"Think Piece"

Entangling the Legalities of Utopia: New Terrains of Entanglement among Traditional and Data Driven Social Credit Governance

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This paper is an initial of an examination of the entanglement between conventional and ″new form″ legal systems and emerging data driven and social credit systems. The idea is to try to understand how two sets of systems, interlinked but autonomous, may now entangle as two quite distinct forms of legalities. Those interlinkages, in turn, suggest consequences for the character of each and their respective role in the organization and management of human collectives (states, global production chains, civil society, and the like).

The objects of examination, these two families of legalities which find themselves opposed and connected, add a layer of complication and new ways of entangling well beyond that of the entanglement of traditional legalities (at least from my perspective) in a number of ways.

1. The traditional scope of the examination of entanglement continues a discussion initiated by Philip Jessup in the 1950s around what was then the question of transnational law. That conversation has itself morphed into one involving the existence of plural law, the revivification of the old controversies of the nature and limits of law, and the battles over the sites where law (or better put legalities) may be sourced. The science of legal entanglement, in this context, provides another useful perspective on this emerging ecology of multi-level, multi-sourced legalities within which traditional law remains both a part and apart.

2. Those battles, in turn, continue to mask the underlying ideological mêlées among academic and policy elites (with consequences for those millions of us who bear the burdens of the detritus of those ideological encounters in the way we are managed by governing institutions and the taboos we are required to respect). Those ideological battles center on the nature of the state, the character of law as an expression of collective political power, the principles through which it may be expressed and constrained, and

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the way it may be delegated up, down or outside the state. That also implicates the central question that continues to elude consensus—is traditional law "special" in the sense that it is the measure, the gold standard, against which the character, function, authority and legitimacy of other legalities are measured or (in some versions) into which such legalities will inevitably, must inevitably, be expressed.

3. Bound up in these conversations are even older conflicts over the purpose of law. These are battles that have continued in the West certainly since the time of Aristotle and are embedded in all sorts of law systems—from the Common Law to the agendas of administrative agencies. Marxist-Leninist systems tell us that the purpose of law is to manage people, and societal collectives toward the ideal: the ideal worker the ideal citizen, the ideal family. It is also meant to manage societal collectives toward the institutional ideal—the ideal forms of production the ideals principles of consumption, the ideal culture, the ideal state, and the like. To those ends the purpose of law is to change both and to manage that process of change—rewarding compliance and punishing deviance from the unalterable movement toward the ideal. Liberal democratic systems started from the opposite end of the spectrum—its purpose was to develop an apparatus (judges, legislatures, executives) whose role was to preserve, protect, and perfect the customs and traditions of the society for which they were established. There were no ends, just means for preservation, protection, and perfection which bound both the autonomous individual and the apparatus of government. A contemporary expression of this fundamental perspective can be found in the revivification of the principles of compliance and accountability built around the objectives of prevention, mitigation, and remedy. The last several centuries, however, have seen liberal democratic systems move toward a more hybrid position. Like Marxist-Leninist systems, liberal-democratic ideologies have embraced the core premise that neither the individual nor society may be left to their own devices. Instead, the perfection of the system requires the state to nudge individuals and societal organizations toward perfection the contours of which are defined by politics and enforced by both a legal-administrative apparatus, and societal collectives to which administrative-governance authority has been delegated.

4. It is the increasingly important principle of perfection, and the secondary principle that organs of government have the responsibility for ensuring perfection, that then aligns the operational structures of both liberal democratic and Marxist-Leninist systems. The methods for managing the application of the expression of that perfection principle, though, have been revolutionized in the last several decades through the miracle of technology. It is in that process of the expression of the regulatory power of perfection through data based systems of rewards and punishments, of ratings, of compliance and

accountability that one encounters emerging social credit systems. These are understood as the expression of compulsory objectives embedded within compliance, surveillance and evaluation protocols (implemented through quantifiable, that is measurable, actions against the ideal expressed in the objective). These produce a rating or assessment to which additional protocols are applied which are then used to impose punishments or provide rewards.

5. Thus unpacked, social credit systems have developed their own variant characteristics depending on the underlying foundational political ideology within which it is developed.

A. *Within liberal democratic political orders*, social credit systems take a variety of forms built primarily around rating and accountability systems. They are used in two respects. The first is as a means of implementing legislative or social objectives by vesting the authority to develop the specific measures through which behavior is to be judged within or as a function of the protocols used to operate the rating or assessment system. These include credit rating systems for individuals and institutions. The second is as a means of assessing compliance with standards, expectations, or rules. These ratings systems are meant to nudge behavior . They have become a prominent methods of soft law management used by international organizations, enterprises, and non-governmental organizations. They also include certification programs (e.g., conformity assessment). Most of these systems are autonomous, sometimes there are markets for such systems, and coordination among them is haphazard. Much of it is privatized through the monitoring and compliance systems of enterprises (charged with implementing legal or other norms), international organizations, and non-governmental organizations.

B. Within Marxist-Leninist political orders, social credit systems have been developed as a broad range of assessment, ratings and disciplinary programs coordinated through the state and designed to further an integrated set of public objectives for the perfection of the individual, the social order, production, and the operations of the state under the guidance of the vanguard (communist) party. In China, the resulting systems consist of two broad categories of data based governance/management. The first is similar to those developed in liberal democratic orders—assessment, ratings, and conformity systems. The difference is that the parameters of assessment is guided by the state, and the state reserves for itself the authority to coordinate these systems. The second category might be best described as adding a platform governance aspect. Social credit systems can be coordinated, and each can leverage the data and analytics of others through platforms, which are increasingly operated, controlled or guided by the state. The resulting aggregated platforms, coordinated and managed through the state, create a

powerful governance mechanism for individual and institutional behavior. For example, the production of a negative assessment on a social credit score above a trigger level (failure to pay bills when due, for example) might result in adding the individual or institution to a blacklist. That blacklist, in turn, can then be used to deny access to certain services (as determined by other organizations that themselves produce ratings and assessments. For example, placement on a bad financial credit blacklist might result in denial of access to high speed trains or air travel, or visas for travel abroad.

6. Social credit systems, then, constitute a set of legalities distinct from and autonomous of the wide range of traditional legalities. They are distinct because they do not share the same discursive characteristics of traditional legalities.

A. Traditional legalities (whether the conventional law of states, international law, norm making, and the regulatory expressions of other institutions with rulemaking authority) *are essentially qualitative* in nature. They reduce the principles around which a community is organized to concrete form by targeting behaviors which are either permitted or suppressed. Those expressions, however, can be enforced only after they have been invoked as the basis for governmental use of its police power (e.g., the discretionary power of administrative officials, police or prosecutors to charge a breach of the rule) and then interpreted and applied (traditionally by courts and increasingly through the rulemaking and quasi adjudicatory functions of administrative organs, public or private). That process then produces a cyclicity in which law evolves on the basis of its application and interpretation as well as on reaction to bot. The science of this system, that is its rationalization, can serve as the basis for jurisprudence. Jurisprudence, then, becomes the means for the rationalization of societal objectives, morals, and goals, its taboos and aspirations, for the guidance of those subject to its power.

B. Social Credit Systems (whether in the form of ratings, assessment, monitoring, conformity or other variations, and whether or not coupled with rewards and punishments, or coordinated, through platforms or on a bilateral basis, with other systems) are essentially quantitative. They start with the development of a measurable ideal (of behavior, of expectation, of result, or the like). The object of this idealization process is the reduction of the societal/political agendas to a measurable essence. In the same way, social credit systems seek to reduce all targeted behaviors to their essence. That essence, in turn, can be measured against the ideal. The difference, the space, between what is measured and the ideal, then becomes the space where governmental action is required to nudge the object of assessment closer to the ideal. In place of words there is data. In place of the apparatus of invocation, interpretation, and application

through exogenous mechanisms, there are analytics (which distill data) and algorithm which apply judgment to what is distilled. The system operates, like law, on the basis of its own internal logic—but unlike law the role of the exercise of human discretion is different. It applies not to the process of invocation, interpretation and application, but to the process of coding, the development of analytics, and the determination of the formulae for the assessment of the results of analytics.

7. If this was all there was, either system would be uninteresting to students of legal entanglement, or at least those who believe there is value in rationalizing entanglement between "families" of legalities that have quite distinct characteristics but which operate in the same power space. But there IS more. What emerges even from this cursory description of the legalities of conventional and data driven legalities is the almost naturalness of their entanglement. But one speaks here not of the traditional entanglement of domestic and international law, of soft law and hard law, of societal rules and legislation, of administrative regulation and the practices of the community regulated, of the interactions of plural legalities, nor even of the way in which these plural legalities might not merely entangle but evolve from a lower form to that nice, safe, apex expression of constitutionally legitimate domestic law. Instead, one speaks here of the entanglement of quantitative and qualitative means of managing behaviors, exercised simultaneously by institutions capable of regulation, that affect both, as well as the legal orders from which they are produced.

8. Here, in the managerial-regulatory spaces where these two families of legalities meet, one encounters the place where entanglement can be encountered in its new forms. It is a critical entanglement in the sense that neither class of systems alone—legal systems and systems of data driven algorithmically ordered management—can attain the objectives of perfection. Data driven systems require the imprimatur of legitimacy and authority of traditional systems; traditional systems require the precision and real time enforcement capabilities of data driven regulatory structures. That need, then, defines the character and scope of entanglement. It also underlines the character of that entanglement as between and among legalities. Liberal democratic ideological orders approach data driven governance entanglements through the lens of privatization and markets. China inverts the trajectories of entanglement, focusing instead on re-creating the universe of data driven governance within the state. *In both cases, law becomes the instruction manual for the operation of social ordering through data driven analytics. But sometimes data driven analytics becomes the basis for ordering reality through which law is made and enforced.*

9. These entanglements are only now emerging more clearly:

A. The recent controversy over the inclusion of questions about citizenship on the U.S. census provides a case in point. Here is the point of entanglement between census as a system of data generation, census as the jurisdiction of compiling a quantitative narrative image of the American population, and census as a necessary predicate for the operationalization of a number of conflicting political objectives expressed though the law of states and the federal government. At the same time, the actual operationalization of decisions respecting the scope of census data harvesting became entangled both within the conventional judicial system and ultimately within the structures of administrative law in the United States (Department of Commerce v. New York. 2019.)

B. Another important point of entanglement between data driven and traditional legalities centers on the scope and principles through which data may be harvested. Most aggressive—again voluntary and on a bargained for basis—are chip implants for employers. More passive are the seamless systems of cameras, credit card transactions, turnstiles, passes for highway tolls, key stroke and internet tracking systems, and the like that can effectively track individuals and record their activities on a continuous basis. The focus of entanglement—as is natural given the ideology of law—are on rights. These include the more well-known rights to privacy. Drone technology has provided another entanglement point. Here one encounters the connection between the data driven management of human movement to further collective health against the political management of civil and political expression. At the same time one encounters the private enterprise in the middle--caught between the construction of drone based systems and its administration against potential liability for complicity in the human rights violations of the purchasing state. One saw this combative entanglement in Rwanda's efforts to use drone technology in late 2020.

C. Entanglement of a different sort occurs with traditional credit and health rating systems. These tend to retain substantial autonomy in developing the measures of creditworthiness, and in some cases may be driven by markets or by consensus within the health community or by data obtained by health providers from which assessment metrics may be developed. Conventional legalities are entangled with respect to the scope of use and the data harvesting (privacy and rules for protecting data integrity and secrecy). Conventional law is also entangled with data driven regulation and assessment by limiting the scope of rewards and punishments that may be produced (for example limitations on ability to deny coverage for preexisting conditions). Specific variations combine the two (health and financial assessment (e.g., healthcare credit scores which use credit history

related to medical treatment to assess creditworthiness for the provision of medical services).

D. The use of simulations in making policy inverts the usual trajectories of entanglement. Here law itself becomes a function of predictive analytics, which in turn is a function of the legal basis for the harvesting and use of personal data. This became most apparent, for example, in the context of the COVID-19 pandemic where governments relied on simulations to implement rules for lockdowns, for availability of vaccines and the like. But it also produced a new form of politics, where for example the Trump administration COVID-19 policy shifted as the battle for dominance between those who emphasized economic consequences in their predictive analytics fought against those who centered mortality and hospital capacity indicators. The politics of "listen to the experts" became an important element of the presidential campaign of 2020 in the United States.

E. Smoking campaigns are well known. Here one entangles moral value systems (about smoking) into political action (anti-smoking regulation) which is then entangled within medical and quantitative measures of harm which contribute to health rankings that affect private markets for insurance, and rankings that may affect individual access to credit or education.

F. The use of human rights due diligence systems in the development of the internal governance of multinational enterprises. Here one encounters a wonderfully complex entanglement among conventional legalities (domestic law, international treaty law, the regulations of international organizations, and soft law mechanisms) which then simultaneously entangle data governance mechanisms (ratings and conformity systems, monitoring and accountability systems). Public international norms (e.g., the UN Guiding Principles for Business and Human Rights, or certain ILO Conventions) provide the qualitative expressions of objectives which are then translated into the quantitative measures extracted from data identified as corresponding to sets of behaviors that are the objective of these norms to manage, national law (e.g., the French supply chain due diligence law, or the Australian Modern Slavery Act) may require either the development of monitoring and disclosure systems operated by the objects of regulation (MNEs subject to those provisions), and effective compliance judged by reference to an analytics of aggregated compliance measures.

10. And there it is. One begins to understand the terrains within which entanglement is possible and is emerging. Is it possible even at this early stage to attempt a rationalization of those encounters? That task is worth a try: the nature of the entanglement of

conventional legalities with those of data driven legal orders may be rationalized at least as a preliminary matter.

A. First, the normative nature of conventional legalities lend themselves to the distillation of principle into the ideal states which are represented through conventional legal expression. In contemporary systems of legalities grounded in the core principle of perfectibility, conventional legalities serve the critical function of describing the ideal state or the socio-political objective to be achieved.

B. Second, data driven governance can then rely on this distillation to produce a foundation of authority and legitimacy for the construction of its data sets, is analytics, and ultimately the judgments built into its algorithms.

C. Third, data driven legalities themselves can serve as an accountability mechanism of the effectiveness of law itself. It can judge the connection between legal expression and the objectives or intent it memorialized in more precise ways.

D. Fourth, the entanglement between conventional and data driven legalities bring together two distinct groups of controlling elites. The first is dominated by the traditionally powerful cocktail of lawyers, academics, lobbyist, elected and administrative officials, and the apparatus of the judiciary. The second is dominated by econometricians, coders, modelers, logicians, and artificial intelligence elites. They do not speak the same language; they may not share values and they may not belong to the same community of meaning makers. That produces a likelihood of sometimes and potentially large disjunctions between the operations of conventional legalities and data driven ones. One sees this especially in the context of data privacy and use rules—not just between different approaches to conventional legal governance (e.g., between European, U.S., and Chinese approaches) but also between the principles of effective data modelling and legal principles.

E. Fifth, data governance regimes can be market driven or state coordinated. This is a function of the political ideologies from which national systems are organized. The nature of entanglement will differ substantially depending on its foundation. Markets driven systems entangle more with plural and non-state based legalities than do state coordinated data systems. State coordinated data systems tend to be less fractured than markets based systems. The forms of the rationalization of the entanglements will also differ. In China coordination is achieved through combinations of law, regulation, and intra-institutional memoranda of understanding. In markets oriented liberal democratic

regimes the system is rationalized through the regulation of the rules of the markets, and through the delegation of managerial tasks from the state to market actors.

F. Sixth, both conventional legalities and data driven governance systems are increasingly bound up within compliance-accountability approaches to regulation. These, in turn are framed by prevention, mitigation, and remedy principles. Both speak to the drive toward perfectibility (of systems, individuals, society, culture, etc.) which then chart the trajectories of entanglement among systems. That is, that the character of entanglement is measured and the quality of that entanglement is assessed by reference to the extent to which that entanglement and its components move the social order closer to the ideals of perfection.