctrines in Hong Kong consistent with those of the Mainland have required sensitive and controversial interpretation of the territory’s *Basic Law* by the NPCSC to overcome the resistance of the Hong Kong legal community and its principle of *stare decisis*.

Macau’s civil law legal system, which is closer than a common law legal system, in general structure and mechanisms, to the Chinese one, proved more flexible, admitting lesser or no binding force for judicial precedent.⁹² In Macau, this approach is associated with a high level of observance of the literal provisions of the statutory law, with a conservative attitude and a low level of judicial activism. This rigid attitude seems to be shared by courts in at least some of the former socialist jurisdictions of Eastern Europe, and differs considerably from trends in Western legal systems of continental tradition, where the rule-making role of the courts is increasingly recognized.⁹³

Another fact to be considered is that special legal procedures are established by law in Macau to generate uniform judicial doctrines in local courts, especially in criminal matters. They are subject to centralized control through mechanisms involving the territory’s highest court and prosecutor both for their development and modification, and to ensure that

⁹² Even the Tribunal de Última Instância, the highest court in Macau, quoted René David’s *Les Grand Systèmes* and expressed the view that

[courts are] not bound by the rules they establish ... if in a new decision the judges apply a rule they had previously applied, this is not due to the authority that rule acquired for the fact they have consecrated it; this rule has no binding effect. ... it is always possible a change in the case law without the court being obliged to justify it. Case law neither threatens the framework nor the very principles of the law. A case law rule only survives and is applied as far as the judges—each judge—consider it as a good one. At principles’ level it seems important to us that the judge is not transformed into a legislator. This is what is sought in the Roman-German family (Tribunal de Última Instância case n° 4/2001, printed in Boletim Oficial da Região Administrativa Especial de Macau, 1st series, number 32 of 2001, 924 at 938), online: Macau SAR Courts Website <images.io.gov.mo/bo/i/2001/32/out-1-32-1-2001.pdf> [translated by author] [TUI 2001].

⁹³ Ewoud Hondius, “General Report” in Hondius, *supra* note 22, 1 at 19-23.

policies adopted with those special procedures at the top of the judiciary are consistently enforced throughout the court system.⁹⁴

Changes in interpretation of statutory law are possible in Macau,⁹⁵ but they would probably result from a policy input rather than a purely legal re-elaboration of legal rules. The absence of the *stare decisis* principle made it much easier for the Macanese courts to smoothly implement policies and legal doctrines consistent with the new political environment after the handover to China. Besides showing a low degree of judicial activism, the courts of Macau can still intervene at a micro level if the political input they receive so warrants, and offer far more flexibility than those of Hong Kong. In fact, the *Basic Law* of Macau has never yet required an interpretation by the NPCSC.

In a case not very different from Hong Kong's *Ng Ka Ling*, the Court of Appeal in Macau enforced a piece of restrictive Macanese legislation without any need to officially ask Beijing for assistance in interpreting the *Basic Law* because pre-handover doctrines and precedents did not bind the Macanese court.⁹⁶ The court simply decided the case following a legal reasoning consistent with the government policy of denying the spouse of a foreign authorized resident the right to reside in the territory.⁹⁷

B. General Differences Between the Two SARs

Had they adopted a more Western stance, the Macanese courts could have declared the relevant legislation unconstitutional or invalid in the above-mentioned case, as the Hong Kong CFA had done in 1999. The fact that it did not do so is not merely due to the absence of the principle of *stare decisis*. Even a superficial general observation of both SARs reveals how Hong Kong has a more independent judiciary, legal profession, and media system.⁹⁸ Its political and legal environment is firmer in protecting

⁹⁴ These mechanisms are described in Castellucci, "Precedent", *supra* note 22.

⁹⁵ It is remarkable how the Macanese judge quoted in TUI 2001 (*supra* note 92) put effort in combining in a single, apparently innocent, phrase two rather opposing principles: court decisions are not binding and can be departed from in subsequent cases; and the one that the courts are however, "at principles' level", no law-makers—thus being unable to actively promote developments in the law. In fact, providing a justification and legitimizing the possibility for the courts to behave more or less rigidly or flexibly—in fact discretionally ("without the court being obliged to justify" at 938)—according to the needs of specific cases.

⁹⁶ *Ibid.*

⁹⁷ Tribunal de Segunda Instância case n° 82/2006, online: Macau SAR Courts Website <www.court.gov.mo/pdf/TSI/TSI-A-82-2006-VP.pdf>.

⁹⁸ See e.g. Sonny Lo Shiu-Hing, "The Politics of Article 23 Consultations in Macau", online: The Hong Kong Democratic Foundation <<http://www.hkdf.org>>.

individual rights vis-à-vis public interests. Hong Kong also has a larger critical economic mass, a strong economy based on Western ideas, and a higher attachment to Western liberal values in both its economy and society. All this makes Hong Kong a less likely place for social, legal, and political experiments with a socialist or communitarian flavour. To some extent, Hong Kong remains able to withstand political pressure from the Mainland. This ability generates complex political dynamics and occasional tension.

Compared to Hong Kong, Macau has a relatively small local economy with related local laws and currency. Its large gambling economy is operated on an offshore mode, so to speak, by a mostly non-Macanese elite. The territory's economy is largely dependent on China, which can decide whether to allow the Macanese economy to soar, or to be strangled, by a simple change in its visa-issuing policy to Mainlanders travelling for leisure.

Macau's main business operations and large Macau-related economic or financial transactions are often negotiated, governed, litigated, and arbitrated outside the territory. These activities occur especially in Hong Kong, using its language, law, courts, arbitral institutions, and currency.⁹⁹

Compared to Hong Kong, Macau generally offers less resistance to the changes required by its reversion to the PRC. It offers a more homogeneous society with deep Chinese roots, smaller bargaining power, and greater legal flexibility vis-à-vis new governmental policies, whether introduced through legislation, administration, or the judiciary. It also offers a legal system more apt, in its language and technicalities, to introduce and enforce more communitarian ideas. This aptness is also confirmed by the technical and historical fact that European socialist countries' legal systems developed well within, or as a ramification of, the civil law tradition, with ancient relations to the Roman and Byzantine tradition and especially influenced, more recently, by the Pandectist legal thought.¹⁰⁰

As a result, Macau is more likely to become a laboratory for several issues related to the legal, political, and economic transition of *both* SARs: a first, convenient bridgehead for later, "soft" infiltration or superimposition

⁹⁹ The Macau Pataca is nowadays a purely local currency, not very welcome anymore even for retail commerce in the bordering Mainland city of Zhuhai—let alone in Hong Kong or the rest of the world where it is almost unknown and not converted. Most significantly, the Pataca is not even usable for gambling in Macanese casinos, where the Hong Kong dollar is the preferred currency.

¹⁰⁰ Antonio Gambaro & Rodolfo Sacco, *Sistemi giuridici comparati* (Turin: UTET, 1996) at 411-60; Gianmaria Ajani, *Diritto dell'Europa orientale* (Turin: UTET, 1996) ch 4.

of Chinese values in Hong Kong that would be too controversial to be introduced there abruptly.

C. Article 23 of the Basic Laws

A recent and important example of that role of Macau is given by legislation on national security. This area falls within the competence of each SAR, according to article 23 of their basic laws. Article 23 was introduced in the basic laws as part of the central government policy in reaction to the 1989 Tiananmen events to prevent the two SARs from becoming possible safe bases for activists of all sorts.¹⁰¹ Since the handover, Hong Kong has avoided enacting such a law because part of the public fears it could become a tool for restricting civil and political liberties. Considering the Chinese approach to security and criminal laws, which feature a degree of vagueness in their definitions of crimes, many in the SAR consider the latitude to prosecute that this gives the government to be unacceptable.¹⁰² Political debate related to a bill on national security law in Hong Kong culminated during 2003 in mass rallies and in the subsequent, and possibly temporary, abandonment of the idea.¹⁰³

More recently, after similar debates to those of Hong Kong in 2009, Macau passed a national security law under article 23 of its *Basic Law*.¹⁰⁴ A curious border incident followed.¹⁰⁵ Macau was praised by the govern-

¹⁰¹ Hualing Fu, "The National Security Factor: Putting Article 23 of the Basic Law in Perspective" in Steve Tsang, ed, *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong: Hong Kong University Press, 2001) 73.

¹⁰² *Ibid* at 76.

¹⁰³ On the Hong Kong discourse on human rights, national security, and the implementation of article 23 in general, see Fu Hualing, Carol J Petersen & Simon NM Young, eds, *National Security and Fundamental Rights: Hong Kong's Article 23 Under Scrutiny* (Hong Kong: Hong Kong University Press, 2005); Simon NM Young, ed, *Hong Kong Basic Law Bibliography* (Hong Kong: Hong Kong Law Journal, 2006); Johannes MM Chan, *Hong Kong Human Rights Bibliography* (Hong Kong: Hong Kong Law Journal, 2006).

¹⁰⁴ There is no literature yet on the promulgated Macanese law. Very interesting insights on the legislative process are given in a report on the draft law prepared for the Macau government during the public consultation period towards the end of 2008: Jorge Godinho, "The Regulation of Article 23 of the Macao Basic Law: A Commentary on the Draft Law on Public Security" (draft version 2, 28 November 2008), online: Social Science Research Network <<http://ssrn.com/author=71317>>. According to this report the Macanese law is a piece of legislation designed at least in part to send a message of moderation to the public (*ibid* at 21), with less restrictive provisions than the ones originally devised in the Hong Kong proposals of some years ago, especially on the issue of liberty of associations to operate in the territory (*ibid* at 19).

¹⁰⁵ This incident, which occurred in March 2009, immediately after the entry into force of the Macanese law, involved a prominent Hong Kong academic who had publicly ex-

ment of the PRC at the highest possible level for the enactment of this piece of legislation. President Hu Jintao delivered a clear message of praise that was probably a not-so-oblique message directed at Hong Kong at least as much as it was directed at Macau. The occasion was President Hu's speech on the tenth anniversary of the Macau handover and foundation of the Macau SAR:

First of all, it is imperative to have a full and correct understanding and implementation of the "one country, two systems" principle, [Hu] said, noting that the key is to realize the most extensive unity under the banner of loving the motherland and loving Macao.

Hu noted that "one country, two systems" is a complete concept, with "one country" closely linked with "two system."

On the one hand, the existing social and economic system and the way of life in Macao must be maintained, and on the other hand, the sovereignty, territorial integrity and security of the country must be safeguarded, and meanwhile, the socialist system practice in the main body of the country must be respected, the president noted.

Hu said that it is imperative to safeguard the high degree of autonomy enjoyed by the Macao SAR and fully protect the master status of the Macao compatriots, but it is also imperative to respect the power endowed upon the central government by laws, and to firmly oppose any external forces in their interference in Macao's affairs.

Early this year, the legislation of Article 23 of the Basic Law of the Macao SAR passed smoothly, a move Hu said fully reflects the strong sense of responsibility of the Government, Legislative Assembly and people of all circles of the Macao SAR to safeguard national security and interests.

"The move also provides a strong guarantee for Macao's long-term stability," said the president.

"As long as the compatriots of Macao unite under the banner of loving the motherland and loving Macao, they will be able to lay a solid political foundation for Macao's long-term prosperity and stability," said Hu.¹⁰⁶

The message is indeed very clear. Some political commentators think that Hong Kong is now strongly expected to follow suit.¹⁰⁷

pressed concerns in 2002 and 2003 about the Hong Kong draft article 23. Seeking to visit Macau to participate in activities related to his work, he was denied access at the border.

¹⁰⁶ Xinhua, "President Hu: Great Motherland Always a Strong Backing for HK, Macao" *Xinhua* (20 December 2009), online: Xinhuanet <<http://www.xinhuanet.com/english>>.

¹⁰⁷ "Some deny any such possible influence of Macau developments on Hong Kong, considering that the two SARs are totally different, but this seems too simplistic a claim: the Macau precedent may, at least, be a factor to be considered or that cannot be ignored

Introducing critical “hard” reforms in Macau allows an assessment of their impact. It also turns them into political precedents for subsequent reforms in Hong Kong as a part of a “softer” strategy for the latter SAR. China’s soaring economy, the growing economic flows between the PRC and the SARs within the framework of the CEPA, and the integration of local economies in the Pearl River Delta Region will probably do the rest, making Hong Kong’s Chinese soul emerge and prevail, perhaps faster than many would expect.

D. Legal Education in Macau

More evidence of a softly managed convergence of the Macanese legal system towards the Chinese one is available. A significant occurrence after the handover was the introduction in Macau of law degrees in Mainland Chinese law. These degrees are issued locally and have, since 2006-2007, produced a number of graduates who hold positions in the Macau civil service that were previously reserved for holders of degrees in Portuguese or Macanese law.

A problem emerged when Chinese Law graduates started applying to the local bar. The bar requires a law degree issued by the University of Macau or a degree recognized in Macau.¹⁰⁸ The holder of a different degree was required to attend a one-year adaptation course in Macanese law and then pass an exam administered by the Macau Lawyers’ Association, which most failed, before being able to proceed with training and eventually try the bar exam.

The rule requiring a law degree “issued in Macau” has been interpreted literally by applicants as allowing the holder of a law degree *issued* in Macau to join the bar as trainees. Such applicants do not have to attend the one-year course of adaptation to local law and then to undergo its final exam administered by the Macau Lawyers’ Association. The government

when the time arrives for a second attempt to pass legislation in Hong Kong”: Godinho, *supra* note 104 at 4. See also Lo Shiu-hing, *supra* note 98. Several articles have also appeared on the media in relation to the promulgation of the Macau law: see e.g., the report from Hong Kong-based journalist Vaudine England, “Macau Law a ‘Bad Example’ for Hong Kong” *BBC News* (3 March 2009), online: [BBC News <http://news.bbc.co.uk>](http://news.bbc.co.uk).

¹⁰⁸ *Regulamento do Acesso à Advocacia [Regulation on Access to Advocacy]* (Macao), Official Bulletin, 2d Series, No 50/1999, art 4(1)(a), available online: <http://bo.io.gov.mo/bo/ii/99/50/regul01.asp>.

of the region has supported this interpretation “to avoid discrimination”.¹⁰⁹

This literal and geographic meaning given by the government to the words “issued in Macau”, irrespective of any systemic or contextual interpretation, encountered strong opposition in the local bar, which was still dominated by Portuguese and Portuguese-trained lawyers. One trainee, having failed the adaptation course’s final exam, sued the Macau Lawyers’ Association in court to have his degree recognized as equivalent to a Macau law degree. No Macau lawyer would take his defence, and he had to apply to have counsel appointed *ex officio*. The case is still pending. The solution, meanwhile, has been that the adaptation course’s final exam has been transformed into a mandatory exam for being admitted to the training for all graduates, including those holding a degree in Macau law. Holders of Macau law degrees don’t need to take the adaptation course, but along with Chinese law and other law graduates they do have to pass the exam.¹¹⁰

E. Cultural Changes

The legal community in Macau is transforming from being characterized by a strong Portuguese legal presence towards a more Chinese-influenced body of judges, lawyers, and government officials. There is pressure in Macau—probably based on the cultural and economic factors already described—to diminish the use of Portuguese, which is spoken by less than 3% of the local population, as the working language for business and government in favour of Chinese and English. These two languages happen to be the two official languages of Hong Kong, and the latter is increasingly spoken in Macau.¹¹¹

This transformation is significant for our discourse. The importance of the use of the original legal languages of the “mixing” legal traditions, for a mixed environment to exist and survive, has been stressed by several

¹⁰⁹ Details pertaining to this case, which was quite sensitive in Macau, are not available in any published source. The details provided above were obtained from personal conversations I engaged in with members of the local legal community.

¹¹⁰ Once again, these details were obtained from personal conversations I engaged in with members of the local legal community as they are not available in any published source.

¹¹¹ Anecdotal elements only can be produced, so far, in support of this statement: it has been reported in town that certain Macanese judges, knowledgeable about Portuguese language, refuse to use it during proceedings. On the other side, English seems to be used sometimes in the city courts. It is interesting to observe, however, how an official report of a Portuguese scholar to the Macanese government has not been written in Portuguese (like Chinese, an official language of the Macau SAR) but in English: Godinho, *supra* note 104.

mixed jurisdictions scholars.¹¹² In fact, elements of common law and Hong Kong law increasingly infiltrate local Macau business practices and legal education.¹¹³

These developments correspond, at least at an initial stage, to another pattern identified by Palmer concerning the importance of the “dominant economy” in determining the adoption of economic and business laws in a “mixed” context.¹¹⁴

As graduates of both Macanese-Portuguese and Chinese backgrounds become increasingly formally equalized, it will become more obvious that the Macau legal system is hybridizing, with its law importing elements from Mainland law, mostly on the institutional side, and from Hong Kong law, in relation to the business side. It will also reflect the career interests of the students’ community and the diminutive political and economic weight of Macau vis-à-vis the Mainland and Hong Kong. Some kind of hybrid “greater Chinese” national law, as contrasted with the specific law of the SAR, may ultimately emerge as the subject of higher education in Macau—as it happened *mutatis mutandis* with US universities in the different states and jurisdictions—and develop as both cause and effect of legal hybridization.

F. The Administrative Formant

Legal convergence is also a product of administrative practices, such as when directives issued by the central government are directly enforced in the SARs as binding rules, instead of allowing Macau to produce locally elaborated by-rules that enforce local laws.¹¹⁵ This practice corresponds to

¹¹² Palmer, “Introduction”, *supra* note 9 at 78; William Tetley, “Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified)” Tetley’s Maritime & Admiralty Law at 49-50, online: McGill University Faculty of Law <<http://www.mcgill.ca/files/maritimelaw/mixedjur.pdf>> [Tetley, “Mixed Jurisdictions”] (also appearing in (1999) 4:3 Unif L Rev ns 591 & 4:4 Unif L Rev ns 877; (2000) 60 La L Rev 677; (2003) 3 Private Law Review 99 (in Chinese)) (also citing Esin Orücü, “Mixed and Mixing Systems: A Conceptual Search” in Esin Orücü, Elspeth Attwooll & Sean Coyle, eds, *Studies in Legal Systems: Mixed and Mixing* (The Hague: Kluwer Law International, 1996) 335 at 349-50).

¹¹³ It happened to me in 2003 when I was requested by the Faculty of Business of the University of Macau to prepare syllabi for courses on (Macanese) commercial law based on an American handbook of business law.

¹¹⁴ Palmer, “Introduction”, *supra* note 9 at 78.

¹¹⁵ See e.g. Esclarecimentos do Comité Permanente da Assembleia Popular Nacional sobre Algumas Questões relativas à Aplicação da Lei da Nacionalidade da Republica Popular da China na Região Administrativa Especial de Macau [Clarifications of the Standing Committee of the National People’s Congress in Relation to the Application of the Nationality Law of the People’s Republic of China in the Macau Special Administrative

another Chinese model, in contrast to the Western approach, that features vertical political and government procedures that are more dependent on hierarchy than they are required to be according to the law alone.

The PRC is a huge, diverse, and multi-ethnic country. Its legal system is not monolithic. The central government and the Chinese Communist Party (CCP) are always discharging a general governance role vis-à-vis all different forms of local governments. These include provinces and municipalities under the direct control of the central government; autonomous regions, prefectures, and counties characterized by Regional Ethnic Autonomies (REAs) that imply some degree of legislative autonomy¹¹⁶ (Tibet and Xingjiang being the two better known examples of regions of that kind); and Special Economic Zones (SEZs), where since the late 1970s foreign investment and market mechanisms have been tested with a view to eventual countrywide application.

The Chinese legal system is a macro-tool for improving central authorities' institutional supervision capability¹¹⁷ over a very fragmented and diversified peripheral apparatus of local governments and normative organs.¹¹⁸ The central government's capability is enhanced by the coupled political supervision of the CCP.¹¹⁹ This fragmented administrative environment, balanced by an increasingly effective centralized institutional and political governance, might represent a viable model for managing a rapid, potentially explosive transition. China is moving from an immensely populated orthodox communist country to a socialist one with a soaring market economy that is actively connected to the globalized world. The

Region], 6th Sess, Standing Committee of the 9th NPC, 29 December 1998 (Portuguese translation reprinted in Macau Official Bulletin), 1st Series, No 1/1999 at 392, available online: <<http://bo.io.gov.mo/bo/i/1999/01/aviso05.asp>>. The decision is a political document that also has a direct normative function, directly and expressly referred to by the Macanese government in the subsequent Regulamento para a Emissão dos Documentos de Viagem da Região Administrativa Especial de Macau [Regulation on the Issuing of Travel Documents of Macau SAR] (Official Bulletin, 1st Series, No 1/1999 at 276, available online: <<http://bo.io.gov.mo/bo/i/1999/01/regadm09.asp>>) issued on 20 December 1999—the day after the handover of the territory from Portugal to China—in order to define the status of Chinese citizens. Article 14.2 of abovementioned regulation reads: “Chinese citizens ... are those possessing Chinese nationality pursuant to the Law on Nationality of the People’s Republic of China and to the *Esclarecimentos* [NPCSC Clarifications]” [translated by author].

¹¹⁶ See Chunli Xia, “Autonomous Legislative Power in Regional Ethnic Autonomy of the People’s Republic of China: The Law and the Reality” in Oliveira & Cardinal, *supra* note 20, 541.

¹¹⁷ See Lok Wai Kin, “The Relationship Between Central and Local Governments Under the Unitary State System of China” in Oliveira & Cardinal, *supra* note 20, 527.

¹¹⁸ See e.g. Xia, *supra* note 116 at 543-54.

¹¹⁹ *Ibid* at 554-61.

approach described above allows it to preserve the unity and the stability of the country while allowing the gradual introduction of general reforms following local tests that assessed their impact.¹²⁰

The two Chinese SARs just add a new type of territorial partition, with specific administrative and legal features, to the already complex Chinese administrative-legal environment.¹²¹ As the SARs become more and more sinicized, their Western characteristics will likely become less obvious and pre-eminent. These characteristics will be reduced to “peculiar historic conditions” to which special Chinese laws and principles are applied. Their very existence as SARs, meanwhile, allows the Mainland to test and assess the functioning of the OCTS model. The Taiwanese are closely monitoring this process to assess possible modes of relation with the Mainland and to determine their potential degree of autonomy in case of reunification, within an OCTS framework or otherwise.

From the Chinese legal point of view, a SAR is another kind of special normative body lodged within the main body of the general Chinese legal system. Like an SEZ, an REA, or a specific private relation governed by a foreign law according to the rules of private international law, it will be a semi-closed legal environment based on geographic, thematic, ethnic, or personal factors allowed by the general legal system. Its internal logic and rules will be different from the general ones, but will still be subject to the limitations and interventions imposed by the general socialist frame.

VI. Testing the Chinese SARs’ Case against Palmer’s Analytical Grid on “Legal Mixity” and Refining the Grid

Palmer’s three-test grid mentioned above in the introductory chapter—namely the “obvious amount of mixity”, the “critical areas”, and “the

¹²⁰ The model, incidentally, seems to be looked at by North Korea, which in some moments of cautious opening—in the early 1990s, and since late 1990s until around 2003—showed interest towards experimenting with economic and administrative reforms: SEZs and SARs modelled on the homologous Chinese territorial entities have been created. The SARs feature Basic Laws and even (the Sinŭiju SAR) a flag resembling those of the Chinese SARs. The Sinŭiju SAR seems to have been de facto abandoned as an institutional project, while the Kaesŏng and Kŭmgangsan ones still operate, if subject to the ups-and-down of political relations with South Korea—the main investor there. Sources in English are scattered over the internet, including US and South Korean agencies and research entities, as well as unofficial and wiki-format web resources. Combining several web researches, a reasonably accurate online description of current administrative divisions of the Democratic People’s Republic of Korea seems to be available at: “Administrative Divisions of North Korea”, online: eNotes <www.enotes.com/topic/Administrative_divisions_of_North_Korea#Special_Administrative_Regions>.

¹²¹ See generally Lok Wai Kin, *supra* note 117.

subjective element” tests¹²²—provides a useful way to analyze the Chinese SARs situation.

A. The Test for “Obvious Amount”

There is an increasing presence of elements of the Chinese socialist legal tradition in the legal systems and environments of the two SARs. The question is whether the first test, as described by Palmer, namely a test seeking the presence of two different traditions “in obviously relevant amounts,” is relevant. Is this test merely quantitative?

The example of the Chinese SARs suggests that Chinese rules and principles are being introduced there with very little “amount” of formal legal reforms. They have not, as described in the previous sections of this essay, been instituted through a variety of means. Principles, interpretations, and rules have started seeping into the system, occupying key junctions and coming to discharge systemic functions. This process occurred without producing an immediately detectable presence of Chinese law in the SARs, at least not in an “obviously relevant amount”. The two SARs will probably be substantially sinicized before 2047 or 2049, at the end of the transitional period provided for in the joint declarations and basic laws.¹²³ However, a substantial part of the law hailing from the previously dominant tradition will remain relatively unchanged: many or most legal devices will remain valuable as tested and effective tools of governance, at least at the micro level and for most private matters.

It is submitted here that it is also a matter of “ways” and quality of the legal substance being introduced. In combination with this informal process, a few, selective legal reforms in key areas can change the entire system. Hybridity may come not just from mixing or juxtaposing several different technical apparatuses of norms within a single jurisdiction, but also from the superimposition or infiltration of new political, constitutional, institutional, or social frames and values. The process will be like new software in old hardware, or like new ghosts in an old machine. As Twinning pointed out:

- (iv) Diffusion may take place through informal interaction without involving formal adoption or enactment.

¹²² Palmer, “Introduction”, *supra* note 9 at 7-11.

¹²³ See *Sino-British Joint Declaration*, *supra* note 19; see also *Sino-Portuguese Joint Declaration*, *supra* note 19.

- (v) Legal rules and concepts are not the only or even the main objects of diffusion.¹²⁴

In a theoretical extreme, the absence of any formal legislative change may still coexist with the generation of a different legal system if new ways to interpret, apply, and enforce the law are introduced in a perfectly untouched legal machinery. The entire concept of “rule of law” may change, in fact, based on the different degrees of “hardness” or “softness” a system may recognize in its set of formal legal rules, allowing more heterogeneous influences and normative elements to play a role in the governance process. This refinement in the first test implies a closer connection of the first test for “obvious amounts” with the other tests, the one for ‘critical areas’ of the law occupied by the dominant system, and the one for the ‘subjective element’ in the legal community.

B. The Test of “Critical” Features

The second test, about the introduction of ‘critical’ elements of the superimposing tradition over the previous one, can also be generalized and refined. “Critical” features are not necessarily limited to those identified by Palmer for common-law-on-civil-law mixes, related to the judiciary, its organization, and the value attached to its products. “Critical features” of the dominant tradition, and thus of the resulting hybrid, may in fact consist of a relatively small amount of formal law, or may just consist of interpretive principles, political-institutional-administrative devices, and other contextual elements. These elements may initially be almost invisible in enactments and law-in-the-books.¹²⁵

In a Chinese-on-Western superimposition, the Chinese tradition based on the prevalence of the “rule of politics”¹²⁶ plays a critical reforming role.

¹²⁴ These are two of the conclusive “warnings” of William Twining, “Diffusion of Law: A Global Perspective” (2004) 49 *J Legal Pluralism* 1 at 34 [Twining, “Diffusion”]. A not-too-distant concept of “transfusión” has been adopted as far back as the 1960s by Roman law scholar Augustín Díaz Biale, in Argentina, to describe how Roman Law concepts and principles have seeped into Latin American codified private laws, creating a legal continuum between Roman law, medieval *ius commune* and those modern legal systems; a romanist approach thus becoming the preferred method for interpretation of law there, instead of those hailing from German and European positivist doctrines of the XIX century; Augustín Díaz Biale, “La Recepción del Derecho Romano en América Hispana” (1960) 99 *La Ley*; “La transfusión du droit romain” (1971) *Revue Internationale des Droit de l’Antiquité* 421; “La transfusión del Derecho Romano en la Argentina” (1978) 5 *Studi Saresi* (Diritto Romano, zcodificazioni e unità del sistema giuridico latinoamericano) at XVI-XIX.

¹²⁵ Twining, “Diffusion” *supra* note 124.

¹²⁶ See Ugo Mattei, “Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems”, (1997) 45:1 *Am J Comp L* 5 (previously published in Italian: “Verso un tripar-

Politics, institutions, administration, and public law will all be important—in that order. The infiltration of new ideas into old legal machinery through political, administrative, economic, and cultural dynamics is the apparent, current strategy of China in Hong Kong and Macau. The “mixing” process is leaving the legal machinery apparently unchanged, or almost so.¹²⁷ Hong Kong could someday see a common law apparatus or machinery enforcing socialist substantive principles, using *stare decisis* as a vehicle to perpetuate their judicial enforcement.

A lesson learned from the data analyzed above is how the dominant legal tradition—often coupled with a related political force—superimposes *its* systemic frame and *its* “critical” elements (which are not necessarily “legal” in a strictly modern Western sense), using *its* peculiar tools, on another tradition. The different developments in the two SARs, however, suggest that the specific features of each receiving system also play a role in determining the superimposition strategies, and the hybrid outcomes of the process.

Enlarging the second test to include all possible legal and non-legal “critical elements” allows it to be applied to the Chinese SARs’ legal changes. It can also be used to explain a number of other historical superimpositions:

1) Palmer found that common-on-civil-law superimpositions have always featured conspicuous legal and institutional reforms in relation to the role of the judiciary. However, a mixed jurisdiction with a reversed civil-on-common-law pattern such as the one in the common law provinces of Cameroon displays a superimposition carried out mostly through constitutional changes, legislative enactments, and governmental institutions. Reforms of the court system do not seem to have played a major role in the Cameroonian superimposition strategy.¹²⁸ The country’s Supreme

tizione non eurocentrica dei sistemi giuridici” in *Scintillae Iuris — Studi in onore di Gino Gorla* (Milan: Giuffrè, 1994)). The author proposes a (“non-eurocentric”) classification of the world’s legal systems based on three main societal models: the one based on the “rule of law”, the one based on the “rule of tradition”, and the one based on the “rule of politics”.

¹²⁷ These conclusions, with an express reference to politics only, are shared by Ghai, “Intersection”, *supra* note 22 at 401-05. Interestingly, the two published versions of this article feature slight differences: the dubitative final conclusion of the author regarding the Chinese system’s triumph over Hong Kong common law in the 2007 version (*ibid* at 405) has been replaced by a purely affirmative one in the 2009 version (Oliveira & Cardinal, *supra* note 20 at 49).

¹²⁸ On Cameroon’s specific “mixity”, see Stella Cziment, “Cameroon: A Mixed Jurisdiction? A Critical Examination of Cameroon’s Legal System Through the Perspective of the Nine Interim Conclusions of *Worldwide Mixed Jurisdictions*” (2009) 2:2 Civil Law Commentaries 1, online: Tulane University Law School <<http://www.law.tulane.edu>>.

Court operates according to the standards of its continental tradition. However, little attention is paid at the central institutional level to local courts of the common law provinces, which largely continue to operate in a traditional common law way within a civil law country. It seems to be a weak superimposition so far, and has not been very successful in bringing about much legal integration between the two parts of the country.¹²⁹ In an African context, perhaps, the unifying forces and the related strategies and tools are different. Significantly, an important role is played by politics in arbitrating the interests of the two separate communities.¹³⁰

2) Modern concepts of law emerged at the end of the eighteenth century and were superimposed over the previous state of legal affairs in the United States and in France. In both cases, the most significant superimposing role was played by the elements critical in the relevant dominant ideology (judicial review in the United States, legislation in France).¹³¹ It should be clear that the continental *ius commune* and the continental post-Napoleonic civil law represent two very different models and historical legal experiences. The codification process on the European continent amounted, in fact, to a superimposition by legislative means of a new legal ideology, and related systems, over the pre-existing legal environment based on the *ius commune*. This strategy worked well in most continental jurisdictions. It has not, however, happened at all in places such as Andorra and San Marino.¹³² In Latin America, the *ius commune* substratum resisted and survived the superimposition process to some extent, resulting in what we could perhaps label as “mixed *ius commune*-codified” jurisdictions—or at least jurisdictions where we can identify *ius commune* pockets in those codified legal systems. Scholarly law still plays an original, normative role, and courts exercise an inherent jurisdictional power, at least in some areas of the law.¹³³ To add complexity, many of those Lat-

¹²⁹ *Ibid*, especially at 13-17, 23-25, 27-28. However, a two-year period of training, mostly based on civil law, in the country's judiciary school in the capital city Yaoundé has been introduced since 1972, for both civil law and common law judges before being appointed to the bench (*ibid* at 15).

¹³⁰ *Ibid* at 11.

¹³¹ Ghai, “Intersection”, *supra* note 22 at 366-67.

¹³² Aquilino Iglesia Ferreirós, ed, *Actes del I simposi jurídic Principat d'Andorra/ República de San Marino. El “ius commune” com a dret vigent: l'experiència judicial d'Andorra i San Marino* (Andorra: Institut d'Estudis Andorrans, 1994).

¹³³ See Ignazio Castellucci, *Sistema jurídico latinoamericano* (Turin: Giappichelli, 2011) [Castellucci, *Sistema jurídico latinoamericano*].

in American jurisdictions feature federal, constitutional, and institutional models heavily influenced by those of the United States.¹³⁴

3) In many other contexts—too many, in fact, to elaborate upon in this paper—the superimposition seems to have taken place mostly through whatever element was paramount in the dominant tradition. This element was not necessarily the court system and case law. Scholarship was one of the main factors of the expansion of Roman law in the provinces of the Roman Empire, the later expansion of civil law developed from Roman texts and canon law in medieval Europe, and their eventual mixing into one single legal system of *ius commune*.¹³⁵ The economy and business practices combined with the scholarly law of *ius commune* to form the medieval *lex mercatoria*. Something similar might be happening today with transnational business law.¹³⁶ Religious-legal scholarship seems to have played an important role in the original expansion of Islam and *shari'a*, as well as in the recent Islamicization of some modern legal systems, including Afghanistan under the Taliban rule and Iran.¹³⁷ Confucian culture and doctrines and the Chinese administrative model were the main elements of the Chinese imperial model transplanted to Korea, Japan, Vietnam, and other Asian countries during the era roughly corresponding to the Western middle ages.¹³⁸ Political doctrines and, especially, political “ways” within a socialist legal environment today characterize, as we have seen, the evolution and expansion of the Chinese model into the SARs, Vietnam, and North Korea.

4) Customary laws, often infused with religious elements, can also be the dominant element driving legal change, obliterating previously existing statutory laws and producing new, legal hybrid products. This element dominates in places where competing institutions are weak, such as

¹³⁴ See Jorge L Esquirol, “Writing the Law of Latin American” (2009) 40:3 Geo Wash Int’l L Rev 693.

¹³⁵ Francesco Calasso, *Medio evo del diritto* (Milan: Giuffrè, 1954) at 391-407.

¹³⁶ See Michael Joachim Bonell, *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts*, 3d ed (Ardsey: Transnational, 2005); see also Francesco Galgano, *Lex mercatoria*, 5th ed (Bologna: Il Mulino, 2010).

¹³⁷ See Massimo Papa, *Afghanistan: tradizione giuridica e ricostruzione dell’ordinamento tra shari’a, consuetudini e diritto statale* (Turin: Giappichelli, 2006) [Papa, *Afghanistan*]; see also Michael Axworthy, *Empire of the Mind: A History of Iran* (London: Hurst, 2007) at 265-98.

¹³⁸ Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (Athens, Ga: University of Georgia Press, 1996); Chongko Choi, *East Asian Jurisprudence* (Seoul: National University Press, 2009); Chun Shin-yong, ed, *Legal System of Korea* (Seoul: Si-sa-yong-o-sa, 1982); Yosiyuki Noda, *Introduction au droit japonais* (Paris: Dalloz, 1966); Michael B Hooker, *A Concise Legal History of South-East Asia* (Oxford: Clarendon, 1978) at 73 ff; Glenn, *supra* note 11, ch 9.

in post-Taliban rural areas of Afghanistan—¹³⁹ where institutional competitors are explicitly withdrawing, as it happened for family law governing Muslim communities in the western and southern lowlands of Eritrea during the War of Independence and after achieving independence from Ethiopia;¹⁴⁰ and when competitors are altogether absent, as in stateless areas of Somalia.¹⁴¹

The crucial elements, whether strictly legal in the Western sense or not, of the relevant dominant social-legal tradition invariably seem to be the ones carrying out a significant part of the legal change. The elements achieve this change by interacting with the receiving environment and its political, legal, social, and economic features, and by adapting their strategies accordingly.

C. The Test of Subjective Perception of “Mixity”

The third test concerning the subjective perception of “mixity” is important to the discussion of the PRC and its SARs. The new political-institutional setting; the basic laws and their interpretive mechanisms; economic and cultural changes; a more Chinese legal training of lawyers and civil servants; government-to-government immediately enforceable administrative directives from Beijing: all are obvious avenues for the Mainland to alter the local legal environment and superimpose a different set of values on the system.

From the subjective point of view, for the purposes of our “mixity test”, all mentioned avenues amount, in Glenn’s terms,¹⁴² to powerful tradition-changing or tradition-generating moves from policymakers that add to the more general cultural changes in both SARs towards a more Chinese societal model.

¹³⁹ See Papa, *Afghanistan*, *supra* note 137.

¹⁴⁰ Eritrean People’s Liberation Front’s Proclamation n 2 of 1991, enforcing basic legal reforms of pre-existing Ethiopian laws in the liberated areas of Eritrea, still in force today, prescribes that state laws should not apply to family and inheritance relations of Muslim Eritrean citizens—with no further detail or explanation. This left Islamic and local customary rules to become the only existing ones in the mentioned domains of law. See Ignazio Castellucci, “Eclectic Legal Reforms in Africa and the Challenges of Reality: The Case of Eritrean Family Law”, in CC Nweze, ed, *Contemporary Issues of International and Comparative Law: Essays in Honour of Christian Nwachukwu Okeke* (Lake Mary, FL: Vandeplass, 2009) 599 at 620 ff.

¹⁴¹ I entertained endless conversations on Africa, stateless Somalia and on the little-known, little-recognized Somaliland state with African law scholar Salvatore Mancuso. See Salvatore Mancuso, “Short Notes on Legal Pluralism(s) in Somaliland”, Proceedings of the Juris Diversitas Conference (Paper delivered at the Swiss Institute of Comparative Law, Lausanne, October 2011) [forthcoming].

¹⁴² Glenn, *supra* note 11, ch 1, 2.

The distance between Hong Kong's legal system and the Mainland's is certainly greater than that between Macau's and the Mainland's due to the specific traditions and circumstances of both SARs. The higher resistance of the Hong Kong community to the infiltration of ideas from the Mainland makes its process of legal hybridization slower than in Macau. However, cultural changes in the legal environment are also taking place in Hong Kong and within its legal community, which is no longer, or not solely, one of old times' English barristers. As the prestige of China increases along with its political power in the region, new generations of proudly Chinese judges, lawyers, and jurists will increasingly populate Hong Kong courts, universities, and government offices.

An early indication of this shift might be how the rigid stance initially shown by the CFA in the *Ng Ka Ling* case softened greatly, following the first constitutional crisis, the outcome of that case.¹⁴³ A full recognition by the CFA of the existing superimposition was made twelve years later in the *Congo* (CFA final decision),¹⁴⁴ as expected by the government, by many in the legal community, and by other observers. The CFA did not decide the *Congo* case unanimously. However, a majority vote in the bench is certainly a "common law way" to solve the issue, with a legalized solution becoming a hard rule through stare decisis. A Chinese law principle disputed in Hong Kong was thus introduced in the system through a common law mechanism.

Another interesting piece of evidence of the changing perceptions and subjective stances in the legal community is given by a 2000 decision of the Hong Kong CFA. In that decision, the court remarked very strongly about the "one China principle" and how Taiwanese courts are "non-recognized" and "under the *de facto* albeit unlawful control of a usurper government."¹⁴⁵ The case was a simple request of *exequatur* of a Taiwanese bankruptcy order, which the CFA ruled to be recognized as not being "inimical to the sovereign's interests or otherwise contrary to public policy."¹⁴⁶ Those strong remarks—which attracted bitter Taiwanese comments¹⁴⁷—were perhaps unnecessary from a purely legal point of view.

¹⁴³ *Ng ka Ling CFA clarification*, *supra* note 37.

¹⁴⁴ *Supra* note 56.

¹⁴⁵ *Chen Li Hung v Ting Lei Miao* (1999), [2000] 1 HKLRD 252 at 263, [2000] 1 HKC 461 (CFA).

¹⁴⁶ *Ibid.* Adding, however, that "it should be clearly understood that giving effect to the Taiwanese bankruptcy order does not involve recognizing the usurper regime or courts in Taiwan" (*ibid.*).

¹⁴⁷ Chien-Huei Wu, "Mutual Recognition and Enforcement of Arbitral Awards among Taiwan, China, Hong Kong and Macau: Regulatory Framework and Judicial Development" (2010) 3:1 *Contemporary Asia Arbitration Journal* 65 at 86.

However, they clearly indicate the perception of Hong Kong legal professionals who are increasingly aware that they are operating in a common law legal system that is a part of a larger Chinese system.

According to all the elements mentioned, the third “subjective element” test in Palmer’s grid has certainly been passed.

D. Refinement of Palmer’s Grid

Palmer’s grid is useful in guiding the assessment of the growing “mixity” of the SARs’ legal environments. At the end of this analysis, however, it is the opinion of this author that the grid can be refined to better suit research on legal hybridity beyond the “classic” mixed jurisdictions.

Of the first two tests (“obvious amount” and “critical features”), the latter only seems to be related to a crucial element. A positive answer to it may still qualify a situation as “hybrid”, provided the third “subjective element” test—certainly confirmed in its fundamental importance—is satisfied. On the other hand, the fulfillment of any purely quantitative condition is hardly imaginable without mechanisms allowing the introduction of new legal substance in the system. Additionally, the scope of observation for the purposes of the “critical features” test should be enlarged to include non-legal elements.

I propose the following possible reading for this tool, so revised: Once a relevant community of “believers” in a new, non-monolithic legal environment comes into existence in a given jurisdiction, whatever the reason, the presence of appropriate devices at critical junctions of the system is necessary and sufficient to produce hybridity. The relevant governing authorities or legal community may then activate said devices any time they find it convenient, abandoning previous mechanisms and legal sources. The “subjective element” and “critical features”, coming into existence in either order, seem to be two conditions necessary to start a process of hybridization. It may then take time before a quantitative equilibrium between two different, sizable parts of the system becomes visible, if it ever does, resulting in a Palmerian type of “mixity” (i.e. only when the superimposition is neither total, nor totally rejected, nor of a type producing diffused hybridity rather than two discrete areas of the law with different characteristics). The “obvious amount” test would just be a gauge, then, providing information on how long or how successful the superimposition has been, and thus how far the hybridization has progressed.

VII. Testing the Tools for Research on “Mixity” Against China: More Lessons to be Drawn

A. *Modern Mixed Jurisdictions*

“Classical mixed jurisdictions studies” have largely been confined to studying systems with historical superimpositions that occurred decades or even centuries ago. These systems were already firmly established since the inception of “mixity” studies. As a result, the importance attached to the different “mixing” processes that occurred in those “mixed” jurisdictions was perhaps smaller than deserved. The focus has instead been on the actual “mixed” features of those jurisdictions and the common elements that set them apart from both civil law and common law systems and place them in the middle of the two related traditions to form a special group: a “family”, if we so like.

In the Chinese developments described above, the process of mixing can be observed “live”. This process should become an extremely interesting and valuable field of study for scholars of mixed jurisdictions, similar to how an ongoing eruption observed live should be of much interest for a volcanologist instead of, or in addition to, cutting cross-sections or extracting core samples to observe the cold, consolidated, and stratified lavic materials of events that occurred long ago.

The above analysis might suggest that even for the “classical” mixed jurisdictions, political action and policy measures, whether transformed into legal enactments or not, and other “soft” methods could have played a significant role during the “mixing” phase that is no longer as evident to legal scholars today. Even if the pillars of the resulting superimposition have invariably been, in the event, the ones identified by Palmer (public laws and institutions, framework concepts, and the judiciary), the political decisions made, policy actions implemented, and pressures exercised by the dominant power to obtain the “mixed” environment—including the growth of the “subjective element”—interacted with the relevant context. These “soft” elements have certainly differed according to the different contexts. These differences certainly contributed to shape the mixed systems that later emerged.¹⁴⁸

“Classical” mixed systems have not been mixed since the Big Bang. “Mixity status” was not attained one day through the mere superimposition of statutes and legal institutions, like turning a switch. Some tension,

¹⁴⁸ This has also been noted by Alain Levasseur, “Two Hundred (200) Years of Civil Law in English: Louisiana’s Lonely Destiny” in Cashin Ritaine, Donlan & Sychold, *supra* note 5, 35 at 35-36.

some kind of struggle, took place. For example, in Québec, William Tetley described the reaction after 1763 of the civil law community receiving the common law superimposition as a boycott¹⁴⁹ (see also Louisiana after 1803).¹⁵⁰ Cameroon's "mixed provinces" still seem to display little conversation between their common law tradition and the superimposed civil law institutional frame.¹⁵¹ South Africa and the Philippines have also posed specific problems warranting specific responses during their respective transitions due to local specificities and plural legal environments.¹⁵²

However, "straight" Western legal systems (i.e. the Western modern legal systems excepting the "classical" mixed ones) have also not been monoliths since the Big Bang. Both common law and Roman law/canon law/*ius commune* originated and developed from and through different mixes of legal experiences. Most of the derived legal systems experienced moments of relative hybridity and homogeneity.¹⁵³

Transitional phases could fruitfully be researched to allow a more complete appreciation of the many facets of the resulting legal hybrids, including "classical" mixed systems and also including the many systems now perceived as monolithic.¹⁵⁴ This methodological expansion would likely bring about innovation in substantive knowledge due to the wider consideration given to factors and formants that thus far have not been the focus. The expansion would also put "mixed" studies in a wider historical perspective.¹⁵⁵ This proposal will make the research on legal hybridity much more complex than it has been so far when limited to "classical" mixed jurisdictions. Sense must be made of a wide array of contextual societal data and events, including historical, political, economic, cultural,

¹⁴⁹ John EC Brierley & Roderick A Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Montgomery Publications, 1993) at 15 cited in William Tetley, "Mixed Jurisdictions", *supra* note 112 at 15.

¹⁵⁰ Apparently in a more tranquil way than in Québec: see Levasseur, *supra* note 148 at 37-39.

¹⁵¹ Cziment, *supra* note 128.

¹⁵² Christa Rautenbach, "Deep Legal Pluralism in South Africa: Judicial Accommodations of Non-State Law" (2010) 60 J Legal Pluralism 143; Justin Holbrook, "Legal Hybridity in the Philippines: Lessons in Legal Pluralism from Mindanao and the Sulu Archipelago" (2010) 18:2 Tul J Int'l & Comp L 403.

¹⁵³ Supporting elements and a similar opinion are given by Seán Patrick Donlan, "Remembering: Legal Hybridity and Legal History" (2011) 2:1 Comp L Rev 1, especially the essay's "Conclusion" at 34-35 [Donlan, "Remembering"].

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

and religious events, to assess their impact on the relevant legal environment.¹⁵⁶

The strong or critical elements of the dominant system, as well as those of the one receiving the superimposition, shall be identified in each particular hybridization process, along with their systemic effects, to better appreciate the dynamics of change and the resulting products. Methodologies shall, by necessity, go beyond purely technical-legal methods, and might include the analysis of all formative elements¹⁵⁷ guiding or characterizing the superimposition process. The methodologies will pay greater attention to phenomena of legal pluralism and may even resort to quantitative methods of social sciences.

B. Importing Foreign Legal Models

Another thing we can learn about legal hybridity from observing today's China, with its reforms establishing a market economy and its rapid legal changes, is that hybridity might be the result not of an external superimposition but also of a sovereign choice of importing foreign legal models. Arguably, this happened earlier with Israel, which became mixed at an early stage in its legal history as a state without any superimposition from outside.¹⁵⁸ It could also be the case of the United States, with its broad constitutional provisions, multiple layers of legislation, civil codes, Restatements, the Uniform Commercial Code, and law schools teaching a sort of *ius commune americanum*, even if it is not yet acknowledged by local jurists.¹⁵⁹ Other processes generating hybridity can be identified in intra-national processes of rapprochement among originally separate entities, as is happening in China, as well as in supra-national processes, as is happening in the European Union.

More importantly, it is also possible that the natural rigidity of our categories and minds makes us see "mixture" or "hybridity" where we simply have the ongoing formation of a new system. China and its SARs could simply be seen as a complex entity with multiple, intertwined evolution-

¹⁵⁶ Keeping in mind Twining's analysis of complexity the legal diffusion process, and his final "warnings" about the need to go beyond the research on horizontal transplants of formal elements, to consider multi-directional diffusion and a wider array of societal influences as affecting the process: Twining, "Diffusion", *supra* note 124.

¹⁵⁷ See Sacco, "Legal Formants I", *supra* note 13; Sacco, "Legal Formants II", *supra* note 13.

¹⁵⁸ Palmer, *Third Family*, *supra* note 3 at 448-68.

¹⁵⁹ AT von Mehren, *Law in the United States: A General Comparative View* (Deventer: Kluwer Law and Taxation, 1987) [Mehren, *Law in the US*]; AT von Mehren, *The US Legal System: Between the Common Law and Civil Law Traditions* (Rome: Centro di studi e ricerche di diritto comparato e straniero, 2001).

ary paths, including a large process of legal reforms, with internal cross-fertilization as well as the reception of a variety of different foreign models. Nothing comes from an absolute vacuum; we use what we already know to try to define and describe new things. After all, no jurisdiction has ever produced internally all the products needed for its development.

C. *Subjective Perception*

A key intuition of Palmer would be pushed forward as a result of this proposed approach. “Mixity” would be *very much* about subjective perception, the third test in his grid, in relation to major changes of legal or institutional setting. Tetley’s light remark about a mixed jurisdiction being “a place where debate over the subject takes place” would not seem so paradoxical.¹⁶⁰ Are all systems generally perceived as “mixed” simply systems in transition, like most or all others are or have been? Are “mixed” systems merely depicted at a particular stage of that transition, however slow it might be?

Western legal history is a history of ramifications, interactions, contaminations, and intertwined evolutionary paths. If several Western legal systems have been monolithic at some stage, most of them have also been hybrid at some other stage.¹⁶¹ Continental *ius commune* and the English classical common law had significant historical connections. Long before modern “convergence” between the two main Western legal traditions, the existence of significant common structural and operational elements has been demonstrated, including a common-law-style approach to case law in the work of several continental high courts before the codification era,¹⁶² and the importance of Roman/civil and canon scholarly laws as components of the English common law tradition.¹⁶³

Codified law has been superimposed on *ius commune* in most places on the European continent; common law has been superimposed on continental jurisdictions of *ius commune*, Roman-Dutch law, and codified civil law in different places. But even common law can be identified either as

¹⁶⁰ “Mixed Jurisdictions”, *supra* note 112 at 2; see also Donlan, “An Introduction”, *supra* note 5 at 15-16.

¹⁶¹ Donlan, “Remembering”, *supra* note 153.

¹⁶² See e.g. the several essays collected in Gino Gorla, *Diritto Comparato e Diritto Comune Europeo* (Milan: Giuffr , 1981), especially chapter 20, 540ff. The phenomenon survived the codification era in Latin America: see Castellucci, *Sistema jur dico latinoamericano*, *supra* note 133.

¹⁶³ See e.g. Se n Patrick Donlan, “‘Our laws are as mixed as our language’: Commentaries on the Laws of England and Ireland, 1704-1804” (2008) 12:1 EJCL, online: <<http://www.ejcl.org>>.

the English classical system or as the more recent American one. Some superimposition of the latter model over the former in the early days of the United States' existence cannot be ruled out in objective terms. It is perhaps the idea or perception of continuity that makes American law seem closer to the idea of a common law jurisdiction than to the paradigm of a "mixed" one.¹⁶⁴

Future legal historians may, with hindsight, perceive complex, ramified, and intertwined Western transitions. We can only see—being in the middle of the change—static systems or very slow changes, with moments of faster or acute change identified with superimpositions or additions of new elements. These points of view are different subjective readings of objectively similar situations. The current categorization of "classic" mixes as the "third (Western) family" could simply be due, after all, to the historical accident of a more conspicuous "mixture" of that group of jurisdictions at the specific time of observation by modern comparative law, with its inherent taxonomic urge. This categorization occurred roughly when René David's picture was taken.¹⁶⁵

Might Louisiana and Scotland some day cease to be considered "mixed jurisdictions" except for historical purposes? Could their "mixture" become, in the long term, a purely subjective, distorted perception as they, objectively, become increasingly indistinguishable from their larger national tradition?¹⁶⁶ This possibility assumes, of course, that the latter do not start showing clear and acknowledged elements of "mixture". The only chance of maintaining either an "eternal state of mixture" or an eternal state of monolithism, *mutatis mutandis*, would be if an immutable balance of the systems' components, where "the two traditions are duly respected and kept in equilibrium, so that one does not overshadow and obliterate the other," is achieved.¹⁶⁷ This balance seems to be a difficult exercise in the long term in many or most "mixed systems", especially with relation to their objective features. Most systems will display changes, whether towards monolithism or towards different mixes. It is, perhaps, more likely that a strong "mixed" sentiment or subjective perception within the relevant community will be the element most capable of resisting or counterbalancing objective changes in reality, for some time at least.

¹⁶⁴ Mehren, *Law in the US*, *supra* note 159.

¹⁶⁵ René David, *Les grands systèmes de droit contemporains* (Paris: Dalloz, 1964).

¹⁶⁶ See e.g., in relation to the case of Scots law, Tetley, "Mixed Jurisdictions", *supra* note 112 at 13, citing Robin Evans-Jones, "Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law" (1998) 114 *Law Q Rev* 228.

¹⁶⁷ Tetley, "Mixed Jurisdictions", *supra* note 112 at 3.

D. New Categories

Meanwhile, if comparative science is to remain at the forefront of legal developments, new categories should be developed and tested beyond David's picture, and especially beyond the relevance of the features identified as salient in that picture. Those features are more and more common nowadays in all or almost all Western systems.¹⁶⁸ "Mixity" studies demonstrate how the usual comparative taxonomies have lost much of their utility. Still, David's family pictures continue to rule comparative lawyers from the terminal phase of their lives, if not from their graves. Its continued influence is demonstrated by the difficulties in overcoming the common law-civil law taxonomic divide as the main comparative classification tool.

Today's legal world offers an immense diversity to be analyzed and classified. Political and economic models, societal organization patterns, public law, models of general governance and coordination of multiple normative fields of all kinds, models based on geo-legal considerations, and models of interaction among states and between state and supra-state or non-state entities must all be considered. As "classical" legal mixity increasingly overlaps with the general idea of Western law and its most avant-garde developments, new analytical tools should be developed by comparative lawyers to manage the sheer diversity of the legal world in the twenty-first century. New categories must be considered that will work for a while until they too, in due course, start failing to properly accommodate a number of emerging hybrids.

¹⁶⁸ The discourse on the "convergence" of both Western legal traditions of civil law and common law into one hybrid Western tradition is acquired knowledge for comparative lawyers: see e.g. John Henry Merryman, "On the Convergence (and Divergence) of the Civil and the Common Law" (1981) 17:2 *Stan J Int'l L* 357; René David, "Existe-t-il un droit occidental?" in Kurt H Nadelmann, Arthur T von Mehren & John N Hazard, eds, *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E Yntema* (Leiden: A W Sijthoff, 1961) 56.