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Reconceptualising the Relationship between the Mainland Chinese Legal System and the Hong Kong Legal System

Cora Chan

Abstract

It has been more than a decade since China began her experiment of “One Country, Two Systems” in Hong Kong (HK). It is now generally assumed that the relationship between the legal systems of these two jurisdictions is monistic. Analysing post-Handover constitutional case law in HK, including a recent landmark decision on sovereign immunity, *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, this article challenges this assumption and argues that the relationship between the two legal systems is best conceptualized as a form of legal pluralism found in the European Union.

KEYWORDS: China, Hong Kong, European Union, legal systems, legal pluralism, constitutions

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I. INTRODUCTION

When China resumed sovereignty over Hong Kong (HK) some thirteen years ago, she put in place an unprecedented constitutional order of “One Country, Two Systems” (OCTS), whereby HK continues to practise the common law legal system within the Socialist, civil law legal system of China. It is now generally assumed that the relationship between the two legal systems is monistic, meaning that HK’s system is part of and subordinate to the Chinese legal system. There are two kinds of such monist conception. Kelsenian monists argue that the legal system of HK is subordinate to that of China since the former is derived from the latter; judicial behaviour is irrelevant for determining what the relationship between the systems is.¹ Hartian monists, on the other hand, consider judicial behaviour relevant for determining the relationship between the systems, and argue that HK’s system is subordinate to the Chinese system because judicial officials in HK and Mainland China have accepted such hierarchy.²

This article casts doubt on both of these common conceptions. I argue that the Kelsenian approach is counter-intuitive. As against Hartian monism, I question the empirical basis for its application to HK. There has been little, if any, analysis showing that, as an empirical fact, the judiciary of HK has unequivocally accepted the superior position of the Chinese legal system within HK. Analysing post-Handover constitutional case law in HK, including a recent landmark decision on sovereign immunity, *FG Hemisphere Associates LLC v. Democratic Republic of Congo*³ (Congo Case), I argue that judicial behaviour on the issue of hierarchy is at best inconclusive. I contend that institutions in both sides of the HK-Mainland border have been engaging in institutional dialogues with each other on various questions of hierarchy, but no conclusions have emerged yet. Such inconclusive judicial behaviour does not sit comfortably with the Hartian monist position.

This article suggests that the model of legal pluralism developed from the context of the European Union (EU) better captures the unique OCTS configuration. This is one of the first comprehensive attempts at applying the pluralist lens from EU to analyse OCTS.⁴ In the following, I will first define three

¹ The Chinese government and some scholars share this view. See *infra* notes 27, 29, 30 and accompanying text.

² This view is usually not made expressly but intimated. See *infra* notes 43, 44, 72, 73 and accompanying text.

³ [2010] 2 HKLRD 66 (HK Court of Appeal) (on appeal). Substantive hearing in the HK Court of Final Appeal is set down for March 2011.

⁴ There were previous attempts to apply and ultimately dismiss the model of legal pluralism for analysing the relationship between the Mainland Chinese and HK legal systems. See Yash Ghai, “Litigating the Basic Law: Jurisdiction, Interpretation and Procedure” in Johannes MM Chan, HL Fu, Yash Ghai, eds., *Hong Kong’s Constitutional Debate: Conflict Over Interpretation* (HK: HK

possible frameworks – monism, dualism and pluralism – for conceptualizing the Mainland-HK legal order. Part III will then offer an overview of the relationship between the two legal systems. Parts IV and V will challenge the Kelsenian monist and Hartian monist positions respectively. Part VI will then consider dualism and pluralism as alternative models to monism, and argue that pluralism best encapsulates the relationship between the two legal systems.

II. MONISM, DUALISM AND PLURALISM

Monism sees two or more legal systems co-existing in one territory as hierarchically ranked. The subordinate system is a partial order of the higher system. For Hartian monists, two legal systems are objectively hierarchically ranked if and only if the hierarchy is accepted by judicial officials within both systems.⁵ For Kelsenian monists, such objective hierarchy is established by one system being ultimately validated by the *grundnorm* of another.⁶

Dualism, on the other hand, sees the two legal systems as distinct orders, and views the effects of one order as operating through another. Taking the relationship between international law and national law as an example, monism would view either the national legal order as part of the international order or vice versa. On the other hand, dualism would view the international system and national system as separate legal orders, with the effects of the former operating in a territory through national legal sources, and national jurisdiction deferring to, but also ultimately retaining the decision on whether to defer to, the unconditional effects of international law within defined subject spheres.⁷

University Press, 2000) [hereinafter “*HK’s Constitutional Debate*”], at 10; Yash Ghai, “The Intersection of Chinese Law and the Common Law in the HKSAR: Question of Technique or Politics?” (2007) 37 Hong Kong Law Journal [hereinafter “*HKLJ*”] 363, at 367. For my response to Ghai’s argument, see *infra* note 25 and accompanying text. In addition, Alice Tay explained how legal pluralism did not fit the ideology of communist China. Alice ES Tay, “People’s Republic of China” in Poh-Ling Tan, *Asian Legal Systems* (Butterworths, 1997), at 63. It is beyond the scope of this article to fully respond to this argument. Suffice to say that this article focuses on what the relationship between legal systems in fact is, which may or may not be in line with the ideology of the ruling government.

⁵ R Barents, “The Precedence of EU Law from the Perspective of Constitutional Pluralism” (2009) 5 European Constitutional Law Review [hereinafter “*EuConst*”] 421, at 427.

⁶ H Kelsen, *Pure Theory of Law*, Max Knight (trs.) (University of California Press, Berkeley, 1978) 198-205, 214-217.

⁷ Kelsen, *ibid*, at 328-329; M La Torre, “Legal Pluralism as Evolutionary Achievement of Community Law” (1999) 12(2) Ratio Juris 192-193; P Eleftheriadis, “Pluralism and Integrity” (2009) Oxford Legal Studies Research Paper No 43/2009 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1486151> (last accessed 18 August 2010), at 6-8, 21-28.

Despite their differences, monism and dualism are both based on certain classical assumptions about law. First, law must be free from inconsistencies. Within one territory, there must always be a single answer to a legal question. For monism, the answer will be found using the hierarchically ranked rules; for dualism, the answer will be found in the rules of the legal system that presides in the subject matter in question. It cannot be the case that on one legal question there are inconsistent answers deriving from different legal systems operating in the same territory. Secondly, only one legal system takes charge within each territory. For monism, the higher legal order takes charge. For dualism, the effects of the “outside” legal order always operate through the sanction of the domestic order, and in that sense the latter order takes charge within the territory.

These classical confines have handicapped monism and dualism in explaining a peculiar legal configuration that has arisen in the EU, whereby the European Court of Justice (ECJ) on the one hand, and certain member states’ courts on the other, make *competing* claims of law and legal supremacy on the same population within those member states. Some jurists working on EU law have thus turned to legal pluralism as a new way of conceptualizing the relationship between the EU legal system and member states’ legal systems. There are numerous strands of legal pluralism in existing literature.⁸ The anthropological strand emphasizes the existence of non-state law, and poses legal pluralism as a response to legal centrism whereby state law is the only source of law. Legal pluralism has also been used to refer to legal polycentricity, that is, the use of various sources of law within one state legal system. Thirdly, legal pluralism has been used to encapsulate the coexistence of two or more autonomous or semi-autonomous legal orders in the same context.⁹

The model of legal pluralism developed in the EU context, which is also the model that this paper relies on, builds upon the third strand of legal pluralism.¹⁰ Posing a challenge to the above-stated assumptions about law, this

⁸ Discussions on legal pluralism have been classified in different ways. See for *e.g.* William Twining’s classification in “Normative and Legal Pluralism: A Global Perspective” (2010) 20 *Duke Journal of Comparative and International Law* 47; and Poh-Ling Tan and Alice ES Tay’s classification in Poh-Ling Tan, *supra* note 4, at 396-405. For discussions on legal pluralism generally, see J Griffiths, “What is Legal Pluralism?” (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1; DJ Galligan, *Law in Modern Society* (New York: Oxford University Press, 2007) 162-170; SE Merry, “Legal Pluralism” (1988) 22(5) *Law & Society Review* 869; GR Woodman, “The Idea of Legal Pluralism” in B Dupret, M Berger, L al-Zwaini, eds., *Legal Pluralism in the Arab World* (Kluwer Law International, 1999) 3-19; M Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (Tokyo: Tokai University Press, 1989); H Petersen and H Zahle, eds., *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth, 1995).

⁹ This distinction follows that made by William Twining in *ibid*, at 488-489.

¹⁰ For discussions on pluralism in the EU, see *e.g.* sources in *supra* notes 5 and 7, and N McCormick, *Questioning Sovereignty* (New York: Oxford University Press, 1999); N Walker,

model presents two or more legal systems emanating from the state and/or multi-state polity as interacting in a *heterarchical* rather than hierarchical manner in the same territory. This means that the legal systems can make competing and conflicting claims of law and legal supremacy on the same population, with no higher legal authority to arbitrate competing claims.¹¹ Which claim of law is superior, and which legal system ranks higher, depend on which legal system's perspective one is looking from.¹² The population (both officials and the general public) in that territory will potentially be faced with multiple inconsistent rules of recognition – a plurality of legal answers to the same question.¹³ Jurists have claimed that these ideas on legal pluralism may have implications for constitutional, supranational and international law beyond the European setting.¹⁴ This article will show that these insights enlighten one's understanding of the Mainland-HK legal configuration.

III. OVERVIEW OF THE RELATIONSHIP BETWEEN THE MAINLAND AND HK LEGAL SYSTEMS

The Sino-British Joint Declaration¹⁵ (JD) and the HK Basic Law¹⁶ (BL) (highest law in HK) sought largely to segregate the legal systems of HK and Mainland China so as to minimize conflicts between them. Under the JD and BL, the Hong Kong Special Administrative Region (HKSAR) shall be vested with independent judicial power including that of final adjudication.¹⁷ Only national laws that are listed in Annex III of the BL (limited to defence, foreign affairs and other matters

“The Idea of Constitutional Pluralism” (2002) 65(3) MLR 317; N Walker, “Late Sovereignty in the European Union” and MP Maduro, “Contrapunctual Law: Europe's Constitutional Pluralism in Action” in N Walker, ed., *Sovereignty in Transition* (Hart Publishing, 2003) 54, 501-537; M Rosenfeld, “Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism” (2008) 6 International Journal of Constitutional Law 415; NW Barber, “Legal Pluralism” (2006) 12(3) European Law Journal 306, 327-329; PC Oliver, *The Constitution of Independence* (New York: Oxford University Press, 2005) 311.

¹¹ These features are gathered from studying the sources *ibid*.

¹² This is MacCormick's “radical pluralism”. See MacCormick, *supra* note 10, at 97-121.

¹³ Barber, *supra* note 10, at 306-308, 316-327. On the rule of recognition generally, see HLA Hart, *The Concept of Law*, 2nd ed., (Oxford: Clarendon Press, 1994); J Raz, *The Concept of a Legal System* (New York: Oxford University Press, reprinted 2003) 187-202; J Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) 78-102.

¹⁴ E.g. Eleftheriadis, *supra* note 7 at 3.

¹⁵ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (signed 19 December 1984, entered into force 30 June 1985) UKTS 26 Cmnd. 9543.

¹⁶ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990.

¹⁷ Art. 19, BL; cl. 3(3), JD.

outside HK's autonomy ("excluded affairs")) shall apply in HK.¹⁸ The systems and policies to be practised in HK and all local laws shall conform to the BL.¹⁹ In that sense, the BL has been considered the "constitution" of HK.²⁰ Institutions in the HK legal system can interpret and amend all local laws, except that the final power of interpreting and amending the BL is vested with Mainland organs.²¹ The two legal systems are, by and large, separated.

However, they intersect in important ways. One significant point of intersection lies with the interpretation of the BL. Art. 158, BL divides the responsibility for interpreting the BL between the Mainland Chinese and HK systems in a way inspired by the former art. 177 of the EC Treaty.²² In line with the Mainland government's unitary conception of power, art. 158(1) states that the power of interpreting the BL lies with the Standing Committee (NPCSC) of the National People's Congress (NPC), a Party-controlled legislature. Yet HK courts are authorised to interpret on their own, during adjudication, provisions which are within the scope of HK's autonomy.²³ HK courts may also interpret provisions on excluded affairs ("excluded provisions"), but if such interpretation is needed to render a final and non-appealable judgment, HK courts shall seek a binding interpretation of the relevant excluded provisions from the NPCSC before making the judgment (*c.f.* art. 177(3) EC).²⁴ This is commonly known as the judicial reference or preliminary ruling procedure. As will be explained in section V(A), ambiguities in the BL over the arrangements for interpreting the BL, as well as other points of intersection between the two legal systems, have paved the way for contrary understandings of these issues by HK courts and Mainland institutions. The text of the BL is obscure, for instance, on the following intersection points:

¹⁸ Art. 18 BL.

¹⁹ Art. 11 BL.

²⁰ HK courts have frequently referred to the BL as the constitution of HK. The use of the term "constitution" to describe the BL has not been uncontroversial. The Chinese government insists that there is only one constitution within China, *i.e.* the Constitution of the People's Republic of China.

²¹ Arts, 158-159, BL. The final power of interpreting the BL is vested with the Standing Committee of the National People's Congress, while the final power of amending the BL is vested with the National People's Congress.

²² Treaty of the European Union (Maastricht consolidated version, 1 November 1993) 92/c 191/01, now renumbered as art. 267 of the Treaty on the Functioning of the European Union (30 March 2010) Volume 53 C83. For a comparison between the two reference schemes, see Wang, *infra* note 30, at 216-218; AHY Chen, "The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law" in *HK's Constitutional Debate*, *supra* note 4 at 114-141; Y Ghai, "Litigating the Basic Law" in *HK's Constitutional Debate*, *supra* note 4, at 35-36.

²³ Art. 158(2), BL.

²⁴ Art. 158(3), BL.

1. whether NPC acts that are applicable to HK or norms of the BL prevail in HK in case of conflict;
2. whether norms of the constitution of the People's Republic of China (PRC) or BL norms prevail in HK in case of conflict;
3. whether HK courts are the final arbiter of constitutionality in HK, and can thus decline to give effect to applicable NPC acts or provisions in the PRC constitution that contravene the BL;
4. whether the foundation for the operation of Mainland law in HK rests with the BL or the PRC Constitution;
5. whether HK courts retain the competence to define the limits of its own competence (the power described by German courts as "*kompetenz-kompetenz*");
6. In relation to art. 158, BL:
 - a. Whether the NPCSC's power to interpret the BL is free-standing – meaning, procedurally, the power can be exercised without judicial reference from HK courts; and substantively, it can be exercised in relation to *all* provisions in the BL, including provisions that are within the scope of HK's autonomy;
 - b. How the stated criteria for HK courts to seek a preliminary ruling from the NPCSC are to be applied in practice.

It is suitable at this juncture to deal with one argument against the use of legal pluralism in analysing the relationship between the HK and Mainland systems. According to Yash Ghai, legal pluralism is not relevant here, because the two systems mostly operate in different geographical spheres without interference from the other.²⁵ While it is acknowledged that the most interesting questions regarding pluralism arise where the two systems intersect (this explains why my analysis focuses on cases of intersection), it cannot be said that pluralism is entirely irrelevant for conceptualising the two systems where they apparently operate without interference from each other. For example, monism sees the HK system as subordinate to the Chinese system even where the former is operating independently; according to one monist conception, the former's independent operation is only possible because it is authorised by the latter. (This view will be explained in the next section.) This article challenges this predominant view, and argues that the two systems are unranked, both when the systems intersect and when they operate without interference from each other.

²⁵ Ghai, "Litigating the Basic Law" in *HK's Constitutional Debate*, *supra* note 4 at 10; Ghai, "The Intersection of Chinese Law and the Common Law in the HKSAR: Question of Technique or Politics?", *supra* note 4 at 367. This point has also been made by the anonymous reviewer.

IV. THE CASE AGAINST KELSENIAN MONISM

A. Kelsenian monism

The Kelsenian monist position is advanced by the Chinese government and some scholars. This position states that:

- (i) A legal system is hierarchically subordinate to another system if it is validated by a norm of the latter system (Kelsenian Theory of Law);
- (ii) The highest law in HK (the BL) is promulgated by an NPC decision,²⁶ which was made pursuant to art. 31 of the PRC constitution (Empirical premise);
- (iii) Therefore the HK legal system is subordinate to the Chinese legal system.

Such logic is rarely set out systematically by officials and scholars, but can be implicated from their works and opinions. For example, Albert Chen argued that Kelsen's theory of the *grundnorm* best explained the nature of the constitutional transition in HK; that after the Handover, the *grundnorm* of HK's legal system had become the PRC Constitution.²⁷ In criticising the HK Court of Final Appeal's (CFA) judgment in *Ng Ka Ling*,²⁸ four prominent Mainland scholars, whose views reflect that of the Chinese government, argued that the PRC Constitution conferred unchallengeable power to the NPC, as a result of which the CFA could not challenge any NPC decision.²⁹ Wang Shuwen, member of the Basic Law Drafting Committee, emphasized in his introductory account of the BL that the PRC Constitution constituted the legal basis of the BL and that answers to questions of hierarchy followed from this.³⁰

According to the Kelsenian monist position, if we bear in mind the hierarchy of systems, many doubts surrounding the relationship between systems can be clarified logically. If despite rules of hierarchy disputes between the

²⁶ Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990.

²⁷ AHY Chen, "The Provisional Legislative Council of the SAR" (1997) 27 HKLJ 1, 9-10. For a general analysis of Kelsen and Hart's theories to the Chinese and HK legal systems, see R Wacks, "One Country, Two Grundnormen? The Basic Law and the Basic Norm" in R Wacks, ed., *Hong Kong, China and 1997: Essays in Legal Theory* (HK: HK University Press, 1997) at 151.

²⁸ *Ng Ka Ling and others v. Director of Immigration* [1999] 1 HKLRD 315.

²⁹ Press release by the New China News Agency (6 February 1999) [in Chinese], English translation by JMM Chan printed in *HK's Constitutional Debate*, at 53-59.

³⁰ Wang Shuwen, ed., *Introduction to the Basic Law of the Hong Kong Special Administrative Region*, 2nd edn., (Law Press China and Joint Publishing (HK) Co Ltd, 1997) at 46, 54, 59, 62-65, 141-150, 178; Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the HK Basic Law* (Beijing: Peking University Press, 2001) at 129, 131, 161.

systems still occur, then according to monist logic, they should be resolved using the rules of the higher legal order, that is, the Mainland Chinese legal order.

B. Challenging the Kelsenian Theory of Law

I seek to challenge point (i), *i.e.* the Kelsenian Theory of Law. Kelsenians contend that as a *general* principle, a legal system is authorized by a law of another system if that law *purports* to authorize the former system.³¹ It does not matter whether judges in the former legal system recognize the authority of that law. Criticisms against this position are well-documented,³² so my arguments here will focus on how it fails to account for the realities of the relationship of the Mainland-HK legal systems.

1. Illustration (1): a hypothetical UK act

Let us first consider a hypothetical example. It is a historical fact that before China's resumption of sovereignty over HK, the UK legal system purported to validate the HK legal system. The status of the UK legal system as the validating source of HK law was recognized by HK courts then. However, since the Handover in 1997, a law enacted in the PRC legal system, the BL, has sought to authorize the operation of the HKSAR legal system. All references in HK laws to the authorizing force of the UK legal system have been removed. HK courts in the post-handover era have unequivocally recognized that the legal basis for the operation of the HK legal system has changed from the UK system to the PRC system.

For Kelsenians, if, *hypothetically*, there is currently a valid UK Act *purporting* to validate the HKSAR legal system, then the HK system will be part of and subordinate to the UK system, even if HK judges *refuse* to recognise the UK Act as the foundation of the HKSAR legal system. In other words, Kelsen's definition of a legal system consists of a collection of laws related *merely* by "validating *purport*".³³ This concept of a legal system is idiosyncratic and counters our intuition that a legal system will only in fact validate another legal system if its validating force is recognized in the latter system.

³¹ I say "general" because Kelsen used the idea of a change in *grundnorm* as an exit point to this principle. See Kelsen, *supra* note 6, and accompanying text to *infra* note 34 below.

³² *E.g.* Raz, *The Authority of Law*, *supra* note 13, ch. 7; Raz, *The Concept of a Legal System*, *supra* note 13, chs. 5, 8; HLA Hart, *Essays in Jurisprudence and Philosophy* (New York: Oxford University Press, 1983), at 309-342.

³³ Hart, *ibid* at 335.

Kelsenians may reply by saying that a shift in *grundnorm* has occurred in HK with the Handover,³⁴ so that the UK system is no longer the validating source for HK laws. However, to ascertain whether there has been such a shift in law, Kelsenians have to examine whether there is a shift in fact – whether judges no longer recognize the UK system as the validating source for HK laws. So at the end of the day, Kelsen’s theory is not as “pure” as it propounds to be. Kelsen cannot explain away the crucial role played by judicial behaviour in determining the validity of norms within a legal system, and has handicapped its general theory’s explanatory power by marginalizing the role of judicial behaviour.

2. *Illustration (2): the Congo case*

The Kelsenian Theory of Law fails to capture that norms of the Mainland legal system are not in fact valid in HK, if judges in HK refuse to enforce them, even if according to Kelsenian logic they *should* be valid in HK. The recent decisions of the HK Court of First Instance³⁵ (CFI) and HK Court of Appeal³⁶ (CA) in the Congo case demonstrate this. A New York company, FG Hemisphere, is seeking to enforce arbitration awards against the Congo government and several Chinese state-owned firms operating in Congo. The CFI and CA recognized two contesting schools of thought on sovereign immunity under public international law: the absolute doctrine and the restrictive doctrine. The absolute doctrine states that domestic courts of a state would not have jurisdiction to try matters where another state was named as defendant, unless the defendant state has waived the immunity. The restrictive doctrine recognizes an exception to the absolute doctrine, being that states do not enjoy immunity from suit in foreign courts when they are involved in purely commercial transactions. The question as to which doctrine is recognized by customary international law is controversial.

The Congo government has raised, *inter alia*, the following arguments: 1. The restrictive doctrine has not attained the status of customary international law. HK courts have to give due weight to the PRC’s rejection of the restrictive doctrine, since HK is now part of the PRC. 2. Even if the court finds that the restrictive rather than the absolute doctrine of sovereign immunity applies in HK, the relevant transactions are not purely of commercial nature, hence the exception to the absolute doctrine has not been made out. The Congo government is still protected by absolute sovereign immunity. 3. In any case, HK courts do not have jurisdiction to adjudicate this case, since the case involved “acts of state” such as “foreign affairs” – affairs that are stipulated under the BL to be exclusively within

³⁴ For an example of such an argument, see Wacks, *supra* note 27.

³⁵ [2009] 1 HKLRD 410.

³⁶ [2010] 2 HKLRD 66.

the Chinese government's terrain. "Foreign affairs" are involved because an issue of the status of a foreign state is concerned.

The Congo government's position on sovereign immunity is shared by the Chinese government, whose position was reflected through the Secretary for Justice of HK, who intervened in the proceedings to advance submissions on sovereign immunity.

FG Hemisphere, on the other hand, argues that: 1. the restrictive doctrine of sovereign immunity forms part of customary international law and is hence incorporated into HK law through the common law; 2. the relevant transactions are of purely commercial nature, thus the exception to the absolute doctrine has been made out. The Congo government therefore does not enjoy immunity from suit offered by the absolute doctrine of sovereign immunity; 3. no acts of state are involved and hence HK courts have jurisdiction to hear the case and enforce the arbitration awards.

The CFI upheld argument no. 2 of the Congo government. Judge Reyes found that the relevant transactions were not purely of commercial nature, so *even if* the restrictive doctrine of sovereign immunity formed part of HK law, the transaction would not fall within such an exception to absolute sovereign immunity.³⁷ The CFI held *in obiter* that the court's provisional view was that the restrictive doctrine of immunity applied in HK as part of the common law, and that no acts of state were involved.³⁸

On appeal the CA expressly held that the restrictive doctrine of sovereign immunity was recognized as a rule of customary international law and hence incorporated into HK law through the common law.³⁹ Overturning the CFI's decision, the CA found that the transactions were of purely commercial nature and hence the restrictive doctrine was applicable.⁴⁰ The CA recognized that the PRC government had consistently rejected the restrictive doctrine of sovereign immunity, but held that the restrictive doctrine applied in HK *notwithstanding the PRC's position*, since the BL recognized that the common law continued to apply in HK in the absence of intervening legislation.⁴¹ It found that no acts of state were involved and HK courts had jurisdiction to hear the case.⁴² The Congo government was therefore not immune from suit.

More analysis on this case will be given in later parts of this article. For present purposes, I would only like to point out that Kelsenian monists would argue that PRC's position on sovereign immunity should apply to HK, since the

³⁷ *Supra* note 35, at paras. 83-96.

³⁸ *Supra* note 35, at paras. 32-33, 37-46, 69-72.

³⁹ *Supra* note 36, at paras. 45-85.

⁴⁰ *Supra* note 36, at paras. 268-269.

⁴¹ *Supra* note 36, at paras. 86-123, 260-267.

⁴² *Supra* note 36, at paras. 34-44

PRC Constitution and BL reserved acts of state to the Chinese government. According to their logic, following art. 158, BL as well as the PRC Constitution, the term “act of state” is subject to interpretation by the Mainland system rather than the HK system. The Chinese government’s understanding of “act of state” to cover a question of sovereign immunity should therefore be adopted. Yet despite this monist logic, such understanding of the term and the principle of absolute sovereign immunity are not valid in HK because the CA refused to enforce them. Even if the CFA ultimately overturns the CA’s decision and holds that the Chinese government’s understanding (or even formal interpretation) of “act of state” applies and/or PRC’s position on absolute sovereign immunity does extend to HK, it would only have confirmed the point being made here, that judicial acceptance in HK is necessary for a Mainland legal norm to be enforceable in HK. The Kelsenian approach fails to reflect the decisive role played by judicial acceptance in delineating the norms that belong to or are enforceable in a legal system, and should be rejected.

V. THE CASE AGAINST HARTIAN MONISM

A. Hartian monism

Hartian monists argues that:

- (i) Two legal systems are hierarchically ranked within a territory if and only if judicial officials in both legal systems accept such hierarchy (Hartian Theory of Law);
- (ii) Officials in the Mainland legal system accept that the Mainland system ranks higher than the HK system (Empirical premise 1);
- (iii) Officials in the HK legal system also accept such hierarchy (Empirical premise 2);
- (iv) Therefore the Mainland system ranks higher than the HK system.

The Hartian monist position is usually intimated by suggestions that the Chinese government’s free-standing power to interpret the BL (and HK courts’ acceptance thereof) erodes the self-contained nature of the HK legal system.⁴³ Ghai argued, after surveying the NPCSC’s use of its power to interpret the BL and HK courts’

⁴³ See *e.g.* Y Ghai, “The Intersection of Chinese Law and the Common Law in the HKSAR: Question of Technique or Politics?”, *supra* note 4 at 405; JMM Chan, “Judicial Independence: A Reply to the Comments of the Mainland Legal Experts on the Constitutional Jurisdiction of the Court of Final Appeal”, Y Ghai, “The NPC Interpretation and Its Consequences”, and public reactions on “interpretation or amendment”, in *HK’s Constitutional Debate*, *supra* note 4 at 61-72, 199-218, 305-412.

response, that the Chinese system had “triumphed” over the common law system due to the political predominance of the Chinese government.⁴⁴

I believe the Hartian Theory of Law is plausible, so I will grant (i) for the sake of argument here. However, (iii) is false for two reasons: 1. HK courts sometimes dispute the Mainland system’s claims of supremacy; 2. HK judges have not accepted the NPCSC as the final arbiter of such disputes.

B. Disputing the Mainland system’s claims

In many instances, the HK judiciary has rejected or is divided towards claims of legal supremacy made by the Mainland legal system. Here we see a commonality between the legal orders of EU and OCTS. The Treaty of Rome omitted to stipulate the relationship between the legal system of the European Community and national legal systems. Similarly, the BL text is ambiguous as to the relationship between the Mainland system and its HK counterpart.⁴⁵ These silences or ambiguities have sowed the seeds in each case for the rise of multiple inconsistent rules of recognition on four major issues that besiege the monist question of hierarchy:⁴⁶ 1. whether the foundation of the operation of EU (Mainland) law in member states (HK) lies in the EU (Mainland) legal system or national constitutions or law (BL); 2. whether the norms of the EU (Mainland) legal system prevail over norms of the member states’ constitutions (BL) in case of conflict; 3. whether national courts (CFA) are (is) the final arbiter of constitutionality; 4. whether EU institutions (NPCSC) or national courts (CFA) possess(es) *kompetenz-kompetenz*.

In the EU, one rule pronounced by the ECJ states that the basis of supremacy of EU law in member states is the autonomous status of the EU legal order, that EU law takes precedence over all national law including national constitutions, and the ECJ can define the limits of its own power.⁴⁷ The contrary rule is expounded by certain national courts. For example, the German Federal Constitutional Court (BVerfG) and the French courts have both stated that the

⁴⁴ Y Ghai, “The Intersection of Chinese Law and the Common Law in the HKSAR: Question of Technique or Politics?”, *supra* note 4 at 405.

⁴⁵ See *supra* Section III.

⁴⁶ Craig and De Burca suggested a similar list of questions for analysing the issue of the supremacy of EU law. P Craig and G De Burca, *EU Law: Text, Cases and Materials*, 4th edn. (Oxford: Oxford University press, 2008) 354.

⁴⁷ E.g. Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 6/64 *Flaminio Costa v. ENEL* [1964] ECR 585; Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

basis for the precedence of EU law lies in their own constitutions.⁴⁸ The BVerfG maintains that norms of fundamental rights guaranteed by the German constitution remain superior to EU law, and that it remains the final arbiter of constitutionality.⁴⁹ UK courts have been more equivocal but have generally accepted that the foundation for the precedence of EU law is primarily the European Communities Act 1972, and that the UK Parliament retains the ultimate power to explicitly repeal this Act.⁵⁰ The BVerfG have expressly asserted that they retain the ultimate competence to police the limits of the authority of EU institutions.⁵¹

Likewise, the population in HK has faced competing answers regarding the above questions. On the questions of whether applicable Mainland law prevails over the BL, and whether HK courts are the final arbiter of constitutionality in HK: one rule expounded by the CFA in *Ng Ka Ling* states that the CFA is the final arbiter of constitutionality and can declare invalid any applicable NPC act that contravenes the BL.⁵² At issue in *Ng Ka Ling* was whether children born of permanent residents of HK (such children qualify as permanent residents with the right of abode in HK under art. 24(2)(3), BL) needed to obtain approval from the Mainland authorities before entering HK from the Mainland (such approval requirements stated in art. 22(4) to apply to *all*

⁴⁸ For German decisions see e.g. *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1974] 2 C.M.L.R. 540 (Solange I); *Re Wunsche Handelsgesellschaft* [1987] 3 C.M.L.R. 225 (Solange II); the BVerfG's recent decision on the Treaty of Lisbon (signed at Lisbon on 13 December 2007, entered into force 1 December 2009): Decision of 30 June 2009, Cases 2 BvE 2/08 et. al. (English translation published by the Court available at http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html). See commentary in R Bieber, "An Association of Sovereign States" (2009) 5 *EuConst* 391 and M Kumm, "Who is the Final Arbiter of Constitutionality in Europe?" (1999) 36 *Common Market Law Review* 351. For French decisions: Decision of Conseil d'Etat on 20 October 1989 in *Raoul Georges Nicolo* [1990] 1 C.M.L.R. 173; Decision of Cour de Cassation on 24 May 1975 in *Administration des Douanes v. Societe Cafes Jacques Vabre' et Sarl Weigel et Cie* [1975] 2 C.M.L.R. 336, both referred to in Craig and De Burca, *supra* note 45 at 354-357; see also P Oliver, "The French Constitution and the Treaty of Maastricht" (1994) 43 *I.C.L.Q.* 1.

⁴⁹ Solange I decision, *ibid.* Nor has this position on retaining the final say on constitutionality been retreated from in Solange II, although there the court revised the Solange formula such that an incompatibility between EU law and German law on fundamental rights is most likely to be exceptional. Confirmed by the court's recent Decision on the Lisbon Treaty, *supra* note 48.

⁵⁰ In *Factortame Ltd v. Secretary of State for Transport (No. 2)* [1990] UKHL 13, Lord Bridge referred to both the ECA 1972 and the ECJ's reasoning in according precedence to EU law (para 4). In *Thoburn v. Sunderland City Council* [2002] EWHC 195 however, the court emphasized that such precedence is based exclusively on domestic acceptance (paras. 60-69).

⁵¹ *Brunner v. The European Union Treaty* [1994] 1 C.M.L.R. 57, *aff'd* in recent Decision on Lisbon Treaty, *supra* note 48. See M Zuleeg, "The European Constitution under Constitutional Constraints: the German Scenario" (1997) 22(1) *European Law Review* 19.

⁵² *Supra* note 28 at 337-339.

Mainlanders who wished to enter HK). One issue that the CFA had to deal with was whether the Immigration (Amendment) (No. 3) Ordinance of HK, which implemented certain aspects of art. 22(4), BL, was passed by a legislative body – the Provisional Legislative Council – that was validly established. The Provisional Legislative Council was set up by a Preparatory Committee that was established by an NPC decision made *on the same day* as when the NPC promulgated the BL. The CFA held that it had the power to declare invalid any applicable NPC acts that contravened the BL. Such bold statement had little impact on the substantive ruling of the case, since on the facts the CFA did not find the relevant NPC decision establishing the Preparatory Committee inconsistent with the BL.⁵³

The contrary rule was articulated by the CA in *Ma Wai Kwan*,⁵⁴ as well as the Chinese government in its criticisms of the CFA's bold position in *Ng Ka Ling*.⁵⁵ This contrary rule affirms that the NPC's supremacy cannot be challenged by any organ. HK courts do not have jurisdiction to declare invalid any NPC or NPCSC act. A year after the *Ng Ka Ling* decision, the question of whether a national law made applicable in HK through the BL, or a conflicting BL provision, prevails, was raised in *Ng Kung Siu*.⁵⁶ This time, unlike the CFA in *Ng Ka Ling*, the court averted from deciding whether HK courts could invalidate any applicable national law that contravened the BL, by disposing of the case on another ground.⁵⁷ Thus while the CFA in *Ng Ka Ling* clearly asserted the supremacy of the BL over contravening NPC acts and the CFA's power to invalidate such contravening acts, the CFA in *Ng Kung Siu* declined to declare its stance. As far as the law of HK is concerned, the CFA's position in *Ng Ka Ling* has not been overridden, but it is not clear if such stance will be followed in light of the Chinese government's criticisms of such position.

In addition, there are multiple rules pointing to different foundations for recognising the operation of the Mainland legal system in HK. One rule espoused by the CFA in *Ng Ka Ling* states that the constitution of HK – the BL – constitutes the only basis for the court's recognition of the NPCSC's power of interpreting the BL.⁵⁸ The contrary rule declared by the Chinese authorities and

⁵³ *Supra* note 28 at 355, 357.

⁵⁴ *HKSAR v. Ma Wai Kwan David & Others* [1997] HKLRD 761, paras. 18-20

⁵⁵ *Supra* note 29. Chinese officials were reported to have criticized the CFA's position as unconstitutional and requested its rectification. For more discussion see AHY Chen, "Constitutional Adjudication in Post-1997 Hong Kong" (2006) 15 *Pacific Rim Law & Policy Journal* 627 at 636.

⁵⁶ *HKSAR v. Ng Kung Siu* (FACC/1999) [2000] 1 HKC 117.

⁵⁷ The CFA found that there was no conflict between BL and the relevant provisions of the national law in question, so there was no need for the court to consider which prevailed in case of conflict. *Ibid*, paras. 60-67.

⁵⁸ *Ng Ka Ling*, *supra* note 28 at 341-345.

the CFA on other occasions states that the BL *as well as the PRC Constitution* form the HK courts' basis for accepting the NPCSC's interpretative power.⁵⁹ HK courts' basis for recognising the effect of the Mainland legal system in HK is equivocal.

The question of whether organs of the Mainland legal system or HK courts possess *kompetenz-kompetenz* arises in various contexts. For instance, there are contrary rules on whether the NPCSC has the power to delineate the limits of its own power to interpret the BL under the judicial reference scheme in art. 158(3), BL. One rule explained by the CFA in *Ng Ka Ling* asserts that the CFA "alone" had the authority to delineate the limits of the NPCSC's power to interpret the BL under the judicial reference scheme.⁶⁰ What constituted an excluded affair (the NPCSC's turf), whether interpretation of such provision was needed to decide a case, and hence, whether a preliminary ruling from the NPCSC had to be sought, were to be decided by the CFA exclusively. In that case, the CFA invented a "predominant provision" test to determine whether there was a need to seek a preliminary ruling from the NPCSC. The CFA held that it would only need to seek a preliminary ruling if the predominant article to be interpreted was an excluded provision.⁶¹ Applying this test, the CFA found that there was no need to seek a preliminary ruling in that case, because the "predominant" article to be interpreted was art. 24(2)(3), BL, a provision that fell within HKSAR's autonomy; the "excluded provision", art. 22(4), BL, was only arguably *relevant* to the interpretation of the predominant article.⁶² Interpreting these provisions on its own, the CFA found that children of HK permanent residents were entitled to the right of abode in HK and did not need to obtain approval from the Chinese authorities before entering HK from the Mainland.⁶³

The NPCSC implicated a contrary rule when it issued an interpretation that overrode the CFA's substantive decision. In response to the social implications of the CFA's decision in *Ng Ka Ling* – that a large number of Mainland children would be at once entitled to the right of abode in HK thus putting grave pressure on the SAR government's financial resources – the Chief Executive of HK requested the NPCSC to issue a reinterpretation of arts. 22(4)

⁵⁹ The Interpretation by the NPCSC of articles 22(4) and 24(2)(3) of the Basic Law of the HKSAR of the PRC adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999 [hereinafter: "*Ng Ka Ling* Interpretation"], at para. 1; *Lau Kong Yung and 16 others v. Director of Immigration* [1999] 3 HKLRD 778 at 797-800; *The Director of Immigration v. Master Chong Fung Yuen* [2001] 2 HKLRD 533 at section 6.2.

⁶⁰ *Ng Ka Ling*, *supra* note 28 at 342.

⁶¹ *Ng Ka Ling*, *supra* note 28 at 341-345.

⁶² *Ng Ka Ling*, *supra* note 28 at 341-345.

⁶³ *Ng Ka Ling*, *supra* note 28 at 341-345.

and 24(2)(3), BL.⁶⁴ By way of background, the legal basis for the Chief Executive's request for reinterpretation was heavily doubted. The HK judiciary is the only institution that was specifically empowered and obligated by the BL to seek interpretations from the NPCSC. The BL does not expressly confer on the Chief Executive the power to seek an interpretation from the NPCSC. The Chief Executive relied on its general powers of implementing law in HK to seek the interpretation.⁶⁵

The NPCSC's reinterpretation, issued in response to the Chief Executive's request, reversed the CFA's ruling. The substantive decision of the NPCSC's interpretation was that Mainland children born of HK permanent residents would still have to obtain approval from Mainland authorities before entering HK from the Mainland.⁶⁶ The NPCSC also remarked that the conditions for seeking judicial reference were met, hinting that the predominant provision test was wrong and the CFA should have sought a preliminary ruling.⁶⁷ Although the NPCSC did not explicitly state that it possessed powers to decide whether its powers of interpreting the BL kicked in under the preliminary ruling system, still the implication of it hinting that the CFA was wrong in not seeking a preliminary ruling was that the NPCSC, rather than the CFA, was the final decision-maker as to whether judicial reference should be sought.

Subsequently, the CFA in *Lau Kong Yung* applied the substantive decision of the reinterpretation by the NPCSC.⁶⁸ At this point one may wonder if the CFA's acceptance of such reinterpretation amounted to its acceptance of the NPCSC's implication that the NPCSC possessed the competence to define the limits of its own interpretative powers under the judicial reference system. I argue that the CFA's acceptance of the NPCSC interpretation should not be read in this way, for the following reasons.

As a matter of theoretical clarity, one must distinguish the two tracks under art. 158, BL through which the NPCSC can interpret the BL. The first track is the NPCSC's power to issue an interpretation of the BL upon reference from HK courts under art. 158(3). The second track is the NPCSC's plenary powers of issuing an interpretation of the BL *without* reference from HK courts under art. 158(1). The NPCSC's reinterpretation in the aftermath of *Ng Ka Ling* was an exercise of its plenary interpretative powers in the second track rather than its

⁶⁴ See The Chief Executive's Report to the State Council Concerning the Right of Abode, submitted to the State Council of the PRC on 20 May 1999, and the *Ng Ka Ling* Interpretation, *supra* note 59, both reproduced in *HK's Constitutional Debate*, *supra* note 4 at 474-480.

⁶⁵ The Chief Executive relied on art. 48(2), BL (on his power to implement laws in HK) and art. 43, BL (stipulating that he shall be the head of the HK government and accountable to the Central People's Government and HKSAR).

⁶⁶ The *Ng Ka Ling* Interpretation, *supra* note 59 para. 2.

⁶⁷ The *Ng Ka Ling* Interpretation, *supra* note 59 para. 1.

⁶⁸ *Lau Kong Yung*, *supra* note 59.

interpretative powers under the judicial reference scheme in the first track. The CFA's acceptance of this reinterpretation clearly indicated its acceptance of the plenary interpretative powers of the NPCSC. (Such acceptance had, of course, for all practical purposes, significant implications on the issue of hierarchy between the two legal systems, as will be explained in section V.B.). However, the CFA has never indicated that it accepts the NPCSC's implicated claim of *kompetenz-kompetenz* under the judicial reference scheme.

Indeed, on various occasions after *Ng Ka Ling*, HK courts have continued to decide for themselves (sometimes fashioning legal tests for these purposes) whether an issue falls within the NPCSC's sphere of excluded affairs for the purposes of determining whether a preliminary ruling had to be requested.⁶⁹ Courts in HK thus seemed to have rejected the Mainland system's claim of *kompetenz-kompetenz* under the judicial reference scheme.

This debate over *kompetenz-kompetenz* is now reoccurring in the Congo case. In a recent procedural hearing, the Congo government requested the CFA to consider asking the NPCSC to interpret provisions in the BL that limit HK court's jurisdiction over "acts of state".⁷⁰ Recall that under art. 158(3), BL, the CFA has to seek a preliminary ruling from the NPCSC if the CFA needs to interpret provisions concerning excluded affairs such as "acts of state" in order to adjudicate a case. What is possibly far-reaching about the Congo government's request for seeking an interpretation from the NPCSC is this. If, in line with the Congo government's position, the CFA ultimately does seek and accept the NPCSC's interpretation of what an "act of state" constitutes and includes, the CFA would *effectively* be letting the NPCSC decide to a large extent when the NPCSC's own powers to interpret the BL under the judicial reference scheme are triggered. The NPCSC would then to a large degree have become the judge of the limits of its own competence under art. 158(3), BL. The CFA would then no longer be able to insist, as the CFA in *Ng Ka Ling* did, that it "alone" has the power to decide whether a preliminary ruling should be sought. Whether this would turn out to be the case will remain a favourite subject of speculation in China and HK until the CFA decides later this year if it will seek its first judicial reference from the NPCSC since the Handover.

⁶⁹ *E.g. Chong Fung Yuen*, *supra* note 59 at section 7.4. The CFA held that the court should examine the "character" of the provision to decide whether it was an excluded provision. See also the Congo Case, (CFI), *supra* note 35 at paras. 45-46, 72-73; The Congo Case (CA), *supra* note 36 at paras. 34-44. Although, it must be noted that the CFA in *Lau Kong Yung* (at 800-F) and *Chong Fung Yuen* (at section 7.5) indicated that the "predominant provision" test might have to be revisited in future if the appropriate case arose.

⁷⁰ In a procedural hearing on 30 June 2010, the Congo government asked the CFA to consider seeking an NPCSC interpretation on arts 8, 13 and 19, BL. See Press Release issued by the HK Judiciary on 20 July 2010, available at <<http://www.info.gov.hk/gia/general/201007/20/P201007200253.htm>> (last accessed on 18 August 2010).

C. No final arbiter

The Hartian monist can concede the above but still insist that the Mainland system ranks higher because:

(iii)(a) Officials in the HK legal system accept the free-standing nature of the NPCSC's power to interpret the BL.

(iii)(b) Thus they accept the NPCSC as final arbiter of disputes between the two legal systems.

(iii)(c) Therefore they accept that the Mainland system ranks higher than the HK system.

This is a powerful claim. The factual premise in (iii)(a) is not disputed. It has been accepted by HK courts in *Lau Kong Yung*⁷¹ and other cases that the NPCSC's power to interpret the BL can be exercised in a free-standing manner. This highlights two important differences between the EU legal order and the Mainland-HK legal order that make the latter look much more monist than the former. First, whereas in the former, the final power of interpreting national constitutions and other national law resides with member states' organs, in the latter, the final power of interpreting the BL resides with an institution of the Mainland legal system. Secondly, whereas in the EU legal order the ECJ could only make preliminary rulings on EU law pursuant to national courts' requests, in the Mainland-HK legal order, the NPCSC could issue an interpretation of the BL on its own initiative, in the absence of reference from institutions of the HK legal system.

I would like to challenge the link from (iii)(a) to (iii)(b), which has largely been assumed. It is widely asserted without explanation that the NPCSC, with free-standing powers of interpreting the BL, is the "arbiter" of constitutional disputes between the two legal systems.⁷² Moreover, Ghai offered no argument as

⁷¹ The *Ng Ka Ling* Interpretation was made without judicial reference. One of the subject articles for interpretation (art. 24(2)(3), BL) was a provision falling within HK's autonomy. The CFA in *Lau Kong Yung*, *supra* note 59, through accepting the Interpretation, accepts both free-standing aspects of the NPCSC's interpretative power. The court's acceptance of the free-standing nature of the NPCSC's interpretative power is confirmed in later cases, see *e.g. Chong Fung Yuen*, *supra* note 59 at section 6.2.

⁷² For example, Chen contrasted federalism with OCTS by pointing out, *inter alia*, that whereas jurisdictional conflicts in the former are resolved by an independent court, in the latter, they are resolved by the NPCSC acting in consultation with the BL Committee. Albert HY Chen, "The Theory, Constitution and Practice of Autonomy: The Case of Hong Kong" in Jorge Oliveira and Paulo Cardinal, eds., *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution* (Springer, 2009), at 761. Similar assertions on the NPCSC being "arbiter" have been made in the context of lamenting the lack of impartial arbiter on jurisdictional disputes between the two systems.

to why HK's courts' acceptance of NPCSC's free-standing power to interpret the BL leads to a victory of the Chinese system over the common law system.⁷³ However, I believe a *prima facie* convincing case can be made for the link as follows.

The argument goes, that the BL is the primary document that regulates the relationship between the Mainland and HK legal systems. The BL might have been ambiguous as to who the arbiter of disputes between the legal systems is, yet 13 years down the road, we are now clear: NPCSC is it. In accepting the NPCSC's free-standing power to interpret the document that sets out the relationship between the two legal systems, the CFA has effectively accepted the NPCSC's power to resolve many disputes regarding the relationship between the two legal systems. For example, an applicable NPC act alleged to be inconsistent with the BL can, through an NPCSC's reinterpretation of the BL, be rendered thus consistent. A determination by the NPCSC of the limits of its own competence can be made under the façade of interpreting certain BL provisions (*e.g.* what constitutes "acts of state").

I do not dispute that judicial acceptance of the NPCSC's free-standing power to interpret the BL can have far-reaching implications for the resolution of disputes between the two systems. I only wish to make the modest point that in light of *the complexities of the BL* and *the subtle resistance displayed in the judicial behaviour in HK*, it is *not clear* that HK courts have accepted the NPCSC as final arbiter of all disputes between the legal systems.

The BL is an ambitious, multifaceted document which, while retaining the Chinese government's supervisory role over HK, stipulates considerable limits on that role. Although the BL did not expressly impose restrictions on the substantive content of an interpretation issued by the NPCSC, still there are content restrictions on the amendment of the BL. Similar to the doctrine of "basic structure" under art. 79(3) of the German Basic Law, which was adopted by courts in some South Asian jurisdictions,⁷⁴ art. 159(4), BL provides that any amendment of the BL cannot contravene the PRC's "basic policies" towards HK,⁷⁵ which include the guarantee of a high degree of autonomy to HK. A special procedure for amending the BL is stipulated in art. 159, BL. The BL of HK, together with the Basic Law of Macau, are the only two laws in the PRC which provide for its own amendment procedures and which contain content restrictions

⁷³ Y Ghai, "The Intersection of Chinese Law and the Common Law in the HKSAR: Question of Technique or Politics?", *supra* note 4 at 405.

⁷⁴ Including India, Bangladesh, and Pakistan.

⁷⁵ Elaborated in the JD (cl. 3 and Annex I) and stipulated to remain unchanged for 50 years (cl. 3(12), JD); stated to be unamendable in the BL (art. 159(4), BL).

on the NPC's plenary powers to amend laws.⁷⁶ The chemistry of the NPCSC's free-standing power to interpret the BL interacting with these provisions limiting the Chinese government's role in HK has yet to be fully tested.

So far only one interpretation of the BL issued by the NPCSC – the interpretation in relation to *Ng Ka Ling* issued in 1999 – has been “put to test” in HK courts. The NPCSC has issued two other interpretations of the BL (one in 2004 and the other in 2005),⁷⁷ but there has not been any occasion in which HK courts had to decide whether to accept these interpretations or not. The CFA in *Ng Ka Ling* found that art. 24(2)(3), BL should not be read subject to art. 22(4), BL. The NPCSC, overriding the CFA's decision, interpreted art. 24(2)(3), BL to be subject to art. 22(4), BL. Arguably, the substantive content of this Interpretation by the NPCSC could reasonably be borne by the text of the BL. The CFA's acceptance of this Interpretation therefore could not reveal whether the CFA recognises any restrictions on the substantive content of an NPCSC interpretation. Nor has the CFA ever indicated whether there are any substantive restrictions on the content of an interpretation issued by the NPCSC. Would the CFA accept an interpretation by the NPCSC, the substantive content of which clearly contravenes the *non-amendable* “*basic policies*” of the PRC towards HK? Would the CFA accept an interpretation with substantive content that contravenes the explicit wording of the BL such that no consistent reading of the two can be sustained – so that to give effect to the interpretation would be to allow a *back-door amendment of the BL* (rendering art. 159, BL nugatory)? HK courts have not been tested on these questions. Their possible stance may be ascertained by examining more closely the oft-overlooked subtle difference that the CFA drew in its “Clarification”.

As explained above, the CFA in *Ng Ka Ling* asserted the jurisdiction to review and declare invalid any applicable NPC act that *contravened* the BL. This ambitious position triggered violent criticisms from the Chinese government and some Chinese scholars.⁷⁸ The HK government, upon pressure from the Chinese government, unprecedentedly requested a “Clarification” from the CFA on this

⁷⁶ Ghai, “Litigating the Basic Law: Jurisdiction, Interpretation and Procedure” in *HK's Constitutional Debate*, *supra* note 4 at 48.

⁷⁷ The 2004 Interpretation was made on the NPCSC's own initiative, in relation to provisions on constitutional reform in HK. The 2005 Interpretation was made on the HK Chief Executive's request, in relation to the term of office of the Chief Executive. The Interpretation by the NPCSC of art. 7 of Annex I and article III of Annex II of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted by the Standing Committee of the Tenth National People's Congress at its Eighth Session on 6 April 2004; the Interpretation of para. 2, art. 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the 15th Session of the Standing Committee of the Tenth National People's Congress on 27 April 2005.

⁷⁸ See *supra* note 29.

point of jurisdiction.⁷⁹ The CFA restated its position in more palatable terms, explaining that it 1. accepted the NPCSC's power to interpret the BL; and 2. could not question any NPC act that was *consistent* with the BL.⁸⁰ The subtle difference drawn by the CFA between the power to interpret the BL and the power to police constitutionality in HK was rarely discussed. While giving up the former power, the CFA tacitly refused to relinquish the latter.

The drawing of this difference is crucial – though its implication is unclear. It may mean that:

- (A) the CFA considers itself qualified to review applicable NPC acts for compatibility with the BL, but if the NPCSC issues an interpretation of the BL that dissolves any incompatibility, the CFA is bound by it.⁸¹ Under this reading, the CFA is no longer the final arbiter of constitutionality in HK.

However, it may also mean that:

- (B) the CFA's acceptance of the NPCSC's power to interpret the BL is *not unconditional*, but subject to *qualifications on the substantive content* of the interpretation. If the NPCSC's interpretation contravenes the unalterable core of the BL, or cannot be read consistently with the BL without amending the BL, then the CFA may enforce the "Schmittian" exception to declare the NPCSC decision invalid.⁸² The German court's *Solange* formula may be relevant here. The BVerfG has maintained that "so long as" the ECJ ensured effective protection of fundamental rights similar to that required under the German Constitution, the BVerfG would not exercise its jurisdiction to review EC law for compatibility with fundamental rights protected by the Constitution.⁸³ The CFA's statement of clarification could suggest that "so long as" an applicable NPC or NPCSC act is consistent with the BL, the CFA would not exercise its

⁷⁹ The HK government's move was heavily criticized by parts of the HK legal profession and academia. See, JMM Chan, "What the Court of Final Appeal Has Not Clarified in Its Clarification: Jurisdiction and Amicus Intervention" in *HK's Constitutional Debate*, *supra* note 4 at 171-178 and criticisms documented in *HK's Constitutional Debates*, *supra* note 4 at 249-252, 255-256.

⁸⁰ *Ng Ka Ling and Others v. Director of Immigration (No. 2)* [1999] 1 HKLRD 577 [hereinafter: "Clarification"], at 578.

⁸¹ AHY Chen, "The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case: Congressional Supremacy and Judicial Review" in *HK's Constitutional Debate*, *supra* note 4 at 84.

⁸² Maduro applied Schmitt's theory of sovereignty to analyse the situation of competing legal sovereigns in Europe, *supra* note 10 at 505, 522.

⁸³ *Solange II* decision, *supra* note 48.

jurisdiction to declare the act invalid. On this reading of the Clarification, the CFA preserves its previously proclaimed role to guard off unconstitutional NPC acts.

Either reading (A or B) of the Clarification is possible. The Clarification managed to resolve the crisis⁸⁴ precisely because of its ambiguity. The point of emphasizing the CFA's obscure position displayed in the Clarification is to highlight that it is far from clear that HK courts have relinquished their role as final arbiters of constitutionality in HK and accepted the NPCSC as the judge to all disputes between the two legal systems. Although it was more than a decade ago when the CFA announced its role to police the constitutionality of applicable Mainland norms in *Ng Ka Ling*, still, HK courts have not retreated from, nor cast doubt upon, this position. To be fair though, the issue of whether HK courts could invalidate contravening NPC or NPCSC acts has not been seriously considered in HK courts since *Ng Ka Ling*. It was raised in *Ng Kung Siu* but the CFA cleverly avoided the need to deal with this question.⁸⁵

Now, 11 years on from *Ng Ka Ling*, the Congo case presents the CFA with a possible opportunity to decide whether it would accept an NPCSC interpretation with substantive content that infringes the unalterable core of the BL.⁸⁶ The following are *some* possible outcomes to the case:

- (A) The CFA may, like the CFI, choose *not* to seek judicial reference and make a decision that *favours* Congo and China's position. For instance, it may find that the relevant transactions are of purely commercial nature, so the restrictive doctrine of sovereign immunity is inapplicable in any case. In this way the CFA could preserve its *kompetenz-kompetenz* without upsetting the Chinese government. It is unclear whether the pragmatic consideration of preserving judicial autonomy without triggering

⁸⁴ In response to the Clarification, a spokesman for the Legislative Affairs Commission of the NPCSC stated that the clarification was necessary, and the Vice-Premier Qian Qichen also hinted that the constitutional crisis had ended. Speech of the Spokesman for the NPCSC, reproduced in *HK's Constitutional Debate*, *supra* note 4 at 246. See also "Qian adds to easing of abode dispute", South China Morning Post (1 March 1999).

⁸⁵ See *supra* note 57.

⁸⁶ The case attracted much attention and was considered the litmus test to HK's high degree of autonomy. See e.g. M Lee, "Hong Kong, China clash in landmark court case on sovereign immunity" The Canadian Press (23 July 2010), available at <<http://www.winnipegfreepress.com/world/breakingnews/hong-kong-china-clash-in-landmark-court-case-on-sovereign-immunity-99091289.html>> (last accessed 18 August 2010). TH Shih, "Top court may seek review of Basic Law: Independence of HK's judicial system faces test" South China Morning Post (HK, 20 July 2010).

constitutional crisis was a factor motivating the CFI's judgment, but in hindsight the CFI's position seemed extremely tactful politically. Or,

- (B) The CFA may, like the CA, choose *not* to seek a judicial reference and make a decision *against* Congo and China's position. For instance, it may find that the restrictive doctrine applies in HK and the relevant transactions are of purely commercial nature. In such a case the NPCSC will likely issue a reinterpretation to overrule the CFA's decision. Or,
- (C) The CFA may, in response to the Congo government's request, seek an interpretation from the NPCSC on the meaning of "act of state" in the BL, in order to determine whether the CFA has jurisdiction to hear the case.

In both scenarios B and C, the NPCSC would very likely interpret "foreign affairs" and "acts of state" in an over-expansive way so that the Congo case is covered. So the NPCSC might, in line with the Congo government's submissions, find that an act of state is involved whenever a claim of sovereign immunity is involved. It is probable that such expansive interpretation will be issued because the Chinese government has vested interests in protecting the Congo government's position in this case. Chinese state-owned firms are also named as defendants in this case. The court's decision will affect the financial position of these state-owned firms, and may also affect the Chinese government's relationship with the Congo government.

If the CFA accepts an expansive interpretation by the NPCSC, it would have surrendered a large part of its competence to delimit when the NPCSC's interpretative powers are triggered under the judicial reference scheme. More importantly, it would have ceded HK courts' jurisdiction to hear matters which were previously considered by the CFI and CA as falling within HK's autonomy. The CFA would have signified that it accepted no content restrictions on the NPCSC's power to interpret the BL. That would be a major step towards accepting the NPCSC as the arbiter of conflicts between the two legal systems.

However, applying the analysis in the last few paragraphs, it is certainly possible and consistent with the CFA's historical position for the CFA to refuse to accept an over-expansive interpretation of the Chinese government's sphere of influence, for the reason that such interpretation would breach a non-amendable core of the BL – the guarantee of a high degree of autonomy, including judicial autonomy, to HK. Indeed, if HK courts do not have jurisdiction whenever a claim of sovereign immunity is involved, the adjudicative sphere of HK courts will be seriously curbed. The CA and CFI of the case have both rejected the Congo government's wide understanding of "foreign affairs" and "acts of state".⁸⁷ The CA held that the act of state doctrine only precluded courts from challenging the

⁸⁷ See CFI and CA's reasoning for rejecting such a wide reading of "foreign affair" and "act of state", Congo Case (CFI), *supra* note 35 at paras. 45-46, 72, (CA), *supra* note 36 at paras. 34-44.

validity of decisions (“acts”) made by foreign states or the PRC government in the exercise of its sovereign power (“of state”).⁸⁸ Both courts found that no such act of state was being questioned in the case, which fell within the four corners of the courts’ jurisdiction. If the CFA in the Congo case ultimately imposed content restrictions on the NPCSC’s power to interpret the BL and refused to give effect to an over-expansive interpretation by the NPCSC for contravening the core of the BL, it would have upheld its role as guardian of constitutionality in HK. This would likely come at the cost of resurrecting the constitutional deadlock between the Chinese government and the CFA in the aftermath of *Ng Ka Ling*.

To conclude this section, in light of the complexities of the BL and the equivocal behaviour of HK courts, it is too crude to conclude that HK courts have, once-and-for-all, accepted the NPCSC as final arbiter of all disputes between the legal systems. The issue may become clearer when HK courts are confronted squarely with decisions on whether to accept NPCSC interpretations, the substantive content of which plainly breaches the PRC’s basic policies towards HK or which clearly constitutes a *de facto* amendment of the BL.

D. Institutional dialogue

The above analysis of institutional behaviour in the two legal systems suggests that actors in the Mainland legal system (*i.e.* the NPCSC and the Central Authorities), and those in its HK counterpart (*i.e.* HK courts), seem to have been engaging in institutional dialogues on various issues of hierarchy.⁸⁹ The dialogue metaphor is apt here since HK courts and the Chinese government each assert their positions on questions of hierarchy and respond to each other’s stance. Neither party has the legal power to trump the other’s claims of legal supremacy. These dialogues have not yielded any clear conclusion on which legal system ranks higher. The HK judiciary sometimes disputes the Mainland system’s stance, is at times divided as to whether to harmonise with the Mainland system’s position, and is at other times equivocal as to whether they accept the Mainland system’s claims of supremacy. Dialogues may seem to be closed when no controversial question of hierarchy is raised, but they may be reopened as soon as unresolved questions of hierarchy resurge.

⁸⁸ Congo case, *supra* note 36 at paras. 37-44, 248.

⁸⁹ I thank Scott Veitch for suggesting the dialogue metaphor.

VI. AN ALTERNATIVE CONCEPTION

A. Dualism

HK courts' attitude towards the question of hierarchy has been, at best, inconclusive. This equivocal judicial attitude does not support a monistic conception of the Mainland-HK legal order. A possible alternative theory for explaining the legal order may be dualism. On a superficial reading of the BL, it seems that dualism is what OCTS is getting at: the NPCSC will have the final say on excluded affairs by retaining the power to interpret excluded provisions of the BL, while HK courts will have the final say on matters within HK's autonomy through its powers to interpret BL provisions within HK's autonomy.

However, two assumptions behind dualism are unfulfilled in the OCTS model. Firstly, dualism assumes that the foundation of recognising the outside legal order rests with the local legal order. This goes against the Mainland legal system's perspective, from which the basis for recognising PRC law in HK is the PRC constitution rather than the BL. A similar problem exists with using the dualist perspective to analyse the legal order of the EU.⁹⁰ Dualism goes against the EU legal system's viewpoint, from which the foundation for recognizing EU law in member states lies in the EU order's autonomous nature and not in national law.

Secondly, dualism assumes that the two legal orders have complete control over their respective subject matters. Yet, the HK and Chinese systems do not possess absolute power in the delineated subject matters, nor are their respective powers limited to those subject areas. The NPCSC's power to interpret excluded provisions is diluted by the power of lower courts in HK to make interpretations on those provisions as well,⁹¹ while HK courts' power to interpret provisions within HK's autonomy is reduced by the NPCSC's retention of the final power to interpret *all* BL provisions.⁹² Since certain assumptions of dualism are unfulfilled in the relationship between the legal systems of Mainland China and HK, dualism is not a suitable model for analysing such relationship.

⁹⁰ For the inability of dualism to explain the EU legal order, see *e.g.* La Torre, *supra* note 7 at 192-193.

⁹¹ Art. 158(3), BL.

⁹² Arts. 158(1) and (2), BL.

B. Pluralism

This article presents legal pluralism as a possible alternative theoretical framework. Applying the legal pluralist framework developed from the EU context, the HK and Chinese legal systems are unranked. This account best explains the competing claims of legal supremacy made by the NPCSC and HK courts respectively, and the equivocal judicial behaviour in HK.⁹³ Each of the two inconsistent claims to supremacy makes sense within their own logic. Both can be correct, it is a matter of perspective.

Legal pluralism tells us to stop asking the monist question of which legal system ranks higher, since in a situation of *parallel* legal systems there is *no single, once-and-for-all answer* to the question.⁹⁴ The contest between the systems will not be determined by legal solution or objective hierarchy, but by how a myriad of political factors play out on a *case-by-case* basis. Examples of such political factors include the relative political strength of the competing protagonists, defined as their ability to make others submit to their will; and their weighing of the pros and cons of insisting on their will in each instance.

This perspective fits comfortably with the dialogic relationship between the Mainland-HK systems. Protagonists of the Mainland legal system and HK legal system constantly test the bottom line of each other in their dialogues on hierarchy issues, and would dare to assert supremacy on such issues whenever the political stakes are favourable. There is no higher legal authority to adjudicate the institutional debate. Victory is determined by the shifting loyalties of officials in each particular instance, in turn determined by various political factors.⁹⁵

On the issue of whether HK courts can invalidate applicable NPC acts that contravene the BL, the CFA in *Ng Ka Ling* entertained the legally controversial request for a “clarification” and delivered its position in a milder tone, for fear that the NPCSC would outright reject a less ambiguous stance. The NPCSC was contented⁹⁶ with an obscure reply from the CFA whereby the court tacitly preserved the superiority of BL norms over conflicting NPC acts and the court’s role to police the constitutionality of NPC acts; such placation grew out of worries that any further insistence on the clarification of the hierarchy question would trigger the CFA’s refusal to cooperate. Both sides demonstrated reluctance to

⁹³ Barents made a similar argument for pluralism in the EU context. Barents, *supra* note 5 at 443-444.

⁹⁴ Kumm, *supra* note 48 at 384-386.

⁹⁵ Tai also emphasized the importance of political considerations to the constitutional positioning of various parties under OCTS. B Tai, “Chapter 1 of HK’s New Constitution” in MK Chan and AY So. eds., *Crisis and Transformation in China’s Hong Kong* (HK: HK University Press, 2002) 189-219, esp. at 211. B Tai, “Basic Law, Basic Politics” (2007) 37 HKLJ 503.

⁹⁶ See *supra* note 84.

surrender supremacy, yet both dared only to push this far in the dialogue as they began to smell smoke.

Regarding the issue of who the arbiter of disputes between the two legal systems is, the CFA in *Lau Kong Yung* accepted the NPCSC's free-standing power of interpreting the BL, thus sanctioning, to some extent, the NPCSC's role as arbiter. The CFA was faced with either accepting or rejecting the NPCSC's interpretation on the *Ng Ka Ling* case. There was no way it could get around with another vague statement. Rejecting the Interpretation would trigger a yet more severe constitutional crisis that it was unprepared to take.⁹⁷

The CFA did resist when the political risks were low enough. *Chong Fung Yuen* is an example that demonstrates such resistance.⁹⁸ The NPCSC indicated in the *Ng Ka Ling* Interpretation that a post-enactment material was a conclusive indicator of the legislative intent of *all* subsections of art. 24(2), BL, although the subject articles of the *Ng Ka Ling* Interpretation were specifically limited to art. 22(4) and *subsection (3) of art. 24(2), BL*.⁹⁹ Two years later, the CFA in *Chong Fung Yuen* had to interpret *subsection (1) of art. 24(2), BL*. The CFA upheld common law rules of interpretation in defiance of the NPCSC's will. It decided that only those parts of the *Ng Ka Ling* Interpretation that related to its subject articles were binding on HK courts; the NPCSC's remarks on the legislative intent of non-subject articles were *obiter*.¹⁰⁰ In the absence of any binding interpretation of subsection (1) of art. 24(2), the CFA applied common law rules of interpretation, which excluded consideration of the post-enactment material.¹⁰¹ An NPCSC spokesman responded immediately to the CFA's defiance by stating that the CFA's stance was inconsistent with the NPCSC's understanding.¹⁰² Yet the NPCSC did not rebuke further. The CFA in this case successfully guarded off the trumping of Mainland norms over common law rules of interpretation, the speculation being that the NPCSC did not see any stake in this particular decision,¹⁰³ and the CFA realised this.

How the question of *kompetenz-kompetenz* in the Congo case will turn out is uncertain. Two points render it likely that the CFA will be tested with an interpretation that will be substantively at odds with the core of the BL. First, art. 158(3), BL imposes the obligation to seek judicial reference on the CFA only, but

⁹⁷ Tai, *supra* note 95.

⁹⁸ *Chong Fung Yuen*, *supra* note 59.

⁹⁹ *Ng Ka Ling* Interpretation, *supra* note 59, clause 2.

¹⁰⁰ *Chong Fung Yuen*, *supra* note 59, sections 7.3-8.3.

¹⁰¹ *Ibid.*

¹⁰² A spokesman for the Legislative Affairs Commission of the NPCSC "expressed concern". "Assembly Standing Committee concerned by abode case in Hong Kong." BBC Monitoring Asia Pacific (Political) (21 July 2001).

¹⁰³ AYH Chen, "Another Case of Conflict Between the CFA and the NPCSC?" (2001) 31 HKLJ 179 at 186.

not on lower courts. The CFI and CA ruling on the case previously had no obligation to seek a preliminary ruling. Yet the CFA will be faced head-on with such an obligation and, hence possibly the decision of whether to yield to a possible claim of *kompetenz-kompetenz* by the NPCSC. Secondly, the fact that the PRC government has vested interests in the case increases the possibility of it imposing its will through a legislative interpretation of the BL. In the end, whether the CFA will accept (the likely) expansive interpretation by the NPCSC, thereby making a crucial surrender in the long-standing battle between the systems, will depend on the political wrestle in the circumstances.

1. *Cut-off point?*

The pluralist contest and institutional dialogue can only go on if the HK judiciary does not take further, clear and sustained steps in accepting the NPCSC as final arbiter of disputes between the legal systems. It may not be easy to tell at which exact point the HK judiciary accepts unequivocally the ranking of the two legal systems. The relationship between co-existing legal systems is characterized by a spectrum, with a clearly monistic legal order on one end. On the other end of the spectrum is the clearly pluralist situation, where two or more legal orders make competing claims of supremacy with no clear arbiter. The relationship between the German courts and ECJ is an apt example of this end. Hovering in between is a range of situations where it is hard to tell if judges have accepted a hierarchy. HK lies somewhere here. Every answer that the HK judiciary gives to questions of hierarchy will push the two systems either closer to or further away from the monist end.

From the pluralist's perspective, what happened in HK was that initially one could not tell from the ambiguously worded BL if the HK or Mainland system ranks higher within HK territory. Since then the Mainland and HK legal systems have engaged in institutional dialogues, asserting rival claims of supremacy. The relationship between the systems *started off* by being on the clearly pluralist end. Yet over the years, the HK judiciary has accepted certain powers of the NPCSC, *e.g.* its power to interpret the BL free-standingly. This acceptance has become unequivocal as it has been *consistently* revealed in case law. Such clear acceptance pushes the Mainland-HK legal order further away from the pluralist end. If in future there are signs to show that the HK judiciary is accepting, without content restrictions, the NPCSC's power of interpreting the BL, and such acceptance is *sustained* over a number of cases – then we can likely conclude that the Mainland-HK legal order has become monistic. This day may or may not come. The HK judiciary is resilient and capable of using techniques of restraint and detour to avoid giving clear answers to sensitive questions. What we know for sure is, before that day comes, the HK judiciary is equivocal regarding

the ranking of the two legal systems, and will rival the Mainland's claims of legal supremacy whenever the political stakes allow. The Mainland-HK legal order, as evolved over the years and as it currently stands, is definitely not monistic, is close to a pluralist description, but not as patently pluralist as the relationship between the German and EU legal systems.

VII. CONCLUSION

This article has sought to challenge the common conception that the Mainland Chinese legal system and its HK counterpart are interacting in a monistic manner. I have argued that the Kelsenian theory of law is counter-intuitive, while the empirical premise of Hartian monists has not been established. This article suggests that, as compared to the classical monist and dualist theories, the dialogic relationship between HK courts and Mainland institutions is better encapsulated by the legal pluralist framework developed from EU jurisprudence.

Reconceptualising the relationship between the Mainland and HK legal systems in a way that more accurately reflects its realities is, in and of itself, of academic interest. Yet the above analysis may be of significance to those interested in comparative law, constitutional law and constitutional theory generally. The articulation of a possible resemblance in pluralist legal patterns between the EU legal order and Chinese-HK legal order potentially opens up opportunities for future discourse between Europe and China on pluralism and other techniques of large-scale governance. Despite vast differences in history, culture, and political systems, the EU and China face common challenges brought about by economic globalisation and growing diversities across a continental-sized population.¹⁰⁴ The sharing of a pluralist legal phenomenon is but one example that bespeaks these common challenges.

China's experience may contribute to the vigorous debates on pluralism in Europe. The circumstances leading up to the formulation of OCTS will shed light on the normative value of pluralism; the stark power imbalance between China and HK will illuminate the role that political strength plays in sustaining a pluralist situation; the gradual shift of the Mainland-HK legal order towards the monist end of the spectrum reveals the importance of political restraint in maintaining pluralism. Due to limited space, these questions will have to be discussed elsewhere. This article sets the stage for further exchanges between China and Europe on these interesting issues, which will be of interest not only to

¹⁰⁴ For discussions on how Europe and China face similar problems and their possible convergence on governance solutions, see *e.g.* M Jacques, *When China Rules the World* (Penguin Books, 2009) 220, 422-424; J Rifkin, *The European Dream* (New York: Penguin Group, 2004), 359-360.

EU and China, but also to other states and polities that are rethinking models of governance in a post-Westphalian era.¹⁰⁵

¹⁰⁵ See S Tierney, *Constitutional Law and National Pluralism* (New York: Oxford University Press, 2004) for a theory of the plurinational state.